DECISION OF DISPUTES PANEL

Name of Applicant in dispute:	Applicant B ("the Applicant")
Name of Respondent in dispute:	A Village ("the Operator")
Date of Dispute Notice:	05 April 2022
Date of Decision:	25 September 2022

The disputes panel appointed under the Retirement Villages Act 2003 ("the RVA") to resolve the dispute between the Applicant and the Respondent has decided on the dispute as follows:

Matters in Dispute

1. The agreed matters in dispute were:

   Issue 1: Lack of consultation in respect of the Operator's decision to restrict access by unvaccinated persons or non-disclosing vaccinated persons to communal facilities.

   Issue 2: The propriety of the Operator's decision to restrict access by unvaccinated persons and non-disclosing vaccinated persons to communal facilities.

2. The following issues were withdrawn: psychological abuse.

3. Further matters arising from consideration of Issues 1 and 2:

   (a) What remedies may be available to the Applicant?

   (b) How costs may be awarded, in terms of section 74 of the RVA.

Process

4. A formal Complaint Form was issued by the Applicant on 18 February 2022.
5. The Complaint was not referred to the Statutory Supervisor.
6. A Dispute Notice was issued by the Applicant on 28 February 2022. On 25 March 2022 the Applicant confirmed her desire to have the dispute determined by the Panel.
7. Initial instructions were received from the Operator on 6 April 2022.
8. I was appointed by the Operator as the panelist to resolve the dispute, under Terms of Appointment dated 11 April 2022.

9. Pursuant to Regulation 11, further particulars were requested from both parties, and these were provided in full by the required dates.

10. In view of the representatives of each party being in different cities, it was agreed that the preliminary matters set out in Regulation 13 would be dealt with by e-mail exchanges. A Notice of the Matters Agreed in Preliminary Meeting Discussions was issued, pursuant to Regulation 13(5), on 04 July 2022. . Acceptance and confirmation of these was received on 05 July 2022 (the Applicant) and 08 July 2022 (the Operator) respectively.

11. Orders requiring verification of written evidence (Regulation 17), and setting a timetable for Statements of Evidence, were issued on 4 July 2022. Statutory declarations verifying written evidence were received on 08 July (from the Operator) and 25 July 2022 (from the Applicant).

12. A Notice of Hearing, pursuant to Regulation 14, was issued on 04 July 2022. A hearing was held on 25 July 2022. It was agreed that the hearing be held in private and ordered accordingly pursuant to Regulation 19(2)(a). Present at the hearing were the Applicant, XXXX (the Applicant's counsel), the Operator's manager, XXXX (the Operator's counsel), and a support person for the Applicant. There was one witness for the Applicant, and three witnesses for the Operator.

13. Following the hearing, submissions of law were required and submitted by both parties by 01 August 2022.

14. A Minute was issued on 09 August 2022 requesting comment from both parties by 5pm on 23 August 2022 in respect of further case law to be considered by the panelist. A response was received from the Applicant by the required date.

15. A Minute was issued on 10 September 2022 requesting comment by 5pm on 14 September 2022 from both parties as to case law and Best Practice Guidelines to be considered by the panelist. A response was received from the Applicant by the

required date.

16. On 10 September 2022 Orders were issued by the Panel that the names of the parties and other witnesses be redacted from the decision and prohibiting publication of all or part of the proceedings at the hearing, except the decision of the Panel.

Jurisdiction

17. I am satisfied that the Matters in Dispute are within the jurisdiction of Section 53 of the RVA. Section 53(1) allows a resident to "give a dispute notice for the resolution of a dispute concerning any of the operator's decisions in four areas, set out in sub-sections (a) to (d).

18. **Issue 1** falls under section 53(1)(d), which states:

> (d) "relating to an alleged breach of a right referred to in the code of resident' rights or of the code of practice".
> The minimum Code of Residents Rights ("CRR") is set out in Schedule 4 of the RVA, The "code of practice" refers to the Retirement Villages Code of Practice 2008 ("COP"). The right that was allegedly breached was the "right to be consulted by the operator about any proposed changes in the services and benefits provided", set out in Right 3 of the CRR, and in Clause 28 of the COP.

19. **Issue 2** falls under section 53(1)(a), which states:

> (a) "affecting the resident's occupation right or right of access to services or facilities."
> It also falls under section 53(1)(d) (alleged breach of a right in the CRR or the COP). The right that was allegedly breached was the "right to services and other benefits promised to you in your occupation right agreement" set out in Right 1 of the CRR.

20. Sections 32 and 33 of the RVA require retirement villages to have and distribute a Code

of Residents' Rights, with the minimum rights conferred on a resident by the RVA being set out in Schedule 4 thereof. Clause 11.1.7 of the Applicant's Occupation Right Agreement dated 31 May 2016 ("the ORA") acknowledges the CRR as "the minimum rights conferred on a Resident of the Village by the RVA". Section 33(2)(e) of the RVA allows a resident to "bring any alleged breach of a right referred to in the CRR to the attention of …. a disputes panel."

21. Section 89 of the RVA requires a retirement village to have a Code of Practice approved by the Minister. Section 92(2)(a)(i) requires every operator of a retirement village to comply with it (unless exempted from compliance under section 93), and Section 92(4) requires the operator to make the COP available to every resident and intending resident on request. Section 92(2)(b) of the RVA states that the COP "is enforceable as a contract by a resident and prevails over any less favourable provision in his or her occupation right agreement." While section 92(2)(c) requires the COP "to be given effect to in any occupation right agreement offered to a resident." In clause 11.1.6 of the ORA, the Operator states that "the Operator will comply with the requirements of the COP".

22. Regulation 49) of the Retirement Villages (General) Regulations 2006 stipulates that "A deed of supervision relating to the statutory supervisor of a retirement village must include provisions requiring the operator of the village – (h)to comply with the operator's obligations under the Act, regulations made under the Act, and the code of practice."

Matters to be taken into account in respect of other residents when considering any alleged breach of rights

23. Footnote to the CRR entitled "Your Obligations to Others" – This states: "Your rights exist alongside the rights of other residents and the rights of the operator, the people who work at the village, and the people who provide services at the village. In the same way that these people are expected to respect your rights, it is expected that you in return will respect their rights and treat them with courtesy."

24. In respect of consultation, Clause 28.7 of the COP, which states:

> "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."

25. Clause 9.3 of the ORA states:

> "The Resident covenants with the Operator: that he will at all times:
> 9.3.1 conduct himself in the Unit and in the Village in such a manner as to not unreasonably cause a nuisance or become an annoyance or give offence to any person."

26. Clause 19 of the ORA states:

> "The Operator will:
> 23.7 Put in place and keep operational adequate provisions for the continuing safety and personal security of the Residents …"

27. Clause 10.2.1 of the ORA states:

> "10.2 Treatment of Residents
> 10.2.1 The Operator will treat all residents in the Village with courtesy and will **respect their rights**…"

Background

28. The Operator is a private limited company which owns and operates a retirement village. The Village is comprised of villas and apartments, common areas, a communal building housing offices and indoor facilities, and outdoor facilities.

29. The Village has 246 residents. Of these residents, 243 residents were vaccinated against Covid-19, and 3 residents were either not vaccinated or were vaccinated but declined to disclose that fact. The Applicant was vaccinated but declined to disclose that fact.

30. The Covid-19 Delta strain occurred in the Auckland region in or about August 2021. It was unable to be contained and the Government effectively admitted defeat in respect of its previously successful elimination strategy, which operated under four Alert levels and brought about extended lockdowns in Auckland, Northland, and other areas most seriously affected by the spread of Covid.

31. The 'traffic light" system was signalled by the Government in an announcement made on 22 October 2021. This was a Covid-19 Protection Framework designed to "deliver greater freedoms for vaccinated New Zealanders", with vaccination certificates indicated to be "central to the new framework". There were three levels in the "traffic light" system – red, orange, and green. The Red Traffic Light System" (RTLS) imposed the strictest requirements, with such requirements being variously eased in the Orange and Green Traffic Light Systems. The aim was to raise vaccination levels to ninety percent in the various regions, and once that level was achieved the region could revert to a lower level with fewer restrictions and more freedoms.

32. The rollout of the traffic light system was to occur "once all DHB's hit 90% full vaccination rates". At 4 pm on 29 November 2021, the government announced that the traffic light system would be operative at 11.59 pm on 2 December 2021.

33. The Village is in an area where the RTLS was to apply. On or about 01 December 2021 the Operator decided to introduce restrictions on access to communal facilities by unvaccinated persons and non-disclosing vaccinated persons, effective as at 11.59pm on 02 December 2021.

34. The Operator requested residents to visit the village office in the week following 2 December 2021 to record whether they held a vaccination pass or other form of vaccination record.

35. The restrictions on access to communal facilities continued until 4 April 2022 when vaccination passes were no longer required in any Traffic Light Setting, but were optional for businesses.

36. Two residents raised complaints and subsequently issued Dispute Notices in respect of alleged lack of consultation regarding the Operator's decision to impose restrictions on access to communal facilities taking place in the community centre, and the withdrawal of access to such facilities, which was promised in their Occupation Right Agreement, The Applicant is the second of these complainants.

Issue 1 – Lack of consultation in respect of the Village Operator's decision to restrict access by unvaccinated persons or non-disclosing vaccinated persons to communal facilities

Findings on material issues of fact

Where is the right to consultation found?

37. The right of residents to be consulted by the operator of a retirement village is found in:

(a) Right 3 of the CRR:

"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 and benefits provided."

(b) Clause 28.1 and 28.2 of the COP:

"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."

(c) Clause 10.1.3 of the ORA:

"10.1 Consultation with Residents

The Operator will **consult** with the Licensee and the Resident:

10.1.3 about any proposed changes in the services and benefits provided or the charges that the Licensee or the Resident is required to pay that will or might have a material impact on **the ability of the Licensee or the Resident to pay** for the services and benefits provided."

38. I find that Right 3 of the CRR, and Clause 28.1 and 28.2a of the COP apply to this dispute, subject to their various components being satisfied (see paragraphs 48 to 54 below). Clause 10.1 of the ORA limits consultation to three specific areas – sale or transfer of the Operator's interest in the Village, appointment of a new Village Manager, and changes in the services and benefits provided or the charges to be paid that will or might have a material impact on the ability of the Licensee or Resident to pay for the services or benefits provided. The "material impact" is "on the ability of the Licensee or Resident to pay…" It differs from Right 3 of the CRR, where the "material impact" is not only on the ability to pay for the services and benefits provided, but also on "occupancy". The changes (see paragraph 50) do not have a material impact on the resident's ability to pay. Therefore, none of the three areas in clause 10.1 of the ORA apply to this dispute.

What does "consultation" mean in this right?

39. Clause 2 of the COP provides the following definition:

"Consult/consultation means to invite parties to comment and provide advice on a given matter, so that the comment or advice can be taken into account when making a decision."

40. Clause 28.3 to 28.6 of the COP provides more details about how this process is to be conducted. It states:

"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.

(d) Residents may, individually or as a group, appoint a person or people to represent their views in the consultation process.

(e) 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.

(f) Following consultation, the operator must tell residents as soon as reasonably practicable the decision(s) made, with reasons. "

41. Notification and consultation

(a) The Retirement Villages Disputes Panel decision of **Sandra Williams v Metlifecare Limited** 2019-1:
In that dispute certain remedial works were carried out, and the resident maintained that a series of meetings and updates after a certain date did not constitute consultation. The Panelist disagreed but added: "I agree notification per se does not constitute consultation" (paragraph 74, page 28).

(b) I agree that mere notification does not constitute consultation, but consultation includes notification. Clearly parties engaging in consultation must notify each other of all matters relevant to the issue before meaningful discussion can take

place, and the ultimate decision that is made by the operator must be notified to all affected parties.

42. Provision of information and consultation – section 34 of the RVA and Right 1 of the CRR

(a) The Retirement Villages Disputes Panel decision of **D Gatley and Others v Metlifecare Poynton Limited** 2018-3. In that dispute a resident challenged the increase in entry age from 55 to 70, and the reduction in medical standards.

(i) The Panelist considered (at paragraphs 71 to 75) the right to consultation in Right 3 of the CRR and in Clause 28 of the COP. The Panel concluded that this right did not apply as it related to "services and benefits" and the increase in entry age and reduction in medical requirements were neither "services" nor "benefits".

(ii) Of more significance, however, was the consideration (at paragraphs 58 to 67) of Section 34 of the RVA, which it is appropriate to consider in relation to this dispute. The residents argued that section 34 required the operator to consult with them, whereas the operator argued that section 34 only required that the residents be "promptly informed". Section 34 states:

"34 Right to be supplied with information relevant to occupancy

(1) Each resident or intending resident of a retirement village has the right to be promptly informed by the operator of the retirement village about any matter that would or might have a material impact on –

(a) the occupancy right, or rights to quiet enjoyment, of the resident or intended resident."

The Panelist decided that section 34 was confined to matters having a material impact on "occupancy rights" or "rights to quiet enjoyment". In paragraph 61 the Panelist stated: "Neither term is defined in the RVA, Codes or ORA, however 'occupancy rights' are perhaps synonymous with the definition of an ORA: both involve conferring the right to occupy, subject to terms and conditions. The' right to quiet enjoyment' is the right to use and occupy without disturbance, and with enjoyment." The Panelist went on to conclude (at paragraph 67) that:" The Panel finds that the correct interpretation of section 34(1) of the RVA only requires

that residents be ‘promptly informed’ of information relevant to ‘occupation rights‘ or ‘rights to quiet enjoyment’.” I have seen a number of Occupation Right Agreements that separate “consultation” matters from “notification” matters accordingly.

(b) A similar right to information is contained in Right 1 of the CRR. This states: “You have the right to information relating to any matters affecting or likely to affect the terms and conditions of your residency”.

The word “residency” is not defined in the RVA, the Codes or the ORA, The Oxford Dictionary definition is “the fact of living in a particular place”, while Wikipedia defines it as “the act of establishing or maintaining a residence in a given place.”

“Resident” is defined in Clause 2 of the COP, as “a person who enters into an occupation right agreement with the operator of a retirement village” or “a person who under an occupation right agreement is, for the time being, entitled to occupy a residential unit within a retirement village, whether or not the agreement is made with that person or some other person”.

I therefore consider that the word “residency”, if defined narrowly, in this context, means living in a residence, and, in similar manner to the interpretation of section 34 mentioned above, is synonymous, with “occupation rights” .If defined widely in the context of living in a place rather than a specific dwelling, as in “my residency is in Auckland”, then it may be interpreted as referring to residency generally in a village, as in “my residency is in this village.” . However, in my view a wide interpretation of the term, taking all things into account, would be strained.

(c) The dispute does not concern occupancy rights, nor the right to quiet enjoyment, nor, at least in the context of its narrow definition, the residency, of the resident or intended resident. I therefore find that section 34 of the RVA and Right 1 of the CRR do not apply to this dispute. In the context of consultation, however, the question is somewhat academic.

(d) That said, this is simply indicative of the inconsistent terminology used in the RVA, the Codes and possibly the ORA. It is disappointing that there is a need to interpret different terms such as “occupancy”, “occupancy right”, and “residency”.

43. Further case law defining consultation

(a) In **West Coast United Council v Prebble (1988) 12 NZTPA 399 (HC) at 405 McGechan J** defined consultation as follows: "*Consultation involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done*."

(b) **In Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 (CA), McKay J** said**:** "*Consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. The concept is grasped most clearly by an approach in principle. To 'consult' is not merely to tell or present. Nor, at the other extreme is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Despite its somewhat impromptu nature I cannot improve on the attempt at description, which I made in West Coast United Council v Prebble, at p 405*:

Consultation *involves the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done.' Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations, adequate consultation could take place in one telephone call. In other contexts, it might require years of formal meetings. Generalities are not helpful."* He also said: *"We do not think 'consultation' can be equated with 'negotiation'. The word 'negotiation' implies a process which has as its object arriving at an agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.*"

44. Commentary on consultation

(a) In “Judicial Review A New Zealand Perspective (4th ed, 2018)”by Graham Taylor he states at para 13.83 on page 650:6: ”It is easy to say what is not consultation. It is not advising of an impending decision even if there is willingness to change it in the light of what the consultee says. Consultation is not negotiation; nor does agreement have to be reached. It is not advising that a decision will probably be made in the future.” Further, at paragraph 13.84 (page 652):7 he states: “The consultation must begin when the decision-making process is at a formative stage. For this reason, alternatives should be provided so that those being consulted can take a genuine part in decision-making. It may be that provision of alternatives is not practical and advice of the strategic aim with consultation as to means may well be sufficient to constitute a fair procedure. At the other extreme, if plans lack specificity, consultation loses its point and the duty to consult would not have been fulfilled. Those who would be affected by a decision and had been active in opposing an earlier decision may sometimes have a legitimate expectation of consultation. Enough notice of the consultation must be given to enable those being consulted to make an adequate response. How long that period would be must depend on the nature of the proposals and the degree of knowledge those being consulted might have already.”

(b) In “Joseph on Constitutional and Administrative Law” (5th edition) by Philip A Joseph, he states at page 1134 (footnotes omitted): “Consultations must be ‘meaningful’, ‘genuine and not a sham’, ‘a reality, not a charade’. Consultation requires more than notification: ‘To consult’ is ‘not merely to tell or present’. It is an opportunity for persuasion. Consultees must have ‘a reasonable opportunity to state their views’, and the decision-maker must keep ‘an open mind and be ready to change and even start afresh’ A significantly changed proposal following consultations may require fresh consultations, even requiring them to start afresh. The decision-maker must allow sufficient time for the process, listen to what consultees are saying and consider their responses. The duration required is context specific. In some cases, one telephone call might suffice, while in others months or years of formal meetings might be required. Nor are there any universal requirements as to form?’ The essence of the duty is good faith’. In **Port Louis Corp v Attorney-General (Mauritius) [1965] AC 1111,** the Privy Council emphasised than the exercise must be genuine, meaningful and in good faith:

‘The requirement of consultation is never to be treated perfunctorily or as a mere formality. [Consultees] must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.’ A duty of consultation imposes a kindred duty of disclosure. Consultees must be ‘adequately informed’ to make ‘intelligent and useful responses. They must receive sufficient detail of what is proposed so as to know what it is that they are responding to. A consultee’s right to speak openly imposes reciprocal obligations on decision-makers to listen with an open mind, give genuine consideration to what is being said and be open to persuasion. Decision-makers may properly form and express provisional views, provided such views do not become a fair accompli. Where there are bona fide consultations, decisionmakers discharge their duty and bear no greater responsibility. The duty does not enjoin them to negotiate with a view to reaching agreement or consensus. The obligation is fairly to listen and consider, not agree.”

(c) The Government Consumer Protection website www.consumerprotection.govt.nz/about-us/consumer-representation/consulting-consumers/#consumer-consultation--the-basics describes “consultation” as “a genuine exchange” and adopts the principles of McGechan J in **Air New Zealand Limited v Wellington International Airport Limited** CP403/91 High Court, Wellington:

- communication of a genuine invitation to give advice
- sufficient information supplied to the consulting party
- sufficient time given to the consulted party to participate
- genuine consideration of advice given

45. It is apparent that the definition of “consultation” in clause 2 of the COP, and the “consultation process” set out in Clause 28.3 and 28.5 of the COP, both espouse the broad principles traversed in the cases and commentaries referred to in paragraphs 43 and 44 above.

46. Consultation is an interactive, transparent, co-operative, collaborative, authentic, proactive, and purposive exchange of information, ideas, viewpoints and advice, to be

embarked upon between two parties or amongst multiple parties as soon as possible and before any decision is made by the party having such authority.

47. It has been suggested in evidence that the inevitability of the ultimate decision may affect the need to consult. The Operator advanced the argument that "further consultation would arguably not have changed the decision". I disagree. It does not matter whether the ultimate decision may be regarded as a fait d'acccompli - that does not abrogate or evade the right to consultation.

What is the consultation about?

48. Right 3 of the CRR states that the consultation by the operator is "about **changes** in the services and **benefits** provided.". Clause 28.2a of the COP refers to the same right in its obligation to consult. This gives rise to four questions:

    (a) Has there been a "change" in the provision of services and benefits"?

    (b) What are "services"?

    (c) What are "benefits"?

    (d) Are "facilities" the same as "benefits", or at least included in that term?

49. The Applicant signed up for certain "Services" and Facilities", which are listed in Part D on page 34 of the ORA. We are concerned here only with those services and facilities which take place in the community centre, since it was access to the community centre that was restricted for the Applicant. The only "service" which is listed as taking place in the community centre is Service (f), which is "TV/Sky". The" facilities" which are listed as taking place in the community centre are Facilities (a) (Kitchen and Dining room), (b) (Home theatre and Sky TV, lounge), (d) (Gym), (e) (Spa Pool/Swimming Pool), (k) (Library) (m) (Pool table and table tennis table).

50. The Oxford Dictionary defines "change" as "the process of replacing something with something new or different", "to substitute one thing for another." It can be a variation,

adjustment, alteration, advance, development, diversity, innovation, modification, reversal, revision, revolution, shift, switch, transformation, transition, turnaround, diminution, or evolution. In this dispute, the question is whether a restriction on access to benefits that had previously been readily available constitutes a "change". In short, free access was to become restricted access for the Applicant. This was a significant reversal, modification, adjustment, variation, alteration, shift, substitution etc. I am therefore satisfied that it constituted a "change."

51. The definition of "retirement village" in section 6(1) of the RVA embraces not only the provision of residential accommodation but also "**services or facilities, or both**, predominantly for persons in their retirement…: Section 6(2) states: "A retirement village includes any common areas and **facilities** to which residents of the retirement village have access under their occupation right agreements." Sections 34(1)(b) and 53(1)(a) also use the words "services and facilities". The latter allows a dispute to be raised about the "right of access to services or facilities". In Schedule 3 of the RVA (Required information and provisions for occupation right agreements), however, the words" services and benefits" are used in clause 1(b)(iv), and again in Rights 1 and 3 listed in Schedule 4 (Basic rights for Code of residents' rights). Again, therefore, we have an inconsistent use of words, with the words "facilities" and "benefits" being used in different places to refer to the same things.

52. "Services" are defined in section 2 of the RVA, and similarly defined in Regulation 19 of the Retirement Villages (General) Regulations 2006. "Facilities" are defined in section 2 of the RVA and in Regulation 19(4) of the Retirement Villages (General) Regulations 2006. We need not concern ourselves here, with those definitions – it suffices to say that they include the services and facilities that are listed in Part D of the ORA. The Applicant lists the indoor facilities held in the community centre in paragraph 18 of her Statement of Evidence. There is no definition, however, of "benefits", nor is there a definition in the Codes or ORA. This brings us to consideration of what the word "benefits" means.

53. In the Retirement Villages Disputes Panel case of **Gatley and Others v Metlifecare**

Poynton Ltd 2018-3, the Panelist stated at paragraph 73: "A 'benefit' is not defined in any of the relevant documents applicable to this hearing, but the Oxford Dictionary defines a benefit as 'an advantage'.'" While this definition is correct and useful, it may connote that someone has something which puts them in a superior position than someone else, whereas all residents are in the same position when it comes to "benefits". A benefit is something that produces good or helpful results or effects or that promotes well-being – it could therefore be called a "positive enhancement", which avoids the superior connotation.

54. The question arises, then, as to whether "benefits" are the same as "facilities". The word "benefits" may have a wider scope of meaning, in that it can include anything that is a "positive enhancement". This may be much broader than the defined "facilities". I find, therefore, that for these purposes the words "benefit" and "facilities" are at best synonymous, and at worst the term "benefits" certainly includes the defined "facilities".

55. I therefore find that the consultation requirement in Right 3 of the CRR that refers to "benefits" includes "facilities".

56. I find that the components in Right 3 of the CRR, namely "a change", and "benefits", have been met.

Who has the right to be consulted?

57. Clause 28 (1) of the COP states:

"Residents have the right to be consulted by the operator. Sub-groups of residents, or individual residents, are also entitled to be consulted." Clause 28(4) states: "Residents may, individually or as a group, appoint a person or persons to represent their views in the consultation process." It is therefore apparent that the COP indicates both collective and individual consultation.

58. The word "or" (as in "sub-groups of residents **or** individual residents" and "individually **or** as a group") is a co-ordinating conjunction that indicates another choice or possibility. Wikipedia says it "presents an alternative, non-contrasting item or idea.". It therefore follows that all residents, or smaller groups of residents, or individuals, all have the right

to be consulted. An operator therefore needs to determine who is and who is not within each of these categories. It should not be assumed that all residents are in one group. The Applicant was an individual. She was not part of the 243 vaccinated residents, though she could be regarded as part of a sub-group of 3 unvaccinated or vaccinated but non-disclosing residents.

59. "Resident" is defined in section 5 of the RVA as:

(a) "a person who enters into an occupation right agreement with the operator of a retirement village":

(b) "a person who, under an occupation right agreement, is, for the time being, entitled to occupy a residential unit within a retirement village, whether or not the agreement is made with that person or some other person",

This definition also appears in clause 2 of the COP. Section 48 reinforces this when it defines "resident" for the purposes of dispute resolution as "a resident in a retirement village".

60. The individual nature of the right is supported by various terminology:

(a) All rights in the CRR begin with the word "You". This is the second person singular, not the second person plural. This is confirmed by the footnote headed "Your obligations to others, as this states: "**Your** rights exist alongside the rights of other residents and the rights of the operator…" The word "your" is again the second person singular, as there would be no point in advising of that fact if it was the collective second person plural. This is further supported by the use of the words "you" and "your" in the further footnotes entitled "Operator's contact person ("If you want more information about your rights…") and "Other contact persons ("Other contact person, if you want to make a complaint about a breach of your rights…")

(b) Section 3(a) and (c)(i) set out the individual consumer purpose of the RVA:

"(a) to protect the interests of residents and intending residents of retirement villages…"

"(c) (i) to promote understanding of the financial and occupancy interests of residents and intending residents of retirement villages."

The context here refers to individual owners or intending owners of an ORA.

(c) Many other provisions in Part 4 (Dispute resolution, enforcement and penalties) of the RVA indicate the clear intention that individual residents have rights and can enforce them:

- Section 48 (a): "**a** resident."
- Section 49: "Any right conferred by this part on **a** resident..."
- Section 52(1) and (2): "**A** resident…."
- Section 53(1), (2), (3), (4): "**A** resident…"

It follows that if an individual resident can seek to enforce a right, then that individual must hold the right.

(d) Clause 6(2) of the COP and section 92(2)(b) of the RVA state: "The Code of Practice is enforceable as a contract by **a resident** and prevails over any less favourable provision in **the resident's** occupation right agreement." These terms are singular.

61. Therefore, I find that each individual resident holds the rights in the CRR. It follows that each individual resident has the right to be consulted. The Applicant had the right, as an individual, to be consulted. Individual residents can join as a total group, or in smaller sub-groups, to present their views, but they have no obligation to do so. An individual can decide not to be part of the entire group, nor of any sub-group.

62. From the evidence presented, it is apparent that most of the residents, 243 of the 246, did not seek formal consultation. They either collectively acquiesced or were collectively content to allow the Operator and the Residents' Association to look after their concerns about separation of vaccinated and unvaccinated/non-disclosing vaccinated persons having access to the community centre. However, the three residents who were either not

vaccinated or were vaccinated but chose not to disclose that fact ("the three") did not choose to join the vast majority. These included the Applicant. They may be regarded either as a sub-group of three, or as individuals, and each of them is able to exercise their rights as individuals accordingly.

63. The right of an individual to consultation exists "**alongside**" the rights of other residents. It is not submerged or done away with by the rights of other residents, nor by the fact that the other residents may constitute most residents in the village. Consultation is a right which really does not affect others who have the same right. If others do not require consultation, then the fact that a few might require it does not mean that they do not matter. That is not the case with all rights, but it is generally the case with consultation.

64. At the outset it must be said that I am primarily concerned with the consultation, if any, that took place **before** the Operator's decision on or about 30 November 2021 to impose restrictions on access to the community centre. While I recognise that the Operator could have delayed the decision, which would have allowed time for further consultation, that did not occur for reasons which I will discuss later in this decision, so I am mainly concerned with the nature of any "pre-decision" consultation. The reasons for this are:

    - In the discussion about consultation in paragraphs 43 to 46 above, consultation is a process that takes place before a decision is made.
    - Clauses 28(3)(c) of the COP indicates that: "When consulting residents the operator must: c fully consider any comment or advice **before** reaching a decision." Clause 28(5) of the COP states: "The operator must not decide a matter **before** consultation has been completed…The outcome cannot have already been decided." Clause 28(6) of the COP states: "**Following consultation** the operator must tell residents as soon as reasonably practicable the decision(s) made, with reasons."

65. I further recognise that some consultation with the Applicant occurred after the decision was made to restrict access to the community centre facilities. This was not consultation about the decision itself but more discussion about its legality, the effects of the decision on the Applicant, and how such effects might be ameliorated.

66. The Applicant's counsel largely presented this dispute as a lack of consultation regarding the introduction of a vaccination pass requirement by the Operator, but in my view the vaccination pass (or alternatively a vaccination record, or even security persons on the door) was simply the means of monitoring access to premises by vaccinated and unvaccinated persons. The real underlying issue, as agreed in the preliminary meeting discussions, is whether the Applicant was consulted about the decision made on or about 30 November 2021 by the Operator to restrict access to the community centre to vaccinated residents only.

67. The Applicant stated in evidence that she was not contacted by the Operator or any member of the RA to discuss any proposed restrictions on her access to the facilities in the community centre. There was no evidence presented by the Operator that there was any direct contact with the Applicant. The Applicant gave evidence that she played cards with a group I the community centre under the Alert levels which preceded the TLS, but she was excluded by the group from 2 December 2021. She was also excluded from the knitting group. The co-ordinator of that group gave evidence and indicated that it was "common knowledge" in the Village as to who was not vaccinated. She was uncertain as to exactly when the exclusion occurred but was certain it was a Saturday as the knitting group meets on a Saturday, She said it was likely to have been Saturday 4 December 2021. That incident was reported to the Village management immediately after it occurred. In paragraph 6 of her Statement of Evidence, the Applicant states: "A rumour has spread amongst the other residents that I am unvaccinated."

68. The evidence indicates that prior to the decision there were four communications with the Applicant – three from the Operator and one from the Residents' Association ("the RA"). I will deal with these in the next 4 paragraphs.

69(a) On Monday 29 November 2021 at 11am the Village held its deferred Annual General Meeting. The Minutes of the meeting were submitted in evidence by both parties. The

Applicant did not attend the meeting but obtained a copy of the Minutes. There were 95 residents present, including the chairperson of the RA, which represented 39 percent of the residents. The meeting lasted 30 minutes. Under the heading of "General Business", the Minutes record:

"Covid-19 Unvaccinated people: The issue was raised how could you prevent unvaccinated people entering the Village. [The Village manager] replied that there is a limit to what you can do to prevent an unvaccinated person entering the Village. He advised that the Government Traffic Light System would be revealed for the country this afternoon and would begin on Friday 3rd December 2021. [The Village manager] advised he will be discussing this with [the chairperson of the RA] and management and there would be a letter by the end of the week." (The square brackets are mine to delete the names of persons.)

(b) It is apparent from this, and the length of the AGM (only 30 minutes), that there was a question raised by a concerned resident, which received an answer from the Village manager. This was really notification of what the management intended to do and did not amount to consultation. This came to the attention of only 39 percent of the residents, including the Applicant. No vote is recorded in the Minutes, though I accept that there was a consensus of the residents physically present at the meeting that restrictions on access to the community centre should be imposed.

(c) The Notice of Meeting and Agenda for the AGM, circulated prior to the meeting, were submitted in evidence. The Agenda has no item in it to discuss restricting access to the community centre to vaccinated persons only. This is somewhat surprising in view of the broad parameters of the Traffic Light System having been announced by the Government as early as 22 October 2021, over one month before the AGM. That announcement was acknowledged by both parties. It set out the following broad characteristics:

- "A vaccine certificate will be central to the new framework."
- "If you want to be guaranteed that no matter the setting that we are in, that you can go to bars, restaurants and close-proximity businesses like a hairdresser, then you will need to be vaccinated."

- “vaccination certificates would allow businesses to be able to open and operate at any level.”
- “Auckland will move into Red as soon as the Auckland DHBs hit the 90 percent vaccination target.”
- “Premises choosing not to use vaccination certificates will face restrictions similar to the current alert level framework.”
- “if any member of the public was not vaccinated, there would be things they would miss out on.”
- “Protection means that we won’t just treat Covid like a seasonal illness, we will protect people from it with vaccination, management, and a response that focuses on minimising the health impacts.”

(d) It was left to a concerned resident to raise the issue of access by unvaccinated persons under “General Business” at the AGM. No discussion was initiated by the Operator, and no plan was presented to those present. It is apparent that as late as 29 November 2021 there had been no plan formulated by the Village management to present to residents at the AGM to address their concerns.

70. On 2 December 2021, the Operator issued a letter to residents entitled “Covid-19 Guidelines for Red Traffic Light Settings”. At its meeting on Thursday 2 December 2021 at 10pm, the RA approved the distribution of this letter to all residents. The Applicant acknowledges in paragraph 14 of her Statement of Evidence that she received this letter on the same date. This outlined the protocols for the “Red” setting, for visitors to the Village, and for residents, stating that these “are in line with the Government’s guidelines for vaccinated and non-vaccinated people”. In particular, it set out the “Guidelines for gatherings and communal village facilities”, which were only to be available to fully vaccinated residents. Residents were advised that they should “be prepared to show their vaccination pass or proof of vaccination.” It is apparent from this that the decision to impose restrictions on access had already been made, and this was notification to residents of the outcome. This did not amount to consultation.

71. On 2 December 2021 the RV issued a letter to all residents. This is referred to in paragraph 11 of the Statement of Evidence of the RA chairperson and was the result of discussions

between the chairman and the Village manager on 1 December 2021. In those discussions the Village manager advised the chairperson that “a vaccine mandate would be adopted from 3 December 2021. This letter was apparently delivered by hand to letterboxes of residents on 2 December 2021, and the Applicant acknowledges in paragraph 15 of her Statement of Evidence that she received it on 3 December 2021. This requested residents to carry their vaccine passes and that they may be asked to show their pass as they entered the Centre. It is apparent from this that the decision to impose restrictions on access, requiring the production of a vaccination pass had been made by the Operator on or before 1 December 2021, and this was notification of the situation. This did not amount to consultation.

72. On 3 December 2021 the Operator issued a letter to residents requesting them to call into reception in the community centre and “show us your vaccine pass so we can tick your name off our list for being vaccinated.” It went on to say that if they had not got their vaccine pass yet then they could “provide us with your purple vaccine record card instead.” This request was entirely voluntary but designed to assist residents from being required to produce their vaccine pass each time they wished to use the community facilities. All residents except 3produced their vaccination record. The Applicant was one of the 3 who did not produce their vaccination record. The Applicant acknowledges in paragraph 16 of her Statement of Evidence that she received this letter on 3 December 2021. The letter was issued after the decision had been made by the Operator, and on the day that the restrictions became operative. It was notification of the requirements to monitor access. It was *post factum and* was too late to amount to pre-decision consultation.

73. I therefore find that none of the communications discussed in paragraphs 69 to 72 above amounted to consultation. The Operator relies heavily on these communications as amounting to sufficient consultation with residents to enable it to make a decision. In the view of the Operator, there was sufficient uptake by the majority of residents to allow it to proceed. The onus is not on the RA to consult with residents before any decision was made. – it is on the Operator. Of the communications discussed, only the unscheduled question at the AGM, and the letter issued by the Village management of 2 December 2021

involved the Operator, and both amounted to notification rather than consultation. There was no information distributed (though this may not have been entirely necessary in view of the Government's announcements and almost daily press conferences which made the reasons for the restrictions very clear, and the sheer size of the ultimate authorising legislation, the Covid-19 Public Health Response (Protection Framework) Order, which amounted to 92 pages and was not made until 30 November 2021, just 3 days before the Traffic Light System was to be effective). However, apart from information, there was no invitation to express views, present ideas and put forward alternatives. In short, there was no genuine and meaningful consultation by the Operator with the Applicant before the decision was made.

Further Considerations Regarding Consultation

74. On 29 November 2021 at 4pm the Government announced the broad details of the Traffic Light System. The features of this system, to quote the announcement, were:

    - "focussed on minimising the impact of Covid-19 and protecting people."
    - "businesses will have protection through My Vaccine Pass to keep operating."
    - Vaccinated New Zealanders using vaccine passes will be able to do many of the things that were previously treated as high risk."
    - "Red is the highest level in the new system, which is why Auckland has moved in at Red as the epicentre of the current outbreak."
    - "Red provides extra protections against Covid-19 such as requiring Vaccine Passes and some capacity limits in the most high-risk settings - that's because if someone has Covid-19, the virus will find it harder to spread among fewer people who are at a distance. "

    Both parties acknowledged that they were aware of the terms of this announcement. The finer details for each of the three levels – red, orange and green - were released on the Ministry of Health and other websites in the ensuing days.

75. The chairperson of the Residents Association ("RA") stated in paragraph 7 of his Statement of Evidence that "there was widespread concern and anxiety expressed by vaccinated residents at the prospect of mixing in the centre with unvaccinated residents."

Of the residents spoken to by himself and other members of the RA, there was 100% support for measures to be introduced to effect such separation. Such contact seemed to be casual and informal, as there was no evidence of a formal and methodical contact of every resident. There was no evidence as to exactly what was discussed with each resident who was spoken to by a member of the RA, though it is obvious that at least each of them was asked the question as to whether they wanted restrictions on access to the communal centre to be implemented. In paragraph 8 of his Statement of Evidence, he refers to a meeting of the RA held on Labour Day, 25 October 2021. The chairperson of the RA indicates this was a very short meeting held in the community centre to discuss the responses to the informal discussions that had taken place with residents. No Minutes were kept of the meeting. The RA voted unanimously "to request Village management to exclude unvaccinated residents from the Centre". The RA felt that this reflected the wishes of the residents. The decision also reflected the responsibility of the RA to "represent and promote the welfare and interests of the residents", which is stated in clause 3a of its Constitution of July 2020 (which was submitted in evidence by both the Applicant and the Operator). The chairperson of the RA stated in evidence that in his view the word "welfare" included the health of the residents. Paragraph 8 indicates that this decision was passed on to the Village manager, who said he would seek legal advice The decision was conveyed to the Operator in accordance with the obligation in clause 3b of its Constitution "to maintain liaison with the village management on matters affecting village administration."

76. The Operator's Village manager indicated in evidence that he was in regular contact with the chairperson of the RA. There were scheduled monthly meetings with the RA, but also weekly informal contact with the chairperson and informal casual contact with other members of the RA. Discussions could take place almost daily. Clause 6 of the Constitution of the RA states that "The chairperson shall act as the liaison focal point with management", and the chairperson stated in evidence that this was regarded by him as his central role. I am satisfied that any happenings in the Village arising from Covid-19 and its ramifications, including who was and was not vaccinated, exclusions from special interest groups, concerns and anxieties expressed by residents, and any other relevant matters, were promptly advised by the RA to the Village management. This was in addition

to any such matters that the Village management itself picked up in the course of its day-to-day operation of the Village.

77. The Operator's Village manager maintains in paragraph 8 of his Statement of Evidence that a lengthy consultation process was not practical. He states:

> "At the time I reached the decision with [his co-manager] to adopt a vaccine mandate, we considered the need for consultation with residents as required by the Act and concluded that, as the issue had been considered by the residents at the AGM and the mandate had been requested by the Residents' Association (which acted for the residents), there had been sufficient buy-in from the residents. Also, given the timeframe of the Government's actions (four days, a lengthy consultation process was just not practical. We considered that the health risk to the vulnerable community was such that it was more important to respond to the risk by urgently adopting measures to protect the whole community rather than defer the adoption of such measures to carry out a comprehensive consultation for the benefit of a small number of residents who may have objected. "

78. The reasoning set out in the preceding paragraph ignores a number of things:

(a) Only 39 percent of residents attended the AGM.

(b) There is no evidence as to how many residents were spoken to by the RA, as no full and formal survey of residents was done.

(c) The basic outline and requirements of the Traffic Light System were announced by the Government on 22 October 2021, including the fact that vaccination passes would be a pivotal part of the framework. This was 5 weeks and 3 days before the details of the framework were announced by the Government on 29 November 2021, and 6 weeks before the Traffic Light System became operative on 3 December 2021. In my view, this was more than sufficient time for a consultation process to be undertaken by the Operator with residents, and in particular the Applicant.

(d) Apart from that, I consider that the identity of the three was known to the Village management before 22 October 2021. Two witnesses indicated in evidence that the identity of the three was "common knowledge" in the Village. It is therefore possible that a consultation process could have been commenced before the Government's first announcement on 22 October 2021, though I appreciate that

the basic structure of the proposed Traffic Light System would not have been known to the Operator until the Government announcement on 22 October 2021.

(e) The Operator may not have known which residents had a vaccination pass or other vaccination record, as the letter of 3 December 2021 invited residents to visit reception in the following week to record such status. That is not the same, however, as knowledge of who or who was not vaccinated. As I have indicated, I am satisfied that the Operator had such knowledge in sufficient time to have carried out a consultation process with the Applicant, and for that matter with the other two of the three.

(f) If all residents did not require consultation, then certainly the three could have been consulted. I asked the Village manager in evidence whether an invitation could have gone out to the three, including the Applicant, to talk to the Village manager. His answer was: “I suppose”.

(g) It is indicated that four days (29 November to 2 December 2021 inclusive) was insufficient to carry out a lengthy consultation. That is a reasonable conclusion if all residents or a very large group of them required consultation. However, in my view even four days would still be sufficient to carry out some considerable consultation with the Applicant, or even the three as a sub-group.

(h) What is important here is the consultation, if any, that took place with the Applicant, not with other residents who were seemingly content not to actively engage in consultation but to leave things to the Operator to sort out.

(i) Consultation is not a difficult process. It would have been relatively easy, in these time periods, to make telephone calls, arrange meetings, send e-mails, exchange documents etc. That was not done. There is no prescribed formula or process for consultation. It can be minimal, but it must be meaningful and deliberate.

79 (a) In the closing submissions of the Operator, it states in paragraph 4.1:

“It is accepted by the respondent (=the Operator) that it did not carry out full consultation as required by the Act prior to deciding to adopt the vaccine mandate. It submits, however, that it achieved substantive consultation with all but 3 of the residents in the village.” In paragraphs 4.2 and 4.3 it goes on to say how the “substantive consultation” was achieved – namely by way of the discussion at the AGM and by way of the enquiries made by the Residents Association which represents all the residents. However, as

indicated earlier, there is no evidence of the 243 vaccinated residents requiring consultation. It seems to be that most of them essentially did nothing. Thirty-nine percent of them attended the AGM, and an unknown number were spoken to by the RA. The onus is on the Operator, however, to proactively initiate, pursue and carry out the consultation process, At the AGM there was no deliberate intention to discuss the introduction of restrictions on access to the community centre, as it was not on the Agenda. The subsequent letters from the Operator to residents on 2 and 3 December 2021 were notifications of a decision already made. Information was fed by the RA to the Operator as to the desire of most residents to have restrictions on access to the community centre implemented, but there is no detail as to whether anything else was discussed with them. The important consideration, however, is what discussions, if any, were carried out with the Applicant before the decision was made.

(b) In paragraph 4.6 it is stated: "In the timeframe available it was not possible for the Operator to determine if there were any residents who were unvaccinated in order to conduct a tailored consultation on the proposal with such residents." For the reasons set out in paragraph 78 above, I do not accept that this was the situation.

80. While there was some discussion about mediation, ultimately the Applicant decided on 25 March 2022 that she wished to have her dispute determined by the Panel. She did not refer it to the Statutory Supervisor.

81. The Village manager states in paragraph 9 of his Statement of Evidence that he attempted at the meeting on 17 February 2022 [referred to in paragraph 69(b)] to explain the reasons for adopting the mandate, and on 24 February 2022 provided the Applicant with a letter setting out the reasoning more fully. However, none of this was consultation preceding the decision. It took place almost three months after the decision had been made. It was therefore of no value in influencing what might have been decided on or about 30 November 2021.

82. In summary, I find as follows:

(a) Consultation is a right available to all residents individually. An individual may elect to be part of a group or sub-group, but is not obliged to do so..

(b) Consultation is an interactive, transparent, co-operative, collaborative, authentic, proactive and purposive exchange of information, ideas, viewpoints, and advice, to be embarked upon between two parties or amongst multiple parties as soon as possible and before any decision is made by the party having such authority.

(c) The components of the consultation right, as set out in Right 3 of the CRR, namely "a change," and "benefits", have been met.

(d) The onus is on the Operator to initiate, pursue and carry out consultation with residents, whether as an entire group, sub-group, or individuals.

(e) The identity of the Applicant as an unvaccinated resident was known to the Operator on or about 8 October 2021,

(f) There was sufficient time between 8 October and 2 December 2021 in which to carry out consultation with the Applicant.

83**. It should be stated, however, that any decision I make in respect of consultation should not be taken as a blueprint, template, or prescription for the consultation process. I have outlined the principles which I consider should be considered and applied, but the consultation process itself may be different in each Village and with each individual resident, sub-group of residents or all residents collectively (as may be applicable). Each dispute alleging a breach of the consultation right needs to be assessed on its own merits.**

Panel's Decision in respect of Issue 1

The Disputes Panel finds fully in favour of the Applicant.

Reasons for decision in respect of Issue 1

The reasons are set out in paragraphs 39 to 82 above.

Orders of Panel in respect of Issue 1

1. The Applicant has sought an apology from the Operator for the lack of consultation. **It is not within the powers in section 69 of the RVA for me to order the Operator to give such an apology, but I strongly recommend to the Operator, as an exercise in goodwill, that this be done.**

2. It is within the powers in section 69 for me to make an order requiring the Operator to comply with its obligations under the Code of Practice, or to give effect to a right referred to in the Code of Residents' Rights. Such an Order is now somewhat academic since the area in which the Village is situated moved to the Orange Traffic Light System on 4 April 2022 and the restrictions on access to the community centre which were applied under the Red Traffic Light System no longer applied. The Orange Traffic Light System has now gone. There are now no restrictions at all. . However, it is possible that the Government could re-introduce the Red Traffic Light System, or some equivalent framework which re-imposes access restrictions requiring a consultation process to be carried out. **If that were to occur, then I order the Operator to comply fully and diligently with its consultation obligations to groups, sub-groups and individuals, as set out in Right 3 of the Code of Residents Rights and clause 28 of the Code of Practice.**

Issue 2: The propriety of the Village Operator's decision to restrict access by unvaccinated persons and non-disclosing vaccinated persons to communal facilities.

84. At 4pm on 29 November 2021 the Government announced the Traffic Light System (TLS") as the new protective framework against Covid-19. This replaced the Alert Level system. It was to be effective at 11.59 pm on 2 December 2021. There were three traffic light levels – red, orange and green - which progressively moved from strict to less strict requirements. Its broad features, to quote the announcement, were:

    - "focussed on minimising the impact of Covid-19 and protecting people."

- “businesses will have protection through My Vaccine Pass to keep operating.”
- “Vaccinated New Zealanders using vaccine passes will be able to do many of the things that were previously treated as high risk.”
- “Red is the highest level in the new system, which is why Auckland has moved in at Red as the epicentre of the current outbreak.”
- “Red provides extra protections against Covid-19 such as requiring Vaccine Passes and some capacity limits in the most high-risk settings - that’s because if someone has Covid-19, the virus will find it harder to spread among fewer people who are at a distance.”

Both parties acknowledged that they were aware of the terms of this announcement. Auckland and Northland were placed under the Red Traffic Light System (“RTLS”), which was the most stringent system of the three.

The Operator’s village falls within these areas.

85. The underlying authorising legislation was the Covid-19 Public Health Response (Protection Framework) Order 2021 (“the PF Order”) which was released on 1 December 2021 and commenced at 11.59 pm on 2 December 2021. This was a substantial piece of legislation containing 114 sections, 8 Schedules and 90 or so pages.

86. The finer details for each of the three systems – red, orange and green - were not only in the PF Order, but also published on the Ministry of Health website, the BusinessNZ website, and various other websites in the ensuing days. These provided guidelines for vaccine pass/vaccine record entry, close proximity services, defined spaces, public and private gatherings, and visits (including social and religious gatherings), outdoor and indoor events, public facilities, business and workplaces (including retail, hospitality, Councils, and government departments, offices other workplaces), travel and accommodation, entertainment/recreation and exercise, education, moving/buying/selling homes, record keeping and scanning, physical distancing, and cross-boundary travel.

87. At 11.59 pm on 2 December 2021 the Operator implemented restrictions on access to the community centre in the Village. Only vaccinated residents could enter the community

centre and use the facilities or participate in special interest groups that met in the community centre. On that date the Operator issued a letter to residents entitled “Covid-19 Guidelines for Red Traffic Light Settings”. The Applicant acknowledges in paragraph 14 of her Statement of Evidence that she received this letter on the same date. This outlined the protocols for the “Red” setting, for visitors to the Village, and for residents, stating that these “are in line with the Government’s guidelines for vaccinated and non-vaccinated people.”. In particular, it set out the guidelines for gatherings and communal village facilities, which were only to be available to fully vaccinated residents. Residents were advised that they should “be prepared to show their vaccination pass or proof of vaccination (a purple vaccine record or Ministry of Health certificate of exemption from vaccination would have been acceptable).”

88. On 3 December 2021 the Operator issued a letter to residents requesting them to call into reception in the community centre and “show us your vaccine pass so we can tick your name off our list for being vaccinated.” It went on to say that if they had not got their vaccine pass yet then they could “provide us with your purple vaccine record card instead.” The Applicant acknowledges in paragraph 16 of her Statement of Evidence that she received this letter on 3 December 2021.

Findings on material issues of fact

The Position of Retirement Villages under the Covid-19 Public Health Response (Protection Framework) Order 2021

89. Retirement Villages are not singled out in the PF Order for separate or special treatment. They were not within “Food and drink” (sections 68-70), “Transport and logistics” (sections 71-73), “Education” (sections 74-79), “Retail” (section 80), “Gym, sports and other exercise” (section 81), “Venue businesses” (section 82) and “Miscellaneous – In-home services” (sections 83-85). They are not identified as “Category 1” or “Category 2” businesses (sections 65-66), which are set out in Schedule 2 of the PF Order, nor are they businesses or services with customers and clients entering their premises (sections 55-61,

64), nor “designated premises” (supermarkets, dairies, pharmacies, and petrol stations), nor “specified businesses or services” (sections 62, 67). They are not “Exempt businesses” within sections 102 to 105 (health services and those granted exemptions by the Director-General of Health). They are, however, within the definition of “business or service” in section 2 of the PF Order, which includes (“b) a private sector business or service; and (c) a public sector business or service.” The Operator is a private sector business. As such, it was required to follow the requirements of the PF Order relating to businesses, and it was also required to follow Traffic Light System rules applying to the area in which the Village is situated, Since the Operator is in an area where the RTLS applied as at 3 December 2021, the requirements of the RTLS applied.

90. The RTLS requirements which applied related to vaccination passes, capacity limits, defined spaces, physical distancing, face masks, record keeping (QR Code or other record), indoor and outdoor gatherings, close proximity services (eg hairdressers), events and contactless food and beverage collection. I intend to examine such of these requirements as are pertinent to the dispute and the Applicant. Before doing so, however, it is appropriate to consider relevant obligations of the Operator as a business and employer, and its rights and duties as a village operator, as these impact upon its RTLS compliance.

The Duty of Care to Workers

91. The Operator is a New Zealand registered company. It has an IRD Number and a New Zealand Business Number (NZBN). Its Business Industry Code (BIC) is XXXX. It employs four staff who work within the community centre – two Village managers, a sales and operations manager, and a receptionist. It engages outside contractors to assist with some services and activities in the community centre (swimming pool, gym, hairdressing), although residents could use the pool and gym individually. The outside contractors declined to come into the Village if unvaccinated residents were allowed into the community

centre. The remaining facilities were operated by the staff, or by the residents themselves. The special interest activity groups that met in the community centre were all operated by residents in the open areas of the community centre.

Health and Safety at Work Act 2015 ("HSWA")

92. The Operator is a "person conducting a business or undertaking" ("PCBU") as defined in section 17(1)(a) of the HSWA:

"PCBU –

(a) means a person conducting a business or undertaking -

(i) whether the person conducts a business alone or with others; and

(ii) whether or not the business or undertaking is conducted for profit or gain."

The word "person" is used in the legal sense. The New Zealand Law Dictionary (9th edition) defines "person" as: "1. A human being capable of rights, also called a natural person. 2. A corporation or legal person, otherwise called an artificial person." The same dictionary defines "artificial person" as: "An entity, such as a company, which is not a real person but which is recognised by law". I Such recognition is given, in each case, if the person is "capable of rights," that is, the person can "sue or be sued, own property in their own right, and enter into contracts."

93. The Operator therefore owes statutory duties to both employees and visiting contractors under the HWSA. Section 3(1) states that the purpose of the Act "is to provide for a balanced framework to secure the health and safety of workers and workplaces by – (1) protecting workers and other persons against harm to their health safety and welfare by eliminating or minimising risks arising from work..." Section 3(2) sets the bar high when it states: "In furthering subsection (1)(a) regard must be had to the principle that workers and other persons should be given **the highest level of protection** against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of

plant as is reasonably practicable." This gives rise to the questions of what is meant by "health, safety and welfare", "workers", "workplaces", "other persons", "hazards", "risks" and "reasonably practicable." For these I draw on the HSWA, the Worksafe NZ website, and the Oxford English Dictionary.

- "health, safety and welfare" – "Health" is defined in section 16 as meaning "physical or mental health". The Oxford dictionary defines it as "the state of being free from illness or injury." "Safety" is "the limitation of elements that can cause harm, accidents, and other negative outcomes in the workplace" The Oxford dictionary defines it as "the condition of being protected from or unlikely to cause risk or injury". "Welfare" is defined in the Oxford dictionary as "the health, happiness and fortunes of a person or group", and "the statutory process or social effort designed to promote the basic physical and material well-being of persons in need." In short, the processes enable them to "fare well."
- "workers" is defined in section 19 and includes "an employee, a contractor or sub-contractor, and an employee of a contractor or sub-contractor."
- "workplace" is defined in section 20 as: "(a) a place where work is being carried out, or is customarily carried out, for a business or undertaking; and (b) includes any place where a worker goes, or is likely to be, while at work."
- "other persons" are visitors and casual volunteers at the workplace, including any persons coming into it for meetings or events.
- "hazard" is defined by the Oxford dictionary as "a danger or risk" and are defined in section 16 as including "a person's behaviour where that behaviour has the potential to cause death, injury or illness to a person."
- "risks" are "the chances of a hazard causing harm and, if so how bad that harm might be."
- "reasonably practicable" means "reasonably able to be done to ensure health and safety, having weighed up and considered all relevant matters, including the likelihood of hazards or risks occurring, the severity of any harm, what a person knows or ought to reasonably know about the risk and the ways of eliminating or minimising it, what measures exist to eliminate or minimise the risk (control measures) and how available and suitable the control measure are."

On this basis, I find that the community centre is a “workplace”, and the employees and contractors of the Operator are “workers”, within the definitions in the HSWA.

94. There are four “duty holders” under the HSWA and regulations – the persons conducting the business or undertaking, officers of that business or undertaking (section 44 outlines the duty of officers), workers (section 45 outlines the duties of workers), and other persons (that is, visitors – section 46 outlines the duties of “other persons”) at workplaces. I find that the Operator and its officers, workers and visitors (eg suppliers) are duty holders accordingly.

95. The primary duty of care incumbent upon a PCBU is found in section 36 of the HSWA. It states:

1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of –
(a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and
(b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the business of the business or undertaking.” Section 36(3)(d) adds that “a PCBU must ensure, as far as is reasonably practicable, - d the provision and maintenance of sale systems of work”.

96. Section 37 of the HSWA outlines the duty of a “PCBU who manages or controls a workplace.” This is defined in sub-section (4) as “a PCBU to the extent that the business or undertaking involves the management or control (in whole or in part) of the workplace.” Since the Operator manages the community facilities, which is a workplace, I find that the Operator is “a PCBU who manages or controls a workplace.”

97. The duty of “a PCBU who manages or controls a workplace” is set out in section 37(1),

namely, to “ensure, so far as is reasonably practicable, that the workplace, the means of entering the workplace, and anything arising from the workplace are without risks to the health and safety of **any person** “ The same duty is found in section 38(1) and (2), which deals with the duty of a PCBU who manages or controls fixtures, fittings, or plant at workplaces: .I find that the Operator has such a duty to “any person” entering the workplace, which was the community centre.

98. The question arises as to what is meant by “**any person**” in sections 37. I have discussed the meaning of “person” in paragraph 92, namely a human or non-human entity, including a company, capable of holding rights. “Any person”, in its usual meaning and construction, means “anyone” or “anybody”. It is not confined to workers. It therefore seems that the words “any person” in section 37 of the HSWA would be wide enough to include anybody who comes into the workplace, and it would therefore be wide enough to embrace residents coming into the community centre. I consider that it is wide enough to include any residents.

99. Section 30 of the HSWA deals with the “Management of risks”. It states:

> “(1) A duty imposed on a person by or under this Act requires the person –
>
> (a) To eliminate risks to health and safety, so far as is reasonably practicable, and
>
> (b) If it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.”

The Operator and its officers are all persons who have a duty imposed on them under the HSWA to manage risks.

100. It follows from this that the Operator has a duty under the HSWA to eliminate risks to the health and safety of workers (which includes contractors and visitors) and to “any persons” (which would include residents) in the workplace (=community centre). I am satisfied that this is the case.

101. There are substantial penalties in sections 47 (reckless conduct, which carries a penalty of up to 5 years imprisonment or a fine of up to $600,000, or both), 48 (failing to comply with duty that exposes individual to risk of death or serious injury or serious illness, which

carries a fine of up to $300,000), and 49 (failure to comply with duty, which carries a fine of up to $100,000.00). Under section 50, “An officer of a PCBU may be convicted or found guilty of an offence under section 44 whether the PCBU has been convicted or found guilty.” There is therefore a strong incentive on PCBU’s and officers of PCBU’s to comply with the obligations under the HSWA.

Health and Safety Assessment

102. Risk assessment under the HSWA could be carried out by way of a health and safety assessment by an employer. The employer could carry this out or engage specialists to carry it out. It did not need to be in writing nor follow any process. As stated on the WorksafeNZ website, employers were encouraged, and are still encouraged, to complete a risk assessment as New Zealand progresses through the Covid-19 outbreak. Such assessment could be reviewed, at the discretion of the employer, in the light of any changes made by the Government in the protection framework.

103. WorksafeNZ put forward several “public health factors” that employers should consider as part of their work health and safety risk assessment process, to help determine whether the risk in the workplace is higher than that in the community:

- Is there a higher risk of the worker being exposed to new variants at work than they would be in the community?
- **Does the worker regularly, as part of their work, interact with people who are at greater risk of severe illness should they contract Covid-19?**
- Does the worker regularly interact with people who are less likely to be vaccinated against Covid-19?
- Does the worker work in a confined indoor space (of less than 100 square metres) and involve close and sustained interactions with others (that is, closer than 1 metre distance, for periods of more than 15 continuous minutes)?

104. The second and third of the abovementioned “public health factors” are particularly salient in a village situation. There is a high chance of a worker regularly interacting with persons who are at greater risk if they contract Covid-19, namely older persons and immuno-

compromised persons. I examine this issue in paragraphs 124 to 132 below. Further, if unvaccinated persons were in the vicinity of workers then clearly they would be regularly interacting “with people who are less likely to be vaccinated against Covid-19”.

105. Employers were permitted, if they considered it necessary and appropriate following a health and safety risk assessment, to:

(a) require all employees to be vaccinated;

(b) dismiss any employee who failed or refused to be vaccinated;

(c) require employees to work from home if this was practical or possible;

(d) impose vaccination restrictions on persons entering workplaces, who might come into contact with employees. I will comment further on this aspect when considering vaccination passes - see paragraphs 171 to 173 below.

106. The Village manager gave evidence that, apart from himself and his co-manager, the two other staff in the community centre were in close contact with residents. On 30 November 2021 the Operator carried out a health and safety risk assessment. This was for workers, residents and visitors. It was not documented. Paragraph 6 of the Village manager’s evidence states the conclusion that was reached: “Due to the vulnerable nature of the Village community and our duty of care for their health and well-being, it was necessary to implement a vaccine mandate to prevent vaccinated and unvaccinated persons mixing near each other in the community centre. We concluded it was not practical to separate the two groups within the centre and in an effective manner carry out deep cleaning operations to protect against virus transmission.”

107. As a result of the health and safety risk assessment, the Operator required all staff to be vaccinated, dismissed one staff member who refused to be vaccinated, and imposed vaccination pass requirements on any persons entering the community centre. The purpose of a health and safety risk assessment under the HSWA is to protect employees, and these measures clearly did that. However, a secondary effect was that they also

protected residents that employees interacted with. The Operator fulfilled its obligations to employees under the HWSA, and to deal with workers under the RTLS which the Operator alluded to in its evidence. It was also carried out, however, to assess the Operator's obligations under its general duty of care to residents (see paragraphs 114 to 115 below). Obviously, the general duty of care to residents needed to be considered and I see no reason the assessment could not be used to address both statutory obligations under the HSWA and general obligations arising under the COP and ORA. In any event, however, as I have stated in paragraphs 96 to 100, the duty of a PCBU to manage health and safety risks in the workplace, set out in section 37 of the HSWA, extends to "any person" entering the workplace, and that would include residents. I therefore see no reason why a health and safety risk assessment under the HSWA could not take into account both duties to employees and duties to residents.

108. It is therefore necessary to consider whether exposure of residents to unvaccinated persons or persons who are vaccinated but unwilling to confirm that fact, giving rise to the possibility of the transmission of the Covid-19 Delta virus (which was the virus current when the TLS was made operative on 3 December 2021) to them, constitutes a "risk to the health and safety" of any workers, other persons (visitors) or any person (anybody, including residents). Before considering that issue, however, it is appropriate to look at other similar duties imposed upon the Operator by other statutes and contracts.

Essential Services

109. Under Alert Level 4, which preceded the TLS, certain services that the Government were essential to the provision of the necessities of life, maintenance of public health and safety, and maintenance of key infrastructure, were allowed to operate. These services were set out in the Covid-19 Public Health Response (Alert Level Requirements) Order (No 11), which was made pursuant to section 9 of the Covid 19 Public Health Response Act 2020.

110. Businesses operating essential services were able to continue working at their workplace or in public facing contact but were required to do so in a way that limited or eliminated the risk of spreading Covid-19. They were required to:

(a) minimise or eliminate, if possible, physical interactions between staff (eg physical distancing, split shifts, staggered meal breaks and flexible working hours) and with and between customers (eg by telephone contact, contactless delivery or managed entry);

(b) ensure appropriate health, hygiene and safety measures were in place (eg handwashing, sanitisers, frequent cleaning of counters, benches, terminals and other high-touch surfaces, protective clothing, non-exposure to unvaccinated persons);

(c) limit activity to only what was essential during the Level 4 period.

This meant that staff were encouraged to work from home if this was possible, but if it was not possible then they needed to operate in a way that limited the risk of the spread and transmission of Covid-19.

111. Following representations by the Retirement Commissioner, retirement villages were classified as “essential services” under the “Accommodation” category. The “essential service” classification covered all staff, including those involved in catering, caregiving, cleaning, maintenance, and administration. It included Villages’ supply chains of food and equipment, including that required for aged care facilities in those Villages that had such facilities. In the announcement by the Retirement Commissioner (6 April 2020), she stated, in relation to essential services under Level 4: “The rights and obligations of operators and residents under occupation right agreements continue as usual, although both parties have additional duties to observe under the Level 4 requirements. Like all members of the community, this includes social distancing of at least two metres, not travelling outside of the local community, and frequent handwashing. Those aged over 70 are considered high-risk and should stay home if they have someone who can drop off food and supplies at their door or at the village entrance. If they need to visit the supermarket, they should keep visits to a minimum”.

112. **At all traffic light settings, essential services continued to operate**, though some of the requirements have since been eased for certain **businesses**. Under the RTLS at the time it was introduced, the requirements set out in paragraph 99 continued to apply. If the Operator could not operate successfully by having staff working from home, then they could work at the Village provided that the measures set out in paragraph 99 were adhered to. To maintain the operation of the Village, and in particular the facilities, the staff needed to be at work. The receptionist could meet and greet visitors and suppliers, and monitor vaccination passes. The sales and operations manager could co-ordinate with potential purchasers and ensure all village operations were being maintained and ran smoothly, including repairs and maintenance. The Village managers could manage the new buildings under construction, conduct meetings with the RA, attend to staff and employment issues, confer and co-ordinate financial and statutory requirements, and other administrative functions. All could be involved in co-ordinating the availability of facilities. I therefore find that the minimal 4 staff In the community centre needed tb e at work to maintain the successful operation of the retirement village. Since they worked in the community centre, that obviated putting in place the requirements to protect staff working in that environment. All staff were required to be vaccinated, and physical interactions minimised. Exposure to unvaccinated persons was perceived as an exposure to the risk of contracting the Covid-19 virus. One obvious way of preventing this, and protecting staff, was to limit access to the community centre to vaccinated residents only.

Covid-19 Public Health Response (Protection Framework) Order 2021

113. The PF Order itself has a number of provisions designed to protect staff. Section 37 requires workers at a workplace to remain at least 1 metre away from any other worker and remain as least 2 metres away from any other person (which would include residents). Section 38 requires a business or service to have systems and processes in place to achieve this. Section 34 widens this responsibility from just residents to “people”, when it states that “a person must maintain physical distancing from any other person, so far as is reasonably practicable, in the premises or circumstances specified in an active

Covid-19 response schedule.". Section 5 defines "premises" as including any "commercial premises or private premises" and defines "business or service" as including "a private sector business or service." More importantly, section 39 requires the business or service to "have systems and processes in place to mitigate, so far as is reasonably practicable, the risks of spreading COVID-19 that arise to the extent that physical distancing in accordance with the applicable physical -distancing rules cannot be fully maintained (for example, through regular cleaning of surfaces or the installation of plastic barriers)." While surfaces could be regularly cleaned. it is apparent that the installation of plastic barriers would be impractical in some of the facilities in the communal centre. These, however, are not the only means of mitigating the risk of spreading Covid-19. Restricting access to the community centre facilities to vaccinated persons only would be an obvious further means of achieving this. This gives rise to the issue of whether the Operator was, in terms of the RLTS, offering a "close proximity service" within the community centre, since in terms of the definition of a "close-proximity business or service" in section 5 of the PF Order, both "people" and "workers" can be affected by the resultant requirements(face masks, physical distancing, and, if required by the business, proof of vaccination or vaccination exemption. I will examine this later in this decision when looking at the specific requirements under the RTLS.

114. I find that the Operator had a duty to observe and maintain its health and safety obligations to workers while operating under the RTLS.

The Duty of Care to Residents

The Code of Practice

115. Clause 16.1 of the COP requires the Operator to "have, maintain and implement a written policy that: a sets out…**any management practices** for the village and the physical environment (the grounds, **facilities**, common areas and residential units) that help maintain and enhance all residents' safety and security.[see the examples below]." One such example of "management practices" is "systems for identifying and eliminating risks

and hazards" Clause 17.1 sets out a similar requirement" for the operator to "have, maintain, and implement **policies and procedures**.…aimed at maintaining and enhancing the safety and personal security of residents in the retirement village." These include "a policy that provides for the safety and security of residents, b , a procedure for reviewing the safety and security of residents, and c a procedure for responding to all safety and security needs of residents and others."

The similarity with the wording in the HSWA, which I have defined in paragraph 93 above, is noticeable, in my view the intended meaning of "risks" and "safety" is the same, and I find that these words therefore include potential exposure to a serious illness such as Covid-19.

The Health and Safety at Work Act 2015

116. As mentioned in paragraph 98 above, I consider that the words "any person" in section 37(1) of the HSWA are wide enough to include residents, and therefore the Operator's health and safety duties in that section extend to residents.

The Retirement Villages Act 2003

117. Section 27(1)(a) of the RV Act requires that an occupation right agreement must contain "'provisions and information of the kind specified in Schedule 3".Clause 1(a)(ii) of Schedule 3 requires the occupation right agreement to contain provisions in relation to "the safety and personal security of residents".

The Best Practice Guidelines of the Retirement Villages Residents' Association of New Zealand ("RVR")

118. In August 2021 the RVR published a document entitled "Checklist for Best Practice in

New Zealand Retirement Villages – August 2021". On page 2 of that document, under the heading "Health and Safety", it states under paragraph c: "Village managers should take responsibility for the overall emotional wellness of individual residents and the 'well-being culture' in the village."

119. In October 2021 the RVR published a comprehensive document entitled "framework for Fairness: Guidelines for Achieving Best Practice in New Zealand in Retirement Villages". On page 10 of that document, under the heading "Health and Safety in and around Villages", the same words as those in paragraph 118 above were used.

120. I have considered the meaning of "safety" in paragraph 93 above and am satisfied that it includes minimising the risk of serious illness. What, then, is the meaning of "well-being"? The Oxford Dictionary defines it as "the state of being comfortable, healthy, or happy". There are many components to well-being – physical, mental, emotional, financial, occupational, social and community. Physical and mental health are pivotal components. I am satisfied that steps taken to avoid physical injury or serious illness, and promote mental health by alleviating concerns about risk, are therefore within the ambit of "well-being".

121. It is clear that the RVR was concerned that village managers should be proactive and take responsibility for health and safety issues in the village. The Operator's witnesses all referred to the high degree of fear, concern and anxiety that there was in the Village about the possibility of allowing unvaccinated persons into the community centre. The vaccinated residents did not want it. This leads me to three conclusions:

(a) Firstly, I find that such fear, concern and anxiety would inevitably impact upon the "overall emotional wellness" and the "well-being culture" in the Village;

(b) Secondly, I find that any proactive steps that the village manager might take to alleviate such fears, concern and anxiety would indicate that the village manager was "taking responsibility", and would obviously be within, and complying with, the health and safety Best Practice Guidelines put forward by the RVR.

(c) Thirdly, I find that since the implementation of restrictions on access to the community centre to allow only vaccinated persons to enter would obviously allay such fears, concerns and anxiety, such restrictions would be within, and complying with, the health and safety Best Practice Guidelines put forward by the RVR.

122. When I enquired of the Applicant as to whether it was reasonable for the Village managers to take steps to prevent the spread of the Covid-19 virus, she replied: “They thought so”. It is unclear whether she had an opposite view. However, any steps taken by the Village managers would accord with the RVR guideline for them to “take responsibility” for the “well-being culture” in the Village.

The Occupation Right Agreement

123. The Operator acknowledges in clause 11.1.7 of the ORA that the COP “summarises the minimum rights conferred on a Resident of the Village by the Retirement Villages Act 2003”. Apart from that, there are no provisions which expressly mention the safety and personal security of residents. The Operator covenants in clauses 11.1.4 and 11.1.5 to maintain and keep in good order the grounds and buildings, which could impact on safety issues.

Persons at Higher Risk of Severe Illness from Covid-19

124. A large amount of anecdotal material was submitted in evidence by the Applicant surrounding relative Covid-19 transmission rates between unvaccinated and vaccinated persons, vaccinated and vaccinated persons, and the fact that both unvaccinated and vaccinated persons can contract the virus and pass it on. People can contract the virus multiple times, so vaccination does not protect them from that. Such material is designed to indicate that measures to keep vaccinated and unvaccinated persons separate are meaningless as far as the transmission of the Covid-19 virus. There are many other

articles to the contrary. One example cited by the Operator in evidence is the World Health Organisation ("WHO") FAQ on Covid-19 Vaccine Safety of 17 May 2022: "Vaccines are not 100% effective, so there is a high risk that an unvaccinated person could infect a vaccinated person, particularly the vulnerable such as the elderly and immune-compromised individuals." The scientific evidence was recently considered in the case of **Orewa Community Church** v **Minister for Covid-19 Response** [2022] NZHC 2026 (Gwyn J) at paragraphs 136 to 163. The Court accepted the science put forward by the Ministry of Health and its array of expert advisers. The Court also considered, in the context of "gatherings", the risk assessment of faith-based gatherings in relation to the Delta virus, which the Court noted "are more likely to have a higher proportion of vulnerable people in attendances, particularly elderly members of the community, who are at a disproportionate risk of severe outcomes from Covid-19 (paragraph 196), and concluded (at paragraph 185) that "there was a sufficient evidential basis to conclude that faith-based gatherings were at risk". The same could be said of retirement villages where the majority of the residents are elderly and many of them have medical conditions which place them at higher risk of severe outcomes if they contracted Covid-19. I am not a clinician or epidemiologist, and I do not need to consider the merits or otherwise of such arguments. What is certain is that Covid-19 kills people, and certain people are at higher risk of severe illness or death. The Applicant accepted that the Covid-19 virus spread person-to-person in the community and accepted the MHO advice that it was desirable to reduce such spread.

125. The Ministry of Health website information entitled "Covid-19: Higher Risk People", lists people with compromised immunity, people with high-risk medical conditions, older people, people in aged care facilities, people who are pregnant and newborn babies, people with a disability, people with mental health conditions and addictions, people of Maori and Pacific ethnicity, and people who smoke, as falling within the higher risk category. I am primarily concerned here with people with compromised immunity, people with high-risk medical conditions, and older people, since it is these that relate to retirement villages. The information in the next 3 paragraphs is from the same website

information, and I have no argument with it.

126. Covid-19 is more likely to become severe when people have conditions or take medications that are associated with immunosuppression, such as chemotherapy or radiotherapy, bone marrow or organ transplantation, some blood cancers, immune deficiencies including HIV infection, some immunity weakening medicines such as high-dose corticosteroids and disease-modifying anti-rheumatic drugs that treat inflammatory conditions such as arthritis and inflammatory bowel disease, and long-term haemodialysis or peritoneal dialysis.

127. Covid-19 is more likely to become severe in those with underlying medical conditions. High risk medical conditions include chronic lung or airways disease, serious heart conditions such as congestive heart failure, coronary artery disease, rheumatic heart disease, and congenital heart disease, hypertension, chronic neurological or neuromuscular disease, diabetes, chronic kidney disease, severe liver disease such as cirrhosis, severe haematological disorders, severe mental illness such as schizophrenia, major depressive disorder, bipolar or schizoaffective disorder, active cancer and morbid obesity (BMI greater than 35).

128. Older people, particularly those with underlying medical conditions, are more at risk of severe illness from Covid-19. Risk increases with age but is particularly an issue for people over the age of 70, although Māori and Pacific populations may be more likely to experience the age-related risk earlier than the age of 70. The Ministry of Housing and Urban Development echoed this information in its website information entitled “Covid-19: Information for Retirement Villages.” The fact of the matter, which is generally accepted, is that our mental and physical health declines with age, and there is a greater occurrence of the sorts of conditions described in paragraphs 126 and 127 above. . That is why older people are considered more at risk of severe illness from Covid-19. It was apparent in the evidence of both the Applicant and the Operator that they were acutely aware of the resulting fear amongst residents in the Village of catching the Covid-19 virus.

129. On or about 9 September 2021 the Ministry of Housing and Urban Development issued a document entitled “Covid-19: Information for Retirement Villages, which was designed to guide residents and operators to additional sources of information. It was particularly aimed at older people, at-risk people, and people aged 70 and over with certain health conditions, and how they could protect themselves.

130. I have outlined these higher-risk categories and conditions because they are more prevalent in older people, and it is older people who reside in retirement villages (the usual minimum entry age for a resident is 55). There are now almost 49,000 residents living in 425 retirement villages.in New Zealand, representing 14 percent of the over-75 age group. Of those, most are over 80 years of age, and are “vulnerable” in terms of WHO assessments. (see paragraph 124 above). In a Zoom meeting run by the Retirement Commission on 11 May 2022, attended by Panellists, Fairway Resolution, the Retirement Villages Residents Association of New Zealand (“RVR”) and the Retirement Villages Association of New Zealand (“RVA”), which I attended, the RVR verbally indicated the outcome of a survey it had carried out as to the health of RVR members who were residents in retirement villages. Of the members who responded, 50 percent indicated a health issue for themselves or their partner, and only 20 percent indicated no health issues at all.

131. The RTLS was designed to counter the severe impact that Covid-19 could have on at-risk people and our health system. In its website information entitled “Covid-19: Older people, their family and whanau”, the Ministry of Health set out what older persons needed to know to protect themselves. It states: “As an older person you may be more vulnerable to Covid-19 as you may have underlying health issues, therefore you may need to reach out to friends, family, and neighbours for support. Remember to follow good hygiene practices, keep your distance from people you don’t know, and stay home if you’re unwell.” The Government “Unite Against Covid-19” website defines the aims of the RTLS – minimisation and protection. It states: “Minimisation means we are aiming to keep the spread of Covid-19 and hospitalisations at as low a level as possible. Outbreaks will be contained and controlled, and if practical, stamped out. There will likely be some

level of cases in the community on an ongoing basis. Protection means that we will protect people from the virus, with vaccination, infection prevention and control, and general public health measures (e.g. contact tracing, case management and testing. Response will also focus on minimising significant health impacts through treatment and support. We will also protect people's health by ensuring we are not letting cases go to the point where the impacts have flow-on effects to impact other health services."

132. In paragraph 5 of the Operator's closing submissions, the Operator states: "Many residents in this community are, by reason of their age and existing health conditions, at serious risk if they succumb to this life-threatening disease." I accept this statement, as it agrees with the constituency of New Zealand retirement villages. In the light of that knowledge, and in fulfilment of its duty of care to residents, I consider that it was reasonable for the Operator to rely on MOH guidelines and adopt a mandate as a precautionary step to minimise the spread of the covid-19 virus within the vulnerable village community. If the Operator had waited till all the science was in, the science debated and watertight conclusions arrived at, the Covid-19 virus could have spread though the Village and Village and a significant number of vulnerable residents could have died.

Alternatives to a Vaccine Pass/Certificate Requirement

133. In paragraph 10 of the Applicant's opening submissions, it states: "But the traffic light system did not require retirement villages to use vaccine passes. It was a choice that the Village made, a choice it made in rapid fashion…It had other choices." It is correct that there were other options to vaccine passes, Some of these are mentioned in paragraph 20 of the Applicant's closing submissions – mask wearing, capacity limits and sanitising. Others were contact-tracing, social distancing and ventilation. The question is whether they would have been as effective, in the context of what was known about the Delta virus on 2 December 2021, as a vaccine pass requirement for access to the community centre. Such "less impairing alternatives" were considered by Gwyn J in **Orewa Community**

Church v Minister for Covid-19 Response [2022] NZHC 2026, at paragraphs 207 to 237. The Orewa Community Church (and others) suggested at paragraph 209 that a number of alternatives to the CVC-related (=Covid Vaccination Certificate-related) restrictions "would be less limiting to their rights and freedoms, but equally effective.": After considering the evidence, the Court found that they were not. At paragraph 233 the Judge stated: "The evidence of Drs Town and Bloomfield clearly establishes the scientific support for the efficacy of vaccination and gathering limits in reducing the spread and harm of Covid-19. The evidence supports a conclusion that **those measures are significantly more useful in achieving the objective than any one or combination of the alternatives proposed by the Orewa applicants."**, and at paragraph 237: "The applicants have not identified any alternative method that would be equally effective in achieving the objective. I conclude that the benefits of the CVC-related restrictions as introduced outweigh the limitation on the applicants' right and the limitation is proportional and demonstrably justified." The "right" referred to was the right contained in section 15 of the New Zealand Bill of Rights Act 1990 ("the BORA"): "every person has the right to manifest that person's belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or in private."

134. I fully appreciate that in the **Orewa Community Church** case the right that was claimed to be limited by the CVC-restrictions was a right in the BORA, in which the rights set out are available to all individuals. That is a far cry from the limitation of the right to use facilities in a retirement village. However, the considerations about the underlying scientific evidence, and the effectiveness of alternatives, are relevant to Issue 2. In this regard I agree with the findings of the Court.

135. I therefore find that the Operator had a duty to maintain and observe its health and safety obligations to residents while operating under the RTLS, I further find that the implementation of a vaccine pass/certificate requirement was a more effective option than the available alternatives alone (mask-wearing, capacity limits, sanitising, social distancing, ventilation). Such alternatives were best used in combination with a vaccine pass/certificate requirement.

The New Zealand Bill of Rights Act 1990

136. Since I have put forward certain aspects that were considered in a case in which a limitation on a right in the BORA was challenged, it is an appropriate point to consider the relationship, if any, that the RLTS,, might have to the BORA, and whether there is anything useful in such considerations, and in particular any cases, that might be applied to the consideration of Issue 2. At the outset I would make it clear that:

    (a) this dispute is **NOT** an application for judicial review of limitations imposed by the TLS (via the Order) on a right in the BORA,;

    (b) this dispute is **NOT** a challenge to the TLS;

    (c) The criteria applied by the High Court and higher courts in determining whether limitations imposed by statute on BORA rights were justified (as in the **Orewa Community Church** case and numerous other cases) need **NOT** be applied in determining whether a limitation on access to communal facilities is justified, and I am certainly NOT suggesting that the same criteria should be applied. The access restrictions were not imposed by statute (the PF Order), but by a business decision made by the Operator.

137. The Applicant's counsel has submitted that such cases "are only of limited relevance." That is correct, in that the "limitation", that is, the restrictions on access to the community centre, was not imposed by the PF Order. It was a business decision made by the Operator to impose a vaccination pass/certificate requirement. There were, of course, other statutes, such as the HSWA, which indicated such restrictions could be appropriate in the context of the obligation to protect workers and any persons from risk.

138. That said, section 6 of the BORA requires that, where possible, an enactment must be given a meaning that is consistent with the rights and freedoms contained in the BORA. The RVA is an "enactment", and if I am to consider the propriety of the limitation of the right to use communal facilities (which are defined in section 5 and are part of the "retirement village" in terms of section 6 of the RVA), then it may be appropriate that I do

so in a manner which is consistent with any relevant rights and freedoms in the BORA. The relevant right in the BORA would be that in section 17 Freedom of Association, which states: “Everyone has the right to freedom of association”. Is a “right of access to use communal facilities” also a right to “freedom of association”? Apart from this, it is noticeable anecdotally that the government itself recognised that no Covid-19 orders made under section 11 of the Covid-19 Public Health Response Act 2020 (“the PHRA”) should offend the rights and freedoms in the BORA. In section 9 (1)(ba) of the PHRA it states: “the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms.” In making the PF Order, which is the basis for the TLS, the government was obviously satisfied that the limitations imposed by the PF Order did not limit or were a justified limit on the rights and freedoms in the BORA, including the right to freedom of association.

139. While I have clearly stated that the criteria adopted by the Courts in determining whether limitations imposed by stature on BORA rights need NOT be applied in determining any right to use communal facilities, some of the criteria are inevitably similar - they are logical and sensible general principles to consider in determining the propriety of any such restrictions. I therefore see no reason why they cannot be considered, together with all the other matters that I have already discussed.

140. There are many New Zealand cases, in which the criteria used to determine whether a limitation imposed by statute on a BORA right was justified have been applied. The basis for any such limitation is section 5 of the BORA, which states:

“5. Justified limitations – Subject to section 4 of the Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”

These words followed those in the Canadian case of **R v Oakes [1986] 1 SCR 103**.These were further summarised by Blanchard J in **Hansen v R** [2007] NZSC7, [2007] 3 NZLR 1, (2007) 23 CRNZ 104 at 65.

The New Zealand cases have involved many different factual scenarios. I will confine any further citations to the cases in which the statute imposing the limitation was the Health Act 1956, the PHRA or the PF Order, and the limitations imposed by the statute were upheld. One is the **Orewa Community Church** case which I have referred to in paragraphs 133 and 134. Others are:

Four Aviation Security Service Employees v Minister of Covid-19 Response [2021] NZHC 3012, (2021 HRNZ 824

Four Midwives v Minister for Covid-19 Response [2021] NZHC 3064

Borrowdale v Director-General of Health [2021] NZCA 520

141. The cases and their outcomes are not important – it is some of the criteria that can be helpful and useful. The criteria that may be gleaned from these and the many other cases, without going into vast detail, are:

(a) the provision of a statute or regulation which is challenged must be of sufficient importance to warrant overriding the right or freedom – that is, it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important;

(b) it must pass a proportionality test – that is, it must be rationally connected to the objective and must not be arbitrary, unfair or based on irrational considerations;

(c) It must impair the right or freedom as little as possible;

(d) It must be such that the effects on the limited right or freedom are proportional to the objective;

(e) the limitation must be prescribed by law;

(f) it must be demonstrably justified;

(g) it must be in a free and democratic society

(h) is the “precautionary principle” relevant, given the subject matter? This principle can be summed up in the phrase “reasonable action to reduce risk should not await scientific certainty.”

142. Looking at these criteria, the following are useful in the context of Issue 2:

- Were the concerns pressing and substantial? There was serious concern amongst the other 243 residents in the Village that unvaccinated persons should not be admitted to the communal facilities. Under the preceding Alert levels, it was apparent that if the Covid-19 virus got into a rest home, there was a high likelihood of deaths and serious illness amongst elderly people. There was similar concerns if it got into a retirement village, which is why retirement villages were required to have a specific plan in place to deal with such an outbreak. There was wider concern that the Delta virus would spread in the community and the hospitals would be overwhelmed. This was considered to be a health emergency. I consider that this criterion is satisfied.
- Were the restrictions on access “rationally connected” to the objective? - The objective of the restrictions, apart from fulfilling HSWA and other statutory and COP contractual obligations, was to protect residents from contracting the virus and prevent the spread of the virus in the Village. That agreed with the purpose stated in section 3 of the PF Order, which was “to prevent , and limit the risk of, the outbreak and spread of Covid19, and to otherwise support the purposes of the Act.,” Further, the objectives of the TLS, according to the Ministry of Health, were stated to be “minimisation” (“to keep the spread of Covid-19 and hospitalisations at as low a level as possible”) and “protection” (“to protect people from the virus, with vaccination, infection prevention and control, and general public health measures”). These purposes agree, and I consider that this criterion is satisfied.
- Did the restrictions impair the right as little as possible? Up to 100 vaccinated residents could still use the facilities, which was the maximum possible in terms of the PR Order capacity limits. Alternative access was offered to the Applicant, which was declined. The Applicant could still use outdoor facilities. I consider that this criterion is satisfied.
- Were the effects of the restrictions (the effect was to prevent the three from entering the communal facilities other than as arranged) proportional to the objective (to prevent the spread of the Covid-19 virus amongst workers and the

other 243 residents)). I consider that the effects were “proportional” and this criterion is satisfied.

- Were the restrictions demonstrably justified? It is unclear whether the restrictions did prevent the spread of the Delta virus in the Village, but the underlying science at the time clearly believed that a mandate would do that. Apart from this, another demonstration would be the resultant reduction in the anxieties and concerns of the other residents, the availability of facilities to the most residents possible, and the management of the Village in the most efficient manner possible under all the circumstances. I consider that, while there may now be some debate as to the mandate preventing the spread of the Delta virus, in the light of what is now known, this criterion is satisfied.
- Is it in a free and democratic society? Such a society has been defined as one where the rule of law is in operation. In a more limited sense, if confined to democracy within the Village, the evidence has indicated an overwhelming desire amongst the other 243 residents for restrictions to be put in place. I consider this criterion satisfied.
- Is the precautionary principle relevant? I have discussed the scientific evidence in paragraph 124. In the absence of absolute certainly, I agree with the conclusion of the Court in the **Orewa Community Church** case that the precautionary principle was appropriate to follow. If the Village had waited till all the science was in and the debates had been resolved, by then the virus could have spread amongst the residents, there would have been serious and vocal concerns from the vaccinated residents, the obligations owed to workers and any persons would not have been met, and at worst some residents could have died. I consider this criterion to be satisfied.

143. I therefore find that all but one of the criteria set out in paragraph 141 above have been satisfied, and to such extent they have been useful in considering the limitation on access to the facilities in the community centre.

The Requirements of the Red Traffic Light System

144. Concurrent with the Traffic Light System taking effect at 11.59pm on 2 December 2021, the Operator introduced restrictions on access to the community centre. Only residents

with a vaccination pass, purple vaccination record or Ministry of Health exemption certificate were and use the facilities therein.

145. Retirement Villages were required to observe the requirements of the particular Traffic Light System that applied to the area in which the village was situated. The Village is situated in an area where the Red Traffic Light System ("RTLS") applied as at 11.59 pm on 2 December 2021, and it is therefore necessary to examine the requirements of the RTLS and consider how these applied to the Applicant and to the residents in the Village generally.

146. The RTLS had the following requirements (Source: Z Government Unite Against Covid-19 website):

- Wear a face mask on flights, public transport, taxis, shops, education (Year 4 and up) and public venues (mandatory)
- You can visit public places like libraries and museums [with limits based on the size of the venue (1 metre distancing)].
- Go to workplaces. Where appropriate staff may work from home.
- Go to education places like schools and ECE (with health measures and controls in place).

My Vaccine Pass allows you to go to the following (up to100 people based on the size of the venue – 1 metre distancing – and seated and separated. For gatherings in a home, you can have up to 100 regardless of the size of the house):

- Cafes, restaurants, and bars
- Gatherings like weddings, funerals, tangihanga, community and social sport, marae, faith-based meetings and gatherings at home
- Indoor (cinemas, theatres, stadiums, concerts, conferences, casinos, private galleries) and outdoor events (community fairs, parades with uncontrolled access)
- Close-proximity businesses like your hairdresser
- The gym and other member-based businesses like dance or martial-art studios
- Tertiary education in person (capacity limits will apply based on venue size)

Without My Vaccine Pass there are restrictions that apply:

- Only allowed contactless pickups at cafes, restaurants, and bars
- Only attend small gatherings of up to 25 people, based on 1 metre distancing. . If held at home, maximum of 25 people regardless of the size of the house
- Cannot attend indoor or outdoor events like concerts
- Up to 25 people can attend outdoor community gatherings with uncontrolled access
- Only distance learning for tertiary education

147. The RVA interpreted these requirements in a document entitled “Preliminary Advice Covid-19 Protection Framework – A Guide to Residents and Families”, which states that it was prepared based on the Business NZ website and without being able to check the information was consistent with the PF Order released on 2 December 2021, which it stated it was then reviewing, which therefore places the date of issue as being around 2 December 2021.

Resident Activities with a Vaccine Pass

- Hospitality services such as the café, bar and restaurant may have up to 200 people or the maximum number possible with 1 metre distancing to provide food and beverages. You must be seated and separated. You will need to show your vaccine pass.
- Hairdressing and other close-contact services can operate as normal. You must show your pass when entering.
- Indoor activities such as the cinema, swimming pool, bowls. Billiards, the library, card games – there can be up to 100 people in the room (subject to capacity limits). You must show your pass.
- Outdoor activities such as bowls, petanque, croquet, walks etc have a maximum limit of 100 people or the number based on 1 metre distancing per defined space (the bowling green, outdoor swimming pool etc). You must show your vaccine pass.

Resident activities without a Vaccine Pass

- Hospitality services will be restricted to contactless collection only. You will not be able to use the gym, a hairdresser or other close contact services.
- Indoor and outdoor activities and gatherings will have a maximum of 25 people per defined space (as above)
- If someone hires the entire space for a family birthday party or a similar event, the same limits above apply. If there's a mix of vaccinated and unvaccinated people, the lower limits apply.

I will now examine these components.

Close-proximity Businesses

148. Close-proximity businesses could operate under the RTLS subject to proprietors being vaccinated, proprietors and users wearing masks (except where necessary to carry out the service), a vaccination pass being required from users, regular sanitising after each user, and 1 metre physical distancing between proprietors and users and between users and users (except where being closer was necessary to carry out the service). Examples were hairdressers, beauty parlours, nail salons, tattoo parlours, non-medical certified playgroups, car-driving instruction, gyms and exercise facilities, nightclubs, farmers markets and close-contact in- home aid.

149. Section 5 of the Order defined a "close-proximity business or service" as:

(a) a business or service to the extent that it carries on activities that it cannot undertake without –

(i) physical contact, or close proximity, between people; or

(ii) a worker being closer than 1 metre to the client; and

(b) includes –

(i) a certified playgroup; and

(ii) an OSCAR programme delivered at premises other than the premises of a registered school."

150. The Operator maintained that it was a close-proximity business because the facilities within the community centre were all close-proximity facilities. This was because of the manner in which elderly residents tend to congregate together in that they do not practice social distancing because of hearing and sight loss or other such conditions. The Operator maintained, in their observation, the residents did not, routinely practice mask wearing and gathered close to each other despite efforts to encourage social distancing. The Operator concluded that it would have been completely ineffectual to rely on social distancing directions to ensure that residents maintained a safe distance at all times. On the other hand, the Applicant maintained that the Operator's business did not fit the definition of a close-proximity business, and therefore vaccination passes were not needed.

151. The Operator operated two close-proximity services within the community centre - a hairdressing service, and a gym. There were also around 20 special interest activity groups that were permitted to operate in the community centre, and while I recognise that these were not operated by the Operator and could have been cancelled, they formed an important part of life in the Village and caused residents to come into the community centre. From the list provided, it is apparent that a significant number of these could involve residents being close to each other and/or sharing common equipment (e.g. bowls) or materials (e.g. playing cards)– 500, bowls, card-making, crafts, cribbage, games, indoor bowls, knit stitch and chat, ladies pool, line-dancing, mah-jong, pool, table tennis. The sharing of equipment and materials could easily transmit the Covid-19 virus, and while the activities were not run or co-ordinated by the Operator it would certainly fall within their duty of care (health and safety) obligations to residents to be mindful of sources of transmission of the Covid-19 virus.

152. No evidence was produced by the Operator as to how many residents had sight, hearing, or other impediments, how many of those that had such impediments used the facilities,

if so what facilities such impaired residents used, and if they did use them then to what extent and why they may have come very close to others. No similar analysis was provided in respect of special interest activity groups that met within the community centre.

153. The definition in the PF Order says "**to the extent**…", and on the evidence presented the "extent" is the close-contact services that operated in the community centre, namely the hairdresser and the gym. I find that the Operator was partially a close contact business "to such extent", that is, in respect of those particular services.

154. That said, if vaccination passes had been required to enter the community centre only from those persons using the hairdresser or the gym, that would have ignored health and safety obligations to other residents using the community centre, and ignored possible transmission of the virus arising from shared equipment and materials. In this regard, it is noted that outside contractors used to provide programmes in the gym (and the swimming pool), and to provide hairdressing services, declined to attend the Village in unvaccinated persons were allowed into the community centre, and this would therefore have deprived other residents of the benefit of those services.

Defined Spaces

155. Section 9 of the PF Order defines a "defined space" as follows:

> 1) "In this order, 'defined space' —
>
> (a) means any single indoor space or outdoor space; and
>
> (b) if there is more than 1 space in any premises, means a space described in paragraph (a) for which there are systems and processes in operation that ensure, so far as is reasonably practicable, that persons using the space (other than workers) do not intermingle at a distance closer than 2 metres with other persons using, entering, or leaving the premises.

2) For the purposes of this clause, —

(a) an indoor space is a “single space” if there are walls (whether permanent or temporary) that substantially divide that space from other spaces:

(b) an outdoor space is a “single space” if—

(i) there are walls (whether permanent or temporary) that substantially divide that space from other spaces; or

(ii) all people in that space are separated by at least 2 metres from other people who are outside that space.”

These spaces were enclosed by ceilings and walls or similar structures and did not have much, if any, flow of air from one space to another.

156. The significance of defined spaces has to do with capacity limits for gatherings within those spaces. Up to 100 people could gather provided that the space was sufficient to allow 1 metre distancing between them. If it did not, then the capacity would need to be adjusted downwards to the number of persons that the space allowed. The Unite Against Covid-19 government website states:

“The activity that occurs in these indoor spaces should determine what capacity limit applies to the indoor space — the rule follows the activity.”

This means that:

- retail capacity limits (capacity based on 1 metre distancing) generally apply to the indoor places in which people:
  - travel directly through to get to an outdoor space, and/or
  - need to go so they can purchase things (for example food, to eat when back outdoors), and/or
  - need to go to use the bathroom.
- indoor capacity limits (of up to 100 people based on 1 metre distancing) generally apply to indoor spaces if people are using the space for purposes other than those listed directly above.

When people can move between spaces

If there is more than one space on the premises, people using the space (other than workers), cannot mix with other people using, entering, or leaving the premises.

Workers can move between gatherings held in different defined spaces.

Every venue is different, so it is up to the venue owner or gathering organiser to put measures in place to stop groups of people mixing within each defined space.

To ensure groups do not mix, consider:

- separate entry and exit points
- staggering start times for events or gatherings
- separate bathrooms
- different service counters for food and drinks, and areas where people go up to pay."

157. My observation of the internal layout of community centre at the Village, of which I took photographs, is that it was comprised of one large central area, which could accommodate up to 100 people at 1 metre distancing without being divided up. There were a number of smaller areas – the library, cinema, pool room, table tennis room, gym, and swimming pool, which were not capable of taking that number of people. Capacity limits for those would be lower, with their own bathrooms and access points. Most of the special interest activity groups met in the main area, which was large enough to accommodate them. No areas were artificially separated by temporary walls. There appeared to be no issues with observing capacity limits and requirements in the various defined spaces within the community centre, with no air flow between them..

Gatherings

158. Under the RTLS, gatherings of up to 100 vaccinated people were allowed, based on 1 metre distancing, and gatherings of up to 25 unvaccinated people were allowed.

159. The Applicant was of the view that she should have been permitted, to enter the community centre as the RLTS allowed small gatherings of up to 25 unvaccinated persons.

160. Section 13 of the Order defines “gathering” as follows:

In this order, **gathering**—

(a) means a group of people in a defined space; but

(b) excludes a group of people at an event.

Examples

- A gathering for voluntary or not-for-profit sporting, recreational, social, or cultural activities.
- A gathering for community club activities (except activities that occur at the same time and place as services provided under a club licence under section 21 of the Sale and Supply of Alcohol Act 2012).
- A faith-based gathering.
- A funeral or tangihanga.
- A gathering held in a defined space or premises of a workplace if that space or those premises is for the exclusive use of the gathering.

161. A primary concern of the Applicant was to have access to the library. The library is a relatively small room which has access from the main entry, and it is separate from the main area of the community centre. The Operator offered to the Applicant access to the library on two days per week at a specific time. The Operator undertook to carry out a full clean of the library to allow other residents to use it after these designated hours. This was declined by the Applicant. The Operator says it was not practical to extend these special arrangements to other areas in the community centre because of the need to conduct full cleaning between the use of vaccinated and unvaccinated persons. Having viewed these areas, I can appreciate the impracticalities created by size, location, access and regular use by other residents. The Applicant was excluded from the knitting

group, which was a decision of the group, which met in the main area of the community centre.

162. When I enquired of the Applicant as to what she considered a “gathering” was, she replied: “A collection of people.” A agree that a gathering is a collection or group of people in a defined space. The examples given indicate that the group which gathers does so because of some common purpose eg to undertake an activity, to dine together. Some of these gatherings have a deliberate one-off arrangement eg a wedding or a funeral or a tangi - or regular scheduling eg a faith-based service. In these, there is some distinctive and definite organisation and common purpose. They do not indicate nor contemplate visits made by one individual. One person is not a gathering. I therefore do not consider that a visit by a sole individual to a facility constitutes a gathering, and on that basis the Applicant on her own is not a “gathering of up to 25 unvaccinated persons.” I find that she could not enter the community centre on the basis of being a “gathering” accordingly.

163. In the recent case of **Orewa Community Church v Minister for Covid-19 Response** [2022] NZHC 2026 (Gwyn J) the Court considered, in the context of “gatherings”, the risk assessment of faith-based gatherings in relation to the Delta virus,. The Court noted at paragraph 196 that such gatherings “are more likely to have a higher proportion of vulnerable people in attendance, particularly elderly members of the community, who are at a disproportionate risk of severe outcomes from Covid-19”. It concluded (at paragraph 185) that “there was a sufficient evidential basis to conclude that faith-based gatherings were high risk”. The same could be said of retirement villages where the majority of the residents are elderly and many of them have medical conditions which place them at higher risk of severe outcomes if they contracted Covid-19.

164. The community centre is not a public place, like a public library or public swimming pool. It is private property and is for the use of residents in the Village, and invited guests. The RLTS “public place” rules do not therefore apply to the community centre.

Events

165. Under the RTLS, events were permitted for up to 100 vaccinated persons, based on 1 metre distancing. No events were allowed for unvaccinated persons.

166. Section 5 of the Order defines an "event" as follows:

Event -

(a) means an activity organised by a business or service—

(i) that is held at—

(A) commercial premises or private premises (whether indoors or outdoors); or

(B) publicly owned premises hired for the purpose of the activity; or

(C) an outdoor area where a group of customers and clients is accompanied or supervised by a worker providing services to that group (for example, a guided tour); and

(ii) for which entry is controlled (whether through ticketing, fees, registration, or any other means); and

(b) also means normal operations at cinemas, theatres, stadiums, concert venues, conference venues, casinos, and private galleries; but

(c) excludes any activity at a private dwellinghouse

167. In paragraphs 28 to 30 of her Statement of Evidence, the Applicant raises the occurrence of a Hawaiian dance group attending the community centre for a concert on 26 February 2022, well after the introduction of the RTLS. She indicates that a photograph on the front page of the February – March Village Residents Newsletter indicates no social distancing, no masks, and a child under 12 years of age. I am not sure why this has been raised by the Applicant, other than to possibly allege that the Operator knowingly allowed an unvaccinated person into the community centre and therefore, did not follow its own access requirements. The event was organised by the RA. The Operator has indicated that all members of the dance group produced evidence of vaccination. The residents who attended (up to 100) were fully vaccinated and

observed social distancing. This was an event and is permitted under the RTLS. Workers and others were strongly encouraged under the RTLS to wear masks, but performers were not required to wear masks. If the performance required close contact, that was permissible, though the photograph indicates that 1 metre distancing was observed between the performers, nor do any of them appear to be close to residents in the audience. The child is not near to residents. No evidence was provided as to the actual age of the child performer. In my estimation it is difficult to tell. However, under the RTLS, schools were not allowed to require children to be vaccinated, to access education, They were deemed to be vaccine- compliant. Similarly, the starting point under the RTLS was that children under 12 years and 3 months were by definition Covid-19 Vaccination Pass compliant, and able to enter premises operating a vaccine pass mandate. Children aged 5-11 were eligible for vaccination from 17 January 2022. If the child was under 12, the child may have had her first vaccine dose. Based on the evidence available, the age and vaccination status of the child cannot be determined. The Operator accepted the evidence that the performers were vaccinated or otherwise Covid-compliant, and given the known concerns of residents, it is unlikely the RA and the Operator would have knowingly allowed breaches to occur. All that said, I do not consider the matter important. It is not the purpose of this Panel to determine possible non- observance of RTLS requitements by performers in an event organised by the RA, not the Operator, which took place almost 3 months after the RTLS was Introduced.

Vaccination Passes

168. On 3 December 2021 the Operator issued a letter to residents requesting them to call into reception in the community centre and “show us your vaccine pass so we can tick your name off our list for being vaccinated.” It went on to say that if they had not got their vaccine pass yet then they could “provide us with your purple vaccine record card instead.” This request was entirely voluntary but designed to assist residents from being

required to produce their vaccine pass each time they wished to use the community facilities. All residents except 3 produced their vaccination record. The Applicant was one of the 3 who did not produce their vaccination record. The Applicant acknowledges in paragraph 16 of her Statement of Evidence that she received this letter on 3 December 2021.

169. The Applicant declined to disclose her vaccination record on the grounds of privacy. She indicated in paragraph 5 of her Statement of Evidence that her decision as to whether or not to take the Pfizer vaccine was, in her view, personal health information which she wished to keep private. She did not wish to produce it. In paragraph 6 she states: "A rumour has spread amongst the other residents that I am unvaccinated." I do not accept that privacy was a valid reason for not disclosing her vaccination status. The reasons are as follows:

(a) In clause 9.14 of the ORA the Applicant "acknowledges that the Operator is required to collect and to hold relevant personal information about the Resident (including the Resident's physical and mental health)". In sub-clause (a) the Operator is authorised to "collect the relevant information about the Resident from the relevant agency", while sub-clause (b) authorises "any agency to disclose such relevant information and in particular any health agency to disclose to the Operator information relating to the Resident's health." In my view, this authority could be used by the Operator to obtain from the Ministry of Health or any other relevant health agency details of the Applicant's vaccination status.

(b) I consider that a request by the Operator to the resident, or to a resident's health agency, for disclosure of a resident's vaccination status, is the collection of

information for “a lawful purpose connected with a function or activity of the agency” in terms of Principle 1, sub-section (1), in section 22 of the Privacy Act 2020. It is also “necessary for that purpose” in terms of sub-section (2). The “agency” is the Village, and the purpose is to protect residents and workers from the Covid-19 Delta virus, for the reasons outlined elsewhere in this decision. The Village could not monitor the residents entering the community centre unless it was aware of the vaccination status of each resident.

(c) The Vaccination Pass only discloses the holder’s name, date of birth, valid-from date and valid-to date. It does not disclose any other medical information.

(d) The Applicant would only be disclosing whether or not she was vaccinated, and this information would only be held by the Village so that she could be admitted to the community centre without having to check the pass on each occasion.

(e) The Applicant’s vaccination status was already common knowledge in the Village. It had been assumed that she was unvaccinated. She presumably did nothing to refute that rumour. On or after 3 December 2021, if she still did not wish to disclose her position, she would not have been disclosing any more than what was already common knowledge.

170. The community centre at the Village had 3 access points. – the main entrance, the downstairs gym, and the activity room. Signage was placed at all three entrances requiring observance of a vaccine pass to enter. During business hours a receptionist was on duty in the main reception. After hours, access was by a swipe card. The Applicant’s swipe card was de-activated as she had openly declared that she was not vaccinated and

would not be vaccinated. It was later re-issued.

171. The requirement to produce vaccination passes (or a purple vaccination record or MOH exemption certificate) as a prerequisite to enter premises was optional under the RTLS, and still is optional under the Orange Traffic Light System. It was, however, strongly recommended by the Government, and most businesses adopted it as a means of protecting staff and protecting other customers or clients from the risk of transmission of the Covid-19 virus. Retirement villages were required to put in place a specific plan to follow in the event of a Covid-19 outbreak within the Village. It was sensible to put in place measures that would prevent any such outbreak occurring.

172. The Government's "Business.govt.nz" website information entitled "Requiring My Vaccine Passes for Entry "set out business rights in respect of who could enter premises, as well as the obligation to keep workers safe (which I have already examined at some length):

Your rights around who can enter your premises

Most businesses can limit access to their premise to people with My Vaccine Pass, or similar, as a condition of entry.

Businesses can do this as long as:

- it doesn't breach any contractual restrictions (for example in a lease or under a franchise agreement)
- it doesn't breach any law, such as the COVID-19 Protection Framework Order (which prohibits certain places requiring My Vaccine Pass, like supermarkets or pharmacies) or the Human Rights Act.

Access conditions are a business decision, and businesses do not need any further justification. Businesses may, however, choose to share their reasons for requiring vaccination, for example, where this is for consistency with an up-to-date work health and safety risk assessment.

There is, however, no obligation for a business to undertake a health and safety risk assessment or point to a public health basis for the access conditions that they set. If a business had based access conditions on these grounds, they may want to review those conditions to reflect updated public health advice.

The exception to this is vaccination requirements for workers or employees, where a business' decision must:

- be supported by a work health and safety risk assessment
- reflect a third-party access requirement.

Keeping workers safe

Businesses must continue to comply with all laws including the Health and Safety at Work Act 2015 (HSWA).

Consider the systems and processes you have in place to keep workers safe and ensure your workers have adequate support, instruction, and information to perform their duties.

You must involve your workers and their representative (including unions) in creating these systems and processes.

Worker engagement and participation(external link) — WorkSafe

Plan for what to do if a person refuses to show their My Vaccine Pass, or becomes angry at the worker who is requesting their My Vaccine Pass.

Some practical steps could include:

- Provide staff with wording they can use if:
    - someone refuses to show their My Vaccine Pass
    - someone provides an expired My Vaccine Pass
    - things escalate, so they are best able to de-escalate the situation.
- Put signs up indicating that abuse of your staff will not be tolerated.
- Consider what kind of behaviour might mean you call the Police and what information would be useful to share with Police. This could include an incident report outlining witness details and accounts of what took place.
- Be clear about when to walk away from the situation. Workers have the right to cease or refuse work where they believe that the work would expose them or

another person to a serious health and safety risk. Request assistance to resolve issues relating to the cessation of work(external link) — WorkSafe

- Develop or use existing internal mechanisms for regularly checking in with workers, collecting feedback, reporting incidents, and keeping a record of what has happened.

173. I agree that the requirement to produce a vaccine pass to enter business premises was a business decision. The Operator took this step. It did not require justification, nor did it require a health and safety assessment. A health and safety assessment was only needed as justification for requiring workers to be vaccinated and dismissing them or requiring them to work from home if they refused. As we have seen, the decision was made to comply with HSWA obligations to workers and to "any person" entering the workplace, and to fulfil the duty of care owed to residents. .

172. It is noted, however, that the Business.govt.nz information contains the rider that "Businesses can do this as long as **it doesn't breach any contractual restrictions (for example in a lease or under a franchise agreement"**. This leads to the consideration of whether the implementation of the Vaccine Pass requirement breached any contractual obligations. There are two contracts to consider here:

(a) The COP; and

(b) The ORA.

174. As indicated in paragraph 21 above, the COP is given contractual status between an Operator and a resident, by virtue of section 92(2)(b) of the RVA. While the COP covers many requirements, it does not, however, have any provision about the use of facilities by residents, neither as a requirement incumbent upon retirement villages, nor as an assurance given to residents. It certainly contains a consultation right/requirement, but it does not contain a use of facilities right/requirement. I therefore find that the implementation of a vaccine pass mandate restricting access to facilities to vaccinated

residents is not a breach of the COP.

175. The ORA defines “Occupation Right”, “Common Areas” and “Community Facilities”.

- “Occupation Right” is defined as “a licence to occupy the Unit without interruption or disturbance by the Operator and to use in common with other residents of the Village and all other persons from time to time authorised by the Operator of the Common Areas on the terms and conditions set out in this Agreement”.
- “Common Areas” are defined as “those parts of the Village including entrances, lobbies, corridors, lavatories, stairways, paths driveways, visitor car parking areas, gardens, ground and other common amenities and conveniences other than those reserved to the Operator or to any other person from time to time by the Operator.”
- “Community Facilities” means the Common Areas and any Community Facilities provided by the Operator from time to time.”

176. The “Occupation Right” is formally granted in clause 7 of the ORA. Further rights in relation to the Unit are set out in clause 30. Interestingly, however, there is no express grant by the Operator to the Applicant of a right to use “community facilities“ (other than “common areas” which are mentioned in both the definition of “Occupation Right” and “Community Facilities.”) In short, there is no express grant of any right to use the “Facilities” listed in Part D of the ORA, which are the facilities located in the community centre. (dining, lounge or television room, laundry, gymnasium, spa pool/swimming pool complex, health clinic, library, hairdressing salon, pool table and table tennis table) and a few outside of the community centre (tennis court, petanque court, bowling green, croquet). Of those within the community centre, only the dining, lounge or television room, gymnasium, spa pool, library, pool table and table tennis table are recorded as being available at that time, with the laundry, health clinic and hairdressing salon recorded as “None at present”, though obviously these have been added since 2015. Clause 4.2.3 of the Disclosure Statement of June 2016 (“the DS”), which is the one given to the Applicant indicates such an intention.

177. The only mention of facilities", apart from in Part D, is in clauses 14,19.3 and 26.4(a)(i). Clause 14 indicates that "The Operator may at its discretion provide the services and facilities in the Village as described in Part D of this Agreement. I will look at this clause shortly. Clause 19.3 requires the Operator to "make and adhere to the long-term plan for maintaining and refurbishing the Village and its facilities." Clause 26.4(1)(a) allows a dispute to be raised if it "relates to any decision the Operator has made concerning: (i) the Resident's right to live in the Unit or to access services or facilities". Clause 10.1.3 refers to "proposed changes in the services and benefits provided", and since "facilities" are the same or within the within the ambit of "benefits" then this could be regarded as a further reference to "facilities". The facilities are listed in Part D (which mirrors clause 4.2 of the DS). They may be provided and must be maintained and refurbished. Access to facilities can be the subject of a dispute. Section 6 of the RVA defines a "retirement village", and sub-sections (1) and (2) both make reference to the inclusion of "facilities", which are further defined in section 6 as "facilities of a shared or communal l kind provided in the retirement village for the benefit of residents of the retirement village and includes recreational facilities and amenities". Clause 4.3.1 (e) of the DS states: "There is no specific charge for the provision of Village Facilities …as the **right to use** these facilities forms part of the capital sum paid to secure an interest in the Unit. From all this it may be safely implied that a resident has the right to use the facilities which are provided, and I find accordingly.

178. The Operator, however, mindful of its obligations under the ORA, the need to seek to accommodate the rights of all residents, and the need to mitigate as far as possible the access restrictions applied to the community centre, took steps to try and accommodate the Applicant. The Applicant expressed a desire to visit the library, and the Operator offered to accommodate the Applicant by allowing access to the library on Tuesday and Thursday each week, between 9am and 10 am. The offer was declined by the Applicant as she did not consider that it was fair. In my view this was a genuine attempt by the Operator to accommodate the Applicant, and for a library the regularity was reasonable. I therefore consider that the decline of this offer

was unreasonable. .

179. The Operator put forward clause 14 in the ORA as a reason for not providing access to facilities to unvaccinated residents. Clause 14 states: “The Operator may at its discretion provide the services and facilities in the Village as described in Part D of this Agreement”. The contention was that since the provision of facilities was entirely discretionary, facilities could be withdrawn by the Operator at any time. I do not agree with that argument for two reasons:

    (a) there is a difference between “provision” and “use”. The dispute is not over whether the promised facilities have been provided, that is, put in place. They have been provided. Once provided, they can be used, and it is the restriction on use that is the issue.

    (b) The intention of clause 14, in my view, was to provide an “out” for the Operator if certain facilities indicated in the DC and in Part D of the ORA could not ultimately be provided. The Operator could then say that provision of them was purely discretionary, not mandatory.

180. I therefore find that the implementation of restrictions on access to the community centre, thereby preventing the use of facilities by the Applicant, was, **prima facie**, a breach of her right under the ORA to the use of the facilities, that is, a breach of contract. It is not the function of this Panel to examine the remedies for such breach, nor to examine the defences to such a breach (though one has been mentioned in the submissions of the Operator). The question is, however, whether such restrictions were justified in all the circumstances. . As we have seen, the decision was justified to comply with HSWA obligations to workers and to “any person” entering the workplace. It was justified to fulfil the duty of care owed to residents under the COP and the ORA. There are, however, further matters that need to be considered before any conclusion can be arrived at.

Documents and Other Matters relied on by the Operator

181. The Government's announcements on 22 October 2021 and 29 November 2021, which have both been discussed, were the starting point. The Operator indicated that it "placed reliance on the public health advice in the government announcements at the time which clearly identified the increased risk of transmission of the virus by unvaccinated persons". These were accompanied by more detailed information on various government websites such as Unite Against Covid-19, Business New Zealand and the Ministry of Health. The Operator indicates that, "based on the Ministry of Health guidelines, it must adopt the mandate as a necessary precautionary step to minimise the spread of infection within the vulnerable village community".

182. At the same time as the RVA put out its "Preliminary Advice Covid-19 Protection Framework – a Guide for Residents and Families", which I have referred to in paragraph 147, it also issued a document entitled "Preliminary Advice Covid-19 Protection Framework – a Guide for Village Managers." ("the Guide"). This was on or about 2 December 2021, as it states that the advice was based on the Business New Zealand website and they had not had the opportunity to check it against the PF Order released on 1 December 2021, which they were reviewing. The Guide indicated on page 2: "If you want to operate at maximum capacity or in some cases simply offer a service or open up a facility, you must ask everyone who wants to use the facility to show their vaccine pass Residents' and visitors' certificates must be checked before they enter any part of the Village's community facilities that are operating under the vaccine certificate rules." Under the heading of "Community Facilities", it stated: "The application of the Covid Protection Framework to the community facility building is awkward. The government guidelines suggest that where a business carries out a number of activities, the business may need to apply different rules to various parts of the premises. The guidelines provide the example of a shopping mall. This approach, however, will not be workable for any community facilities which have multiple access points and spaces used for different purposes at different times. Each village will need to decide how they wish to proceed

based on their own premises configuration. In some cases, it may be possible to say that the whole premises are used to so as to fall into the My Vaccine Pass regime, for example, where the cafe is in the centre of the community facility."

183. The Guide was clear that operating a café, bar or restaurant, events and recreation where up to 100 people could gather, gyms, close contact services (eg hairdresser, beauty parlour), cinema, swimming pool, bowls, billiards, library and card games would all require a vaccine pass. It is apparent from my observation of the community centre that it had multiple access points, a number of defined spaces offering different facilities at different times, and the café/kitchen/dining area was central and comprised a large part of the main area of the community centre.

184. The Operator was aware of the extreme concern in the Village community that allowing access by unvaccinated persons to the expose residents to the Covid-19 virus. The RA had passed on these concerns, apart from the vibes that the Operator had picked up The Applicant was aware of these concerns in the Village. The Operator was concerned to allay these fears. It was also aware that a greater range of resident activities would be possible with a vaccine pass operating.

185. The Operator sought legal advice as to the implementation of restrictions on unvaccinated residents to enter the community centre, with a vaccine pass requirement. The legal advice indicated that it could occur.

186. The Operator was in an unprecedented and difficult position. It could impose access restrictions on unvaccinated persons entering the community centre and monitor access by requiring the production of a vaccine pass (that is, impose a vaccine mandate), but such denial of the use of facilities could constitute a technical breach of the ORA. On the other hand, the need to fulfil its statutory and COP contractual obligations was extreme, and the consequences of not doing so were serious. It had a duty of care to keep residents healthy and safe. It had the following factors to consider in the light of what was

known about the Covid-19 Delta virus at the time:

(a) the obligation to protect against any risk to the health and safety of “workers” and of “any persons” (which would include residents) in terms of the HSWA;

(b) a duty of care in the COP to adopt management practices to eliminate risks and hazards to residents;

(c) the Best Practice Guideline of the RVR for village managers to take responsibility for the overall emotional wellness of individual residents and the well-being culture in the village;

(d) the clear indications in government announcements and website information that older people, immune-compromised people, and people with certain health conditions should be protected against the Covid-19 virus;

(e) the apparent greater effectiveness of a vaccine pass/certificate requirement as opposed to or in combination with the alternatives of mask-wearing, capacity limits and regular sanitation.

(f) the close-proximity context of some of the facilities and many of the activity groups taking place in the community centre;

(g) the extreme pressure from vaccinated residents in the village to adopt the mandate in respect of access to the community centre;

(h) the advice in guidelines issued by the RVA, and given by lawyers, which indicated that a mandate should be adopted;

(i) the COP requirement to follow management practices in respect of the facilities which would maintain and enhance the safety and security of all residents;

(j) the need to run the communal facilities in such a manner that they would be available to the most residents.

(k) the balancing of the rights of the Applicant against the rights of other residents, the rights of the Operator, the people who work at the village, and the people who provide services at the Village.

(l) The Applicant expressed a desire to visit the library, and the Operator offered to accommodate the Applicant by allowing access to the library at specific times on specific days, with deep cleaning after such visits. , The offer was declined by the Applicant, and in my view such decline was unreasonable.

187. In the light of all these considerations, I find that the Operator acted reasonably, responsibly, proportionally, justifiably, fairly and in a bona fide manner in restricting access to the community centre to vaccinated residents only, and monitoring such access by requiring production of a vaccine pass or equivalent from residents.

Panel's Decision in respect of Issue 2

The Disputes Panel finds fully in favour of the Operator.

Reasons for decision in respect of Issue 2

The reasons are set out in paragraphs 89 to 186 above.

Remedy in respect of Issue 2

188. The Applicant seeks a refund of part of the fortnightly "Village outgoings charge" paid by her. This is variously referred to in the Applicant's closing submissions as a "modest partial refund" (paragraph 44) and a "discount" (paragraph 51). The Applicant considers that $30.00 per week for each week that she was unable to use the facilities, namely from 3 December 2021 to 4 April 2022 (17 weeks 3 days) represents "a fair reflection of the benefits that were denied..." This would amount to $522.85.

189. The Applicant paid a "Village outgoings charge" of $254.00 per fortnight before 1 April 2022, and this was increased to $260.00 per fortnight from 1 April 2022. She paid this in full for the entire period that she was excluded from the community facilities.

190. The “Village outgoings charge is used by the Operator to pay outgoings on the Village. “Village Outgoings Schedule” is defined in clause 6.3(c) of the ORA, and it refers to the outgoings specified in Part C of the ORA.

Part C of the ORA sets out that these include:

- All taxes in respect of the Village
- All rates, levies, charges, assessments and fees payable to any Government, Territorial or Local Authority.
- Costs of compliance with any statute, regulation, by-law or other lawful obligation in respect of the Village;
- Charges for water, gas, electricity, telephones and other utilities or services in respect of the common areas and facilities;
- Insurance premiums and associated valuation fees;
- All salaries, wages, fees and other remuneration of persons engaged in the management and operation of the Village;
- The costs of providing security, cleaning, gardening and other services for the general use and benefit of the residents;
- The costs of maintenance and repair of all buildings, common areas and the Village generally;
- Appropriate fees and expenses of the Statutory Supervisor and Auditor.

Clause 4.3.1(a) of the DC also lists “a reasonable allowance for depreciation of the chattels comprised in the common areas.

191. The basis for the Applicant’s claim is that part of the Village outgoings charge is used to maintain and repair the community centre in which the facilities that the Applicant was excluded from are situated.

Decision of Panel on Remedy sought in respect of Issue 2

The Panel declines the remedy sought by the Applicant.

Reasons for decision on Remedy sought in respect of Issue 2

192. The fortnightly payments of the Village outgoings charge are not paid in consideration of access to the community facilities, but as a pro-rata share of the total Village outgoings. The consideration for access to the community facilities was part of the original **capital sum** which was paid when the occupation right for the unit was purchased by the Applicant. This is made clear in the following:

(a) The definition of "retirement village in section 6(1) and 6(2) of the RVA:

> "(1) In this Act, but subject to subsections (2) to (6), "***retirement village"*** means the part of any property, building, or other premises that contains 2 or more residential units that provide, or are intended to provide, residential accommodation **together with services** or **facilities**, or both, predominantly for persons in their retirement, or persons in their retirement and their spouses or partners, or both, and **for which the residents pay, or agree to pay, a capital sum as consideration…**
>
> (2) A retirement village includes any common areas **and facilities** to which residents of the retirement village have access under their occupation right agreements."

Clause 8.1 of the ORA required the Applicant to pay the Capital Sum on the Commencement Date (15 March 2018 or 7 days after the Operator notified the Applicant that the Unit was complete).

(b) Clause 4.3.1 (e) in the Disclosure Statement states:

> "There is no specific charge for the provision of the Village Facilities (other than as included in the above levels of service) **as the right to use these facilities forms part of the capital sum paid to secure an interest in the unit."**

On page 2 of the ORA, the Applicant confirmed receipt of a copy of the ORA and the Disclosure Statement.

(c) Clause 8.2.1 of the ORA states:

> "The Licensee (=the Applicant) will pay to the Operator each year the Village Outgoings **for the cost of administration, rates, insurance, maintenance and depreciation of chattels of the Community facilities and the provision of other services in the Village as specified in the Village Outgoings Schedule".**

There is no mention here of any part of the payment being for the **use** of the Community facilities.

193. It is submitted by the Applicant that there is jurisdiction to order payment of the amount sought by the Applicant in terms of section 69(1)(c) of the RVA. That section is designed to allow an order to pay or refund all or part of "any monetary amount", but only if **the dispute** concerns "the liability for, or payment of, any monetary amount. The order would be "to pay or refund all or part of the amount **in dispute**." This dispute is not a claim for a liquidated monetary amount that the Operator might have liability for – it is about alleged breaches of the right to consultation and the right to use communal facilities. It is therefore not within the ambit of section 69 (1)(c).

194. The amount of $30.00 per week is an arbitrary amount that the Applicant considers to be a "fair refection" of the benefits denied. Some reference was made to comparative cost of pool and gym membership outside the Village, but in fact the amount has no quantifiable basis. It is in the nature of compensatory damages, and there is no jurisdiction in section 69 to award damages. Section 69 ((1)(e) makes it clear that the disputes panel may "not impose any other obligation other than in relation to the payment of costs on any party."

195. There is therefore no legal basis to deduct any amount from the fortnightly "Village outgoings charge" There is also no legal basis for any refund of capital. Capital is repayable on termination of the ORA. Clauses 20.2 and 20.3 of the ORA indicate that the ORA can be terminated by the resident giving one month's

notice (20.2) or on the death of the resident or the survivor if there are two residents (20.3). Short-term non-use of facilities is not a circumstance allowing or requiring any refund of capital.

Preliminary decision as to Costs

I make no award of costs in favour of either party.

Reasons for the preliminary decision as to Costs

196. Section 74(1) of the RVA sets out that the Operator is responsible for meeting all the costs incurred by the disputes panel in conducting a dispute resolution. However, section 74(2) allows the disputes panel, in its discretion, to award costs to the Applicant or to any other person in the various circumstances set out in sub-sections (a) to (d). Neither the Applicant nor the Operator has indicated any specific costs and expenses incurred and I therefore assume that the only costs which may be the subject of any discretionary award would be my costs and expenses in conducting the dispute resolution.

197. Section 74(2)(a) allows an award of costs and expenses in favour of the Applicant "if the disputes panel makes a disputes resolution decision fully or substantially in favour of the Applicant". I have not made a decision fully or substantially in favour of the Applicant. The Applicant has succeeded in respect of Issue 1, and the Operator has succeeded in respect of Issue 2.

198. Section 74(2)(b) allows an award of costs and expenses in favour of the Applicant "if the disputes panel does not make a dispute resolution decision in favour of the Applicant but considers that the Applicant acted reasonably in applying for the dispute resolution." I have made a decision in favour of the Applicant in respect of Issue 1 (consultation), and I consider that the Applicant acted reasonably in applying for the resolution of Issue 1. However, in all the circumstances (see paragraph 185 above I decline to award any costs and expenses to the Applicant in respect of Issue 1. I have not made a decision in favour of the Applicant in respect of Issue 2, and I do not consider that the Applicant acted

reasonably in applying for the dispute resolution in respect of Issue 2. I therefore decline to award any costs and expenses to the Applicant in respect of Issue 2.

199. Section 74(2)(c) allows an award of costs and expenses to "any other person …if the disputes panel makes a dispute resolution fully or substantially in favour of that person." In the Retirement Villages Disputes Panel decision of **Perry, Emery and Maunder v Waitakere Group Limited** 2007-4, the Panelist found in paragraph 36 that the words "any other person" included the Respondent (the village operator), and further found in paragraph 38 that the word "costs" included the costs of the disputes panel. I concur with such conclusions. It is therefore open to make an award of costs in favour of the Operator if the decision is fully or substantially in favour of the Operator. It is not. I have found in favour of the Applicant in respect of Issue 1, and in favour of the Operator in respect of Issue 2. I therefore decline to make any award of costs in favour of the Operator.

200. In considering whether to award costs under section 74(2), I am obliged to consider the three matters set out in section 74(3 (a), (b) and (c). In this regard, I comment in sequence as follows:

(a) Since neither party has referred to any specific costs and expenses, then I have assumed that it is only my costs and expenses which are relevant. I consider my costs to be reasonable, though I may be accused of lacking objectivity in that regard! No award has been incurred by the Applicant or the Operator.

(b) The two Issues in dispute involved alleged breaches of the right of consultation and the right to use the communal facilities. There was a peripheral "amount" of $30.00 per week claimed for the loss of benefit, This totalled the relatively small sum of $522.85, which I have declined because it has no contractual basis. The matters in dispute were of substantial importance to both parties. Issue 1 was important to the Applicant because she considered that she had been ignored and not taken seriously by the Operator, and it has been made clear t(in both the Applicant's submissions, and on page 10 of the RVR Mid-2022 Newsletter)Ihat there are other similar complaints arising in other villages which are awaiting the decision in this dispute. The consultation dispute was important to the Operator because if considered it had consulted adequately with residents of the Village.

Issue 2 was important to the Applicant because she considered that the implementation of access restrictions and a vaccine pass mandate was a breach of her rights under the ORA. Issue 2 was important to the Operator because it considered it acted properly in performance of its statutory and COP contractual duties and in accordance with RVR Best Practice guidelines. I have taken into account the conduct of both in respect of the two Issues in dispute, and in the course of the formal processes and procedures. I cannot speak too highly of the conduct of both parties and their counsel over the course of this dispute. The pre-hearing deliberations, compliance with my requests for further particulars, compliance with orders, behaviour during the hearing and after the hearing has been amicable, professional, co-operative, and comprehensive.

(c) I am not aware of any limitations prescribed by regulations under the RVA.

201. This is a preliminary decision as to costs, and the parties may make submissions to me within seven days of receiving this decision.

_____

Roger Donnell
Single Member of Disputes Panel

_____

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.