

IN THE MATTER

of a dispute under the
Retirement Villages Act 2003

BETWEEN

Mrs Vilma Flanagan as the executrix of
the Estate of Warren Flanagan

Applicant

AND

Summerset Villages (Richmond) Ltd

Summerset

DECISION OF RETIREMENT VILLAGES ACT
DISPUTES PANEL

Date of Claim: 12 April 2022
Date of Hearing: 19 December 2022
Date of Decision: 25 January 2023

The disputes panel appointed under the Retirement Villages Act 2003 (RVA) to resolve the dispute between the applicant and the respondent has decided the dispute as follows:

MATTERS IN DISPUTE:

1. There are 5 claims of breach of obligation. They fall into 2 categories:
 - a general breach of the contract to provide care and support of the quality promised and paid for; and
 - 4 claims concerning failures of communication or to provide information as required by the ORA.
2. The first claim is that Summerset failed to provide the quality care and support promised and that it failed to ensure that the village was operated to ensure access to the services and facilities promised. The claim relies on:
 - the representations made to Mrs Flanagan in the period prior to the parties entering into the ORA;
 - Summerset's failure to make the sensory room available to Mr Flanagan;
 - the failure to provide effective supervision or suitable activities for Mr Flanagan during his occupation; and
 - the fact that when suitable activities were provided to Mr Flanagan at the Alexander Hospital his attitude, demeanour and behaviour improved noticeably.
3. The second claim concerns Summerset's failure to communicate during the sale of Mr Flanagan's unit. It relies on:
 - the obligation to consult contained in the ORA (para F);
 - Summerset's false representation of 6 November 2021 that the family would be advised when an application for purchase (or occupation) of the unit was received;
 - the rebuffed attempts by the family to obtain information about the sale process between November 2021 and February 2022;
 - the discovery 3 months later (9 February 2022) of the re-occupation having occurred on 24 November 2022 or thereabouts;
 - the upsetting consequences for Mrs Flanagan of that discovery; and
 - Summerset's continued refusal to provide details of the resale.
4. The third claim is similar and concerns Summerset's failure to advise that a new resident was occupying Mr Flanagan's unit. It relies on:
 - Clause 11.4 ORA;
 - Summerset's failure to confirm that the new resident was occupying the unit until Mrs Flanagan discovered this for herself; and
 - Summerset's apology for the 'mistake' of 10 May 2022 during the complaints process (during the referral to statutory supervisor).
5. The fourth claim concerns Summerset's communication failures during the complaints process. It relies on:
 - Summerset's failure to comply with its own rule to provide details of the process and deadlines within 5 working days of receipt of a written complaint;
 - provision of this information on 10 May 2022 following receipt of the complaint on 12 April 2022 and a further request for process details on 10 May 2022;
 - Summerset's failure to respond to a request for mediation, but referral instead to the statutory supervisor;

- Summerset’s failure to advise of the right to issue a Dispute Notice and have it heard by the Dispute Panel, and
 - Summerset’s failure to ensure that as the family of an occupant, the Flanagan family were aware of all dispute procedures from the time they entered into the contract to occupy – either in hard copy form or easily accessible on the website.
6. The fifth claim alleges that Summerset actively withheld information from Mrs Flanagan about the shower incident that caused the flooding of two units on 30 September 2021. It relies on:
- failure to advise Mrs Flanagan that the flooding event was serious enough to warrant relocating Mr Flanagan to another unit while his and the neighbouring unit were dried out;
 - that the flooding was significant enough to require the skirting boards to be lifted;
 - a refusal to provide any other information about why the incident occurred. How long, for instance, Mr Flanagan was alone or unsupervised during the incident, or when it occurred;
 - Mrs Flanagan’s discovery that her husband’s nursing notes for the day the incident occurred were edited yet still unclear; and
 - the absence of any Event Notice for the incident and the absence of any description of the event in the (possibly edited) nursing notes.

BACKGROUND

7. The applicant is the widow of the late Warren Flanagan, who died on 19 December 2021 (Mr Flanagan). Mr and Mrs Flanagan were victims of the Christchurch earthquakes (when their home was destroyed) and then the Port Hills fire (when their replacement home was destroyed). After making a decision to retire to the Nelson area in 2019 Mr Flanagan was diagnosed as suffering from Lewy Body Dementia and assessed as D3.
8. When the behaviours associated with this condition became too difficult for Mrs Flanagan to manage, she began looking for assistance. In mid-2021 Mrs Flanagan responded to a radio advertisement about Summerset Villages (Richmond) Ltd’s (Summerset) new dementia facility in Richmond. She was given a tour of the facility which, she was told, represented a new way of dealing with dementia in a memory care suite including a state-of-the-art sensory room. This was new information to Mrs Flanagan who stated in evidence that Summerset assured her that the memory care suite had all the services and facilities that Mr Flanagan would need.
9. Mrs Flanagan and her sons agreed to purchase a right to occupy Memory Care Suite 5 in the Summerset Village for the sum of \$405,000. Under the terms of the Occupation Right Agreement (ORA) they committed to meet monthly care payments and a Deferred Management Fee (DMF) due upon termination of the right to occupy. This DMF sum is dependent on the length of residence, with a maximum value of 25% of the purchase price of the unit. Under clause 6 of the ORA if the Agreement is terminated by notice from the occupier within 35 days of the Commencement Date, no DMF is levied, subject to conditions, but also at the discretion of Summerset.
10. On the day of admission, 18 June 2021, it became clear that Mr Flanagan was the Memory Suite’s first occupant. He remained the sole occupant before being joined by another resident in August 2021. Mr Flanagan had been an active man prior to his dementia diagnosis and Mrs Flanagan had been assured that the advertised activities would keep him occupied. Over time

it became clear that these were not being provided. A comprehensive care plan which had been stated to be provided, was not. The door to the sensory room appeared to Mrs Flanagan to be permanently locked. Not locked, however, were the other units in the facility. Mr Flanagan was free to roam these at will, which he did, ensuring he was essentially unsupervised and at times difficult to locate. Mrs Flanagan noted however, that the staff in the unit took good physical care of her husband.

11. During early meetings with the management Mrs Flanagan was advised that the staff found Mr Flanagan difficult to manage. He exhibited some behaviours difficult for staff, liked to rearrange furniture, had a limited capacity to sit still or remain in bed at nights. On 30 September 2021 he flooded his unit and the next-door unit with the shower, such that these required several days to dry out. Information about this incident is limited.
12. Within a short time of admission, in early July, Mrs Flanagan was advised that her husband would need to be re-assessed at the local dementia assessment facility, Alexandra Hospital. Mr Flanagan was transferred to the Alexandra facility on 11 October 2021 and was eventually re-assessed as D6 so that on 27 October 2021 the decision was made that he should remain in Alexandra Hospital.
13. Mrs Flanagan was delighted by the care her husband received at Alexandra Hospital: *“They loved him, cared for him, kept him occupied, by that I mean activities and talking about farming, lots of fresh air, and stimulated his mind. It was like having the old Warren back.”*
14. On 31 October 2021 the right to occupy the unit was terminated when Mr Flanagan’s family cleared it of his possessions and completed the termination notice. Summerset retained the right to dispose of the unit subject to the obligation to advise the family when the unit was reoccupied. Despite a number of attempts by Mr Flanagan’s family to obtain information about this process via phone calls in December 2021, January and February 2022 no information was forthcoming.
15. The family discovered the unit had been reoccupied in November 2021 only after a visit to the facility by Mrs Flanagan on 9 February 2022, when it was clear that someone was living in the unit.
16. When Mrs Flanagan phoned the sales person to clarify the situation, she received a flustered response and the sudden termination of the call, suggesting to her that the Summerset staff were under instruction to withhold all details of the resale. Subsequent attempts by the family’s legal adviser to obtain these details were similarly unsuccessful. It remained unclear (until mid-2022) when the new resident applied for the unit, when the offer became unconditional, and when settlement occurred.
17. The fact is that the new resident took occupation of the unit on either the 24th or 27th of November 2021 (Summerset was unable to clarify this date and used both dates in their submissions). It is difficult to reconcile this with the advice from Summerset on 9 February 2022 that “an application for the unit had been received”.
18. In mid-2022 Summerset calculated the amount repayable to Mrs Flanagan under the ORA. The DMF was initially calculated to amount to \$45,548.63 on the basis that the unit had been occupied for a period of 228 days – from 18 June 2021 to 31 January 2022 (being 90 days later than the date of decant of 31 October 2021). The fee was reduced by \$7,656.16 following referral of a complaint to Summerset’s statutory supervisor in mid-2022. At that time this sum

was stated by Summerset to represent a concession about Summerset's failure to advise that the unit had been reoccupied in November 2021. In fact, the payment made as a concession represents the difference in the calculation of the DMF when it is calculated on the basis of the period of occupation being 18 June 2021 to 24 November 2021 rather than 31 January 2022.

19. As noted, Summerset views the reversal of this amount as a concession. In answer to a question during the hearing Summerset advised that it was therefore theoretically possible under their protocols to charge a unit out – in terms of recoverable DMF – to more than one person at a time.
20. The referral to the statutory supervisor did not resolve issues to Mrs Flanagan's satisfaction. A subsequent mediation was unsuccessful and the matter was referred to a Retirement Villages Act Dispute panel with the hearing taking place on 19 December 2022

FINDINGS ON FACTS

21. We do not accept Summerset's position that Mrs Flanagan's claim was out of time, and dealt with this in our preliminary decision released on 7 December 2022.

Claim 1

22. Consideration of the first claim requires some analysis of the reasons for Mrs Flanagan's dissatisfaction with the care provided to Mr Flanagan. It should be clear, however, that this analysis is for the purpose of determining the contractual issue - whether the applicant got the facilities and services she paid for under the right to occupy, or Summerset delivered what it said it would - and is not an attempt to take on the role of the Health and Disability Commissioner by analysing the care, or lack of health care.
23. The difficult reality raised by this claim is that successful care of those suffering dementia is dependent not only on the facilities available but on the quality and training of the staff who deliver that service. Of her initial visit to the memory care suite, Mrs Flanagan said she was struck by how beautiful everything was: the new building; its design; the talk of a new approach to dementia; the enthusiasm of the staff she met. She also admitted her lack of understanding of the appropriate care of dementia sufferers (apart from what she had learned of her husband's condition) and her fear of his vulnerability in an institution. Ultimately these views changed upon Mr Flanagan's admission to the Alexandra Hospital – a Nelson Marlborough District Health Board (State funded) facility.
24. We accept Mrs Flanagan's evidence that Mr Flanagan deteriorated visibly and significantly during his time at the Summerset's memory care suite and that he improved markedly whilst in the subsequent care of the Alexandra Hospital.
25. We were told in evidence that the Occupational Therapist did not have contact with Mr Flanagan for his first 2 months of residence at Summerset. Perplexingly it seems the sensory room was seldom made available for the residents' use with or without the presence of the Occupational Therapist. Again, we accept Mrs Flanagan's evidence that Summerset did not provide the anticipated level of care facilities and processes that were represented to be available.

26. It is clear (from the nursing notes, and evidence brief) that senior staff recognised soon after his admission (in June 2021) that Mr Flanagan needed an updated assessment that could require him to be transferred out of Summerset's care, but it remains unclear why it took the flooding incident 3 months later to effect that transfer. Summerset asserts that it worked closely with the Mental Health Liaison nurse from Older Persons Mental Health (OPMH) who wanted to manage Mr Flanagan via a medication regime as the reason for the delay. This person did not give evidence and we do not have access to their nursing notes. Given that Summerset also asserts that the decision to transfer Mr Flanagan was made by OPMH following a multi-disciplinary meeting on 5 October it would have been useful to have been provided by Summerset with the record of that meeting.
27. The question arises whether a more timely assessment of his needs and eventually the need for Mr Flanagan to be moved out of Summerset, might have triggered clause 6 of the ORA on an earlier date, thus perhaps obviating the requirement to pay the assessed DFM.
28. Although Summerset did not seek to rely on the fact that the creation of a new health service will inevitably be accompanied by difficulties, we accept that this may be a factor that should be considered.
29. Summerset did, however, rely on staff/resident ratio requirements (1:6) to argue that the 2 staff on each shift was a sufficient illustration of the adequacy of the management of the facility. This argument fails to account for the frequency and length of the periods when Mr Flanagan was unsupervised. Mrs Flanagan visited daily apart from the few days when she was unwell. She says she often had to search for her husband on arrival. He might be found to be in an unoccupied unit staring into space. He seemed bored. He spent a lot of time watching TV (the notes confirm this). The activity which apparently irritated the staff most, his rearranging of the common area furniture, can only have occurred whilst he was unsupervised. The flooding of two units via a single shower cannot logically have occurred without a lengthy period without supervision.
30. The absence of a detailed activity plan for Mr Flanagan, the absence of the Occupational Therapist, the 3 recorded occasions that the activities officer noted an activity with Mr Flanagan, the long-term unavailability of the sensory room, Mr Flanagan's disrupted sleep patterns, the unsuccessful attempts to regulate this with medication, together suggest that keeping Mr Flanagan occupied and busy during the day was not a priority for Summerset.
31. Mrs Flanagan's expectation that her husband would be properly supervised and engaged in a range of activities was underpinned by the consideration she agreed to at the outset: the purchase of a unit, (\$405,000) plus the monthly care fees and the DMF.
32. Summerset's decision to withhold the staff responsible for Mr Flanagan's care, including those who had filed affidavits, from the panel hearing compounded the difficulty for them in defending the claim. It would have been helpful, for instance, to have some more detail about the effects of Mr Flanagan's D3 assessment, and his activities and to have been able to cross-examine those who gave evidence through their filed affidavits.
33. For these reasons we find that Summerset failed to meet the expectations created in its initial representations and contract with the applicant and we find the claim to be made out.

34. We note the advice and photographic evidence of 2 activities/visits filed by Summerset since the hearing on 19 December 2022 and while interesting, as a matter of natural justice we cannot take these into account.

Claims 2 and 3

35. Clause 11.4 ORA provides:

Occupation of your Care Suite: We reserve the right to allow new residents to occupy your Care Suite prior to you receiving the Repayment Sum and will notify you if this is going to happen.

36. Consideration of claims 2 & 3 requires an analysis of the evasive way Summerset dealt with Mr Flanagan's family over the re-occupation and sale of the unit. The applicant's daughter-in-law Ms Rochelle Ainsworth gave evidence, which we accept, that every time she sought advice about what was happening to the unit she was told that the person responsible for its disposition would return the call, but they never did. Those enquiries began in November 2021 and were made intermittently until 9 February 2022 when Mrs Flanagan discovered for herself that the unit was (and had been since November 2021) occupied. Mrs Flanagan rang a staff member of the facility who responded by expressing sympathy and horror for the way the family had been treated, but then abruptly terminated the call.
37. We note and consider it relevant that the family believe that Summerset's activities are consistent with a deliberate strategy to withhold details of the re-occupation from the applicant thereby breaching cl 11.4 ORA.
38. Summerset has called the omission to notify the re-occupation, and subsequently the complaint resolution process, an "administrative error".
39. Summerset acknowledges the breach and has apologised, but does not accept that any damage was incurred by Mrs Flanagan. We disagree and reject that position. The silence about a matter the applicant was entitled to know was frustrating, demeaning and time-consuming. It also cost Mrs Flanagan avoidable legal fees. She believed she had a warm personal relationship with the person she rang on 9 February, so the terminated call was a shock and the failure of a return call compounded this.
40. For these reasons we find that Summerset breached its obligations to keep the applicant informed about the re-occupation and subsequent sale of Mr Flanagan's unit.

Claim 4

41. This claim is based on the failure of Summerset to follow its own policies about complaints. Summerset appeared to rely on a defensive rather than a co-operative strategy in the written communications between the parties. We accept that Mrs Flanagan sought details in relation to her claim that were not provided and that Summerset appeared reluctant to facilitate early resolution of the complaints.
42. The following statement in the Settlement Manager's brief of evidence suggests a reason for this approach: *In my experience relating to complaints asking for the Deferred Management Fee (DMF) to be waived, it is my view that the Applicant has sought to embellish her complaint, in order to justify the request for the DMF to be waived (sic) after Summerset confirmed there was no contractual basis for such a request to be granted.*

43. The same manager requested of the applicant's solicitor that Mrs Flanagan be requested to treat Summerset staff with respect, and that the way she treated staff in February 2022 was not acceptable. This was a reference to Mrs Flanagan's discovery that someone was living in her husband's former unit. We consider that this way of discovering that fact was in breach of the Summerset's obligation to the applicant, so we take the view that this demand was, itself, a breach of the right to be treated with courtesy and have rights respected (Right 7 Summerset Villages Code of Residents' Rights).
44. The significance of this evidence is that it reveals an approach to complaints at odds with the philosophy of the Code of Residents' Rights and the Retirement Villages Act 2003. We have taken these documents to promote a facilitative approach to dispute resolution over traditional adversarial practices.
45. Accordingly, we find that the right to a speedy, and efficient response for resolving disputes (Right 5) was not achieved and the applicant's claim is proven.

Claim 5

46. A key event during Mr Flanagan's time in the Memory Care Suite was the shower incident which occurred on the night of 29/30 September 2021. Two units were flooded, requiring Mr Flanagan to be relocated to another unit for the time it took to dry the affected carpets and walls.
47. There are discrepancies within the log maintained by Summerset – the VCare Progress Note Report regarding what in fact happened. The entry timed at 06:27 noted Mr Flanagan had showered at 3:30am and gone back to bed and there were no current concerns. The entry timed at 07:02- marked as Edit – states Mr Flanagan had a shower again at 05:30 and had been found wet and soiled, now on his bed and settled. One of the entries is clearly wrong.
48. Summerset advised that the "Edit" was in fact entered at the time – i.e. on or about 30 September. The applicant's lawyer suggested that the nursing notes for this incident were edited subsequently – i.e. after 30 September. Summerset relied on communications from its technical staff to deny that it is possible to edit those notes in that way. We cannot resolve this discrepancy, but consider the absence of a clear description of the flooding event in the nursing notes is troubling.
49. In the event two units were flooded, requiring Mr Flanagan to be relocated to another unit for the time it took to dry the affected carpets and walls. This extent of water damage would seem to have required the shower to be left running for a considerable time, which raises questions as to the level of supervision.
50. Mrs Flanagan was not notified in a timely manner of this incident but left to discover it and the fact that her husband had been relocated, when she arrived for her daily visit around 4pm. Her inquiries were met with a marked reluctance to provide any detail, except that he had been left showering for 20 minutes. Her assessment of the damage suggested it was a significantly longer period.
51. We consider this to be a serious deficiency in communication, and we find that this claim is proven.

PANEL'S DECISION

The panel unanimously finds fully in favour of the applicant, Mrs Flanagan, and makes the following orders: under section 69(1) and section 70(1) of the Retirement Villages Act 2003

52. Pursuant to s70(1)(b) we order Summerset to pay compensation in the amount of \$37,892.47 for the proven breach by Summerset of its obligations under the ORA, the COP and the CRR to be paid within 5 working days of the date of this decision.
53. Pursuant to s70(1)(c) we order Summerset to pay interest on \$37,892.47 calculated in accordance with Schedule 2, Interest of Money Claims Act 2016 calculated from the date of the filing of the claim until the date paid.

REASONS

54. Mrs Flanagan is entitled to know the reasons for the silence that resulted in the breaches of her rights. It became clear during the hearing, how much her ignorance of what occurred during this period, and the reasons for it, was troubling her. To date that has been denied to her.
55. The applicant has sought the same financial remedy under alternative remedy provisions of the Retirement Villages Act 2003, in sections 69 and 70: the repayment of, or compensation equal to, the DMF.
56. Whilst some of these breaches are more egregious than others, we accept that they should be treated globally as each contributing to the distress and humiliation suffered by Mrs Flanagan.

COSTS

57. The applicant may apply for a costs award within 15 working days of the date of this award if she is unable to reach a satisfactory agreement with Summerset.

DATED this 25th day of January 2023

Susan Robson

Rob Ashcroft

Jenny Leith (Chair)

