

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CIV-2023-042-000072
[2023] NZDC 17450**

BETWEEN SUMMERSET VILLAGES (RICHMOND)
LIMITED
Appellant

AND VILMA FLANAGAN
Respondent

Hearing: 29 June 2023

Appearances: J Upson for the Appellant
T Mackenzie for the Respondent

Judgment: 21 August 2023

**RESERVED JUDGMENT OF JUDGE A A ZOHRAB
[as to an appeal against a decision of a Disputes Panel appointed under the
Retirement Villages Act 2003]**

[1] Warren Flanagan (“Mr Flanagan”) was diagnosed with Lewy Body Dementia in 2020. Within a year his symptoms made homecare impossible.

[2] Not surprisingly, Mr Flanagan’s wife Vilma Flanagan (“Mrs Flanagan”) wanted appropriate care for Mr Flanagan. She was shown around the Summerset Villages (Richmond) Limited (“Summerset”) dementia facility. They agreed to purchase a right to occupy a care suite in Summerset’s care suite.

[3] Mr Flanagan was admitted to the village on 18 June 2021. On 11 October 2021 he was transferred to Alexandra Hospital, a public dementia facility.

[4] Sadly, Mr Flanagan's dementia continued to worsen, and he passed away on 19 December 2021.

[5] Mrs Flanagan, as the executrix of Mr Flanagan's estate, made a formal complaint on 12 April 2022 alleging that Summerset had failed in its contractual obligations to provide Mr Flanagan with quality care and support. Dispute resolution by way of the complaints facility and mediation were unsuccessful, and Mrs Flanagan issued a Dispute Notice on 12 October 2022.

[6] A Disputes Panel ("the Panel") was appointed under the Retirement Villages Act 2003 ("the RV Act"). Five separate matters were raised by Mrs Flanagan before the Panel in relation to issues arising between Summerset and Mr Flanagan from the time he spent as a resident at Summerset.

[7] The Panel made a determination on all five matters in their original decision in favour of Mrs Flanagan. However, Summerset only appeals against the Panel's decision in relation to what is referred to as "Matter One."

[8] The Panel described Matter One in their decision in the following terms:

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.

Submissions of the appellant

[9] Summerset appeals the decision of the Panel on two main grounds. These are:

- (a) The Panel erred in finding that it had jurisdiction to determine Matter One, because it was properly a matter about health and disability services; and
- (b) The Panel, having struck out Matter One in the preliminary decision, was *functus officio*, and could not hear and determine the issue.

[10] It is submitted that Matter One was a dispute about health or disability services and therefore the Panel did not have jurisdiction, whether or not the provision of health or disability services also involved a potential breach of contract. It is submitted that these disputes are properly within the jurisdiction of the Health and Disability Commissioner (“the Commissioner”), given they have the necessary expertise and jurisdiction to perform a regulatory role in provision of health and disability services under the Health and Disability Commissioner Act 1994 (“the HDC Act”).

[11] Summerset raises this appeal as a matter of principle because it is concerned about the impact of a precedent being established allowing disputes panels under the RV Act to hear a broad range of disputes about health and disability, which they are, in Summerset’s view, both ill equipped to do, and statutorily prevented from doing.

[12] When Mr Flanagan signed the Occupation Right Agreement with Summerset, some of the things Summerset undertook were:¹

- (a) To “do our best to provide you with quality care and support and treat your care suite as your home”.
- (b) To ensure that the village and care centre are run properly and efficiently in compliance with all legislative and mandatory

¹ Occupation Right Agreement, cls F and G. Common bundle p 401.0003.

requirements and that the village, care centre and their facilities are well maintained.

- (c) That the care centre was “certified to provide certain care services which may include rest home hospital and/or dementia care”.

[13] Summerset notes that on 2 December 2022 the Panel invited submissions regarding the need to predetermine whether all or just some of the grounds needed to be considered by the Panel. In response, Summerset submitted that Matter One was outside of the Panel’s jurisdiction as it concerned health and disability services, and the Act prohibits panels from determining issues about such matters.

[14] In their preliminary decision, the Panel noted:

RV disputes concern contracts, money and property; care services are covered by the Code of Health and Disability Services Consumers’ Rights under the Health and Disability Commissioner Act 1994.

[15] The Panel also reserved the right to hear evidence on care matters insofar as they would allow them to determine issues in dispute that were in the Panel’s jurisdiction.

[16] The statement of claim filed by Mrs Flanagan subsequent to that decision made no reference to the preliminary decision and continued to plead Matter One.

[17] On the basis of the understanding that the care matter had been struck out, Summerset made no further submissions on it. Summerset filed evidence about Mr Flanagan’s care from staff members but made no submissions about the level of care.

[18] Summerset submits that the RV Act provides the statutory framework governing the relationship between village residents and operators. Under the RV Act, there are two forms of dispute procedure – a complaints facility and a disputes panel.

[19] For a complaint to be determined by a disputes panel, there first must have been a referral to a complaints facility. Where a disputes notice has been given, then a disputes panel must be formed.

[20] Under s 53(1) of the RV Act, a resident may give a dispute notice relating to various disputes. Summerset notes the following as being relevant to the extant matter:

- (a) Disputes affecting the resident's occupation right or right to access services or facilities; and
- (b) Disputes relating to an alleged breach of a right referred to in the code of residents' rights or the code of practice.

[21] However, s 53(2) specifically excludes disputes about health and disability services, noting:

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

[22] Summerset submits that the words "nothing in subsection (1)" operate as a complete exclusion, and that where a dispute falls under both subs (1) and (2), then a dispute panel has no jurisdiction.

[23] The HDC Act provides the Commissioner with jurisdiction over complaints against health care providers and disability service providers who are said to be in breach of the Code.

[24] It is submitted that it is significant that the HDC Act requires the Code to contain provision for the duties of health care and disability services providers to provide services of an appropriate standard. Summerset note Right 4, which provides:

Right 4

Right to services of an appropriate standard

- (1) Every consumer has the right to have services provided with reasonable care and skill.
- (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

...

[25] Summerset submits that under Right 4(2), where the Commissioner is determining “other relevant standards”, they rely on standards of care imposed by contract.

[26] Summerset draws attention to the distinction between the jurisdiction of disputes panels and that of the Commissioner. In summary, the distinction is said to be that disputes panels have the jurisdiction to deal with rights of *access* to contracted services or facilities, whereas the Commissioner has jurisdiction for issues of the *quality* of those services.

[27] It is noted that the High Court have described the rights under the Code as being about “how” services are provided, not “what” services are provided. Furthermore, Summerset notes that the Commissioner routinely exercises jurisdiction over retirement villages under the code.

[28] Summerset state that just as the RV Act prohibits disputes panels from determining matters related to health services or disability services, a version of the Code published on the Commissioner’s website notes that the Commissioner’s jurisdiction is restricted to the quality of care; it does not cover issues of funding or entitlement to a service.² The effect of these concurrent regimes is said to restrict the jurisdiction of dispute panels in relation to quality issues in favour of the Commissioner. The rationale for this is said to be because the Commissioner is better suited to determine issues relating to quality of care.

² I note that this comment is not included in the Code itself.

The Panel lacked jurisdiction

[29] Summerset submits that the Panel lacked jurisdiction to determine the matter. The Panel was restricted by the provision of s 52(2) from determining an issue relating to health services and disability services. Indeed, the Panel acknowledged this restriction in their preliminary decision and struck that part of the issue out accordingly.

[30] It is submitted that despite this, Matter One, as proceeded with in the statement of claim, related to the *standard* of the provision of a health and disability service provided by Summerset. Despite the reframing of the matter as ostensibly being an access issue, substantively it remained an issue about quality of care. Therefore, it is submitted that it is properly outside of the Panel's jurisdiction.

[31] This is said to have continued through to the decision of the Panel. In the decision, the Panel stated:

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

[32] Notwithstanding this statement, Summerset submits that it is clear from the reasoning of the Panel that the substantive concern was whether the standard of care met the needs of Mr Flanagan. This submission relies on the following points:

- (a) The Panel noted that the successful care of dementia patients is “dependent not only on the facilities but on the quality and training of the staff”.
- (b) The Panel accepted that Mr Flanagan “deteriorated visibly and significantly during his time at Summerset”, and that “he improved markedly” while in the care of Alexandra Hospital.
- (c) The Panel found explicitly that Summerset “did not provide the anticipated level of care facilities and processes”.

- (d) The Panel placed weight on the “frequency and length of the periods when Mr Flanagan was unsupervised.”
- (e) The conclusion of the Panel that “keeping Mr Flanagan occupied and busy during the day was not a priority for Summerset”.

Summary

[33] It is the core of the submissions for Summerset that s 53(2) is a complete exclusion. The effect of which is that even though there is a contractual element to the claim, as it also involved health and disability services, it was barred from being determined by the Panel.

[34] Furthermore, if s 53(2) were not to act as a complete exclusion, it is argued that the restriction would become meaningless, because all disputes about health and disability services provided in a retirement village can be framed as a contractual dispute, more especially given all services are, and are required to be, provided under a contract between the village and the resident, generally following representations by the village as to the standard of services.

[35] A second argument has been advanced that the Panel was not able to substantively determine Matter One because once it struck it out in the preliminary decision it was *functus officio*. In short, the argument relies upon the fact that the preliminary decision struck out the hearing related to health and disability services. As a result, Summerset filed no more evidence or arguments to that point. Despite the preliminary decision, it is submitted that the Panel substantially determined Matter One regardless.

Submissions of the respondent

[36] Mrs Flanagan, in her capacity as the executrix of the estate of her late husband, Mr Flanagan, submits the sole issue to be determined is whether or not the decision of the Panel regarding Matter One was within its jurisdiction.

[37] Mrs Flanagan makes reference to the extent to which an appellate court should defer to the first instance decision making body when considering findings of fact and credibility. In particular, she notes the advantages available to the first instance body in hearing and seeing the entire matter. Although this is often discussed in the criminal context, she submits it is equally applicable in this, the civil context.

[38] In assessing whether the Panel had jurisdiction to determine Matter One, it is argued that the starting point must be the claim itself. Although parts of the claim could be isolated, and then said to relate to care, the essence of this particular claim was a services claim. Mrs Flanagan submits this can be seen by the way Matter One specifically pleaded “access to services and facilities as promised”.³

[39] It is noted that the particulars following that pleading related to the representation of services, that being the lack of sensory room and activities.

[40] In a similar vein it is submitted that the evidence itself, while still touching on care issues, had at its essence a complaint about access to the represented services.

[41] It is submitted that the mere presence of care related concerns in the pleading or the evidence does not render the claim outside of the jurisdiction of the Panel. The issue was therefore framed by Mrs Flanagan as being whether the Panel determined a complaint about access to services.

[42] Mrs Flanagan raises the point that disputes under the RV Act will often be charged with personal feelings about care which will filter through the evidence. It is submitted on her behalf that the present case is a classic example, a widow who has complained about a lack of services but also broached care concerns. It is said that the Panel, as a specialist tribunal in this subject matter, would have found this common, and directed itself accordingly, before focusing on the issues within its jurisdiction.

[43] With particular reference to the decision, it is noted that the Panel was aware of the issue relating to jurisdiction and that it directed itself accordingly. The Panel

³ Statement of Claim, para 1 a. Common bundle p 101.0035.

specifically noted that it was only considering this evidence in relation to determining whether the facilities and services were provided. It is submitted that this completely answers the concerns raised by Summerset.

[44] It is submitted that the Panel considered the evidence in support of the claim, while noting the lack of evidence from the appellant challenging the claim. Ultimately, this resulted in a finding that the promised services were not provided and accordingly a finding of a lack of access to those services followed.

[45] In respect of the argument that the services in question were health services to the extent that their purpose was responding to Mr Flanagan's health needs in connection with his dementia, or disability services insofar as they provided care and support to him given his disability arising from his dementia, it is argued that this would render redundant nearly all of retirement village services disputes, given the inevitable overlap of there being a care requirement present.

[46] Further, it is submitted that the lack of activities, or lack of sensory room, may have had the consequence of a lack of care, or even adverse side effects, but that does not detract from the fact that the claim, and indeed the decision, were based on the absence of those services.

[47] It is argued that any number of service disputes would fall outside of the jurisdiction of the Panel if Summerset's argument is to be accepted. For example, if a resident was to contract for a room and a bed but was not given those and was required to sleep on a couch in the lounge, their health may suffer.

[48] In the dementia context it is argued that a resident may contract for access to a swimming pool, garden, television or a piano. Each of these provides stimulation and therefore, on the basis of the argument advanced by Summerset, essentially respond to a health need, and would be excluded from the jurisdiction of the Panel.

[49] Ultimately, it is submitted that it is a matter of fact and degree, and that the Court is not being asked to, nor could it, draw a hard "line in the sand". However, this case was not determined as a dispute about care standards or quality of health or

disability services. It is the submission of Mrs Flanagan that this was simply a dispute that some services were not provided. The fact that those services would likely improve care, as are all services in this context, is not said to be a determinative factor.

[50] As to the *functus officio* argument it is submitted that it has no application in this appeal as the matter rises or falls on jurisdiction.

[51] Furthermore, it is submitted that the Panel never became *functus officio* on the meaning of the principle as it concerns the finality of litigation where the Court has discharged its statutory functions and its role is at an end, which clearly was not the case given the proceeding continued. The elements of Matter One which were a dispute about care services are said to have been struck out, but the balance of the claim, including the access to services claim, remained.

[52] In support of this argument, Mrs Flanagan submits that if the Panel had considered the entire contents of Matter One were off limits, following the strike out, the Panel logically would have raised some concerns with the claim that they had just struck out being immediately raised again. It is submitted that the Panel did not do so because the balance of Matter One had not been struck out.

Legal principles on appeal

[53] Section 75 of the RV Act provides for a right of appeal to this Court. The appeal is by way of rehearing.⁴

[54] The general approach to appeals by way of rehearing is well settled. On a general appeal, the appellate court has the responsibility of considering the merits of the case afresh.⁵ In *Austin, Nichols & Co Inc v Stichting Lodestar*, Elias CJ stated that the appellate court must reach its own opinion “even where that opinion is an assessment of fact and degree and entails a value judgment”.⁶ She continued:⁷

⁴ Retirement Villages Act 2003, s 75(4).

⁵ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

⁶ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

⁷ At [16].

If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[55] This does not mean that an appellate court should be “uninfluenced” by the lower court.⁸ What influence the lower court's reasoning should have is for the appellate court's assessment. As Elias CJ stated in *Austin, Nichols & Co Inc v Stichting Lodestar*:⁹

The High Court Judge was obliged to reconsider the issue. He was entitled to use the reasons of the Assistant Commissioner to assist him in reaching his own conclusion, but the weight he placed on them was a matter for him.

The law

[56] The starting point for considering this dispute is s 53 of the RV Act. It is clear that the interplay between subs (1) and (2) is where the tension lies. If, as Summerset contends, subs (2) operates to exclude any services or facilities which may be construed as health or disability services from the jurisdiction of the Panel, then the decision of the Panel on Matter One can properly be seen to be *ultra-vires*.

[57] Therefore, the question to be determined in the first instance is the extent of the operation of subs (2), both generally and in the context of this dispute. The relevant parts of s 53 read:

53 Types of dispute for which resident may give dispute notice

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

⁸ *Kacem v Bashir*, above n 5, at [31].

⁹ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 6, at [17].

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

[58] It is clear on a plain reading that a dispute concerning health services or disability services or facilities to which the Code of Health and Disability Services Consumers' Rights under the HDC Act is barred from being pleaded in a Dispute Notice.¹⁰ As a dispute notice is a procedural requirement before a dispute panel may be appointed, it is also barred from being argued in front of such a panel.¹¹

[59] It is trite law that the Health and Disability Code applies to healthcare providers. The HDC Act defines a healthcare provider as follows:¹²

3 Definition of health care provider

In this Act, unless the context otherwise requires, the term health care provider means—

- (a) a person for the time being in charge of providing health care services within the meaning of the Health and Disability Services (Safety) Act 2001, in compliance with that Act:
- ...
- (k) any other person who provides, or holds himself or herself or itself out as providing, health services to the public or to any section of the public, whether or not any charge is made for those services.

[60] It is clear that the latter definition applies to at least some extent to Summerset in respect of the issue at hand. However, I consider that the Health and Disability Services (Safety) Act 2001 should also be considered.

[61] That Act defines healthcare services as being:¹³

health care services means services that are hospital care, residential disability care, rest home care, or specified health or disability services

¹⁰ Section 53(2).

¹¹ Section 59(1).

¹² Section 3.

¹³ Section 3.

[62] Relevant to our purposes are the definitions of rest home and residential disability care:¹⁴

residential disability care institution—

- (a) means premises used to provide residential disability care, in accordance with section 9; but where only parts of any premises are used for that purpose, means only those parts and any other parts used for ancillary purposes; and

rest home—

- (b) means premises used to provide rest home care, in accordance with section 9; but where only parts of any premises are used for that purpose, means only those parts and any other parts used for ancillary purposes; and

[63] Both definitions specify that where only parts of the premises are used for such purpose then only those parts defined as being healthcare services of that type.

[64] In contrast to this, the RV Act provides a comprehensive definition of retirement villages:¹⁵

6 Meaning of retirement village

- (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 and regardless of whether—
 - (a) a resident's right of occupation of any residential unit is provided by way of freehold or leasehold title, crosslease title, unit title, lease, licence to occupy, residential tenancy, or other form of assurance, for life or any other term; or
 - (b) the form of the consideration for that right is a lump sum payment or deduction, or a contribution or a payment in kind of any form, a periodic payment or deduction, or any combination of such payments or deductions, whether made before, during, or after occupancy; or

¹⁴ Section 58(4)

¹⁵ Retirement Villages Act 2003, s 6.

- (c) the consideration is actually paid or agreed to be paid by a particular resident or particular residents or on behalf of that resident or those residents, or by another person for the benefit of that resident or those residents; or
 - (d) the resident makes an additional payment or periodical payment (for example, a service fee) for any services or facilities or access to such services or facilities; or
 - (e) the services or facilities, or both, are provided by the owner of the property, building, or other premises, or by any other person under an arrangement with the operator of the village.
- (2) A retirement village includes any common areas and facilities to which residents of the retirement village have access under their occupation right agreements.
- (3) Despite subsections (1) and (2), if 1 or more of the residential units referred to in subsection (1) are located in a rest home or hospital care institution, the only parts of that rest home or hospital care institution that comprise, or are included in, the retirement village are—
- (a) the residential unit or units themselves; and
 - (b) the common areas and facilities within the rest home or hospital care institution (if any) to which the resident or residents of the unit or units have access only by reason of their occupation right agreement.
- ...
- (5) Whether or not a property or building is, or any other premises are, a retirement village must be determined according to the nature, substance, and economic effect of the operation of the property, building, or premises and other facts, and independently of its or their form or description in any document.

[65] Of particular interest is the definition under subs (3) which allows that where a retirement village is located as part of a facility offering rest home or hospital care, then the only parts that comprise the retirement village, the residential unit and the common areas and facilities to which the residents have access only by reason of their occupation right agreement.

[66] In order to assist determination of whether a property or building or any other premises is part of the retirement village, the legislation provides consideration must be given to the nature, substance, and economic effect of the operation of the property, building or premises.¹⁶ Furthermore, other facts may be taken into account. Finally,

¹⁶ Retirement Villages Act, s 6(5).

the form or description of the premises is independent of any analysis as to the true nature of it.¹⁷

Discussion

[67] The two disparate legislative regimes under the RV Act and the myriad health and disability legislation do not sit easily together. As retirement village providers such as Summerset move their business model towards a hybrid one providing both types of service, often at the same time to the same resident, these two regimes will be forced to be considered side by side.

[68] Mrs Flanagan submits that the matter that has arisen is commonplace for the Panel, and they would have directed themselves in accordance with usual practice. Research does not indicate that this is the case. It appears that the disputes process is designed to facilitate resolution of retirement village issues prior to a specialist body considering it. Research did not reveal many disputes panel decisions at all, let alone those that fall into the potential for cross jurisdictional issues, such as this one.

[69] Against that, Summerset have submitted that the Commissioner routinely issues decisions wherein it exercises jurisdiction over retirement villages. This is true. However, retirement villages providing care services are bound by the Code in respect to these services. This was never in doubt. Research indicates that although there are decisions about the provision of care services by retirement villages, they relate to the standard of care and do not have a basis in contractual disputes.

[70] The extant case is one where it is not easy to draw a distinction between the categories of service. Indeed, it is inevitable that there will be some overlap in these such matters. As noted by counsel for Mrs Flanagan, it will not be appropriate for this court to draw a “line in the sand”. Considerations such as this one are a matter of fact and degree.

¹⁷ Above.

[71] In the context of residential care, and residential dementia care especially, it is difficult to ascertain where care ends and mere residential rights begin, given the overarching nature of treatment for such a condition. However, there is an Occupation Right Agreement in this issue, and so far as that goes the retirement village disputes regime must apply at some level. This is not necessarily a contentious concept given the acceptance of the Panel's jurisdiction for Matters Two through Five, so the question becomes the extent of its applicability, and whether it encompasses Matter One.

[72] The Panel noted that the difficulty in assessing the successful care of those suffering dementia is that it is dependent on both the facilities available and the quality and training of the staff delivering that service.¹⁸ It is clear from this and other comments that the Panel were concerned by the lack of adequate supervision and low priority given to the need to keep Mr Flanagan occupied during the day. To my mind, both of these issues fall squarely into the provision of care services.

[73] Access to the sensory room, however, requires further analysis. As noted by Summerset, the difference between the regimes is that disputes panels have the jurisdiction to deal with rights of *access* to contracted services or facilities, whereas the Commissioner has jurisdiction for issues of the *quality* of those services. As Summerset correctly submitted, it is about "how" services are provided, not "what" services are provided.

[74] It is important at this juncture to discuss that the complaints regarding the sensory room are not related to what particular sensory items and activities the sensory room contained, nor the amount of times a care plan intended for Mr Flanagan to use it. The core issue at the heart of the complaint relating to this room was that he was unable to access it as a part of his day-to-day life at Summerset.

[75] In a matter as finely balanced as this, that may make all the difference.

[76] I note to this extent that the sensory room was both a therapeutic device, for the treatment or alleviation of the symptoms of Mr Flanagan's condition, and also a resource for his entertainment and to keep him occupied.

¹⁸ *Flanagan v Summerset Villages (Richmond) Limited* (Disputes Panel decision), at [23].

[77] The Occupational Right Agreement, along with the representations made to Mrs Flanagan, were that Mr Flanagan would be able to access the room as he pleased - for his own benefit.

[78] The right of Mr Flanagan as a person to self-determination and to fill his own days was not extinguished by his condition, or his also being provided with healthcare services.

[79] I consider the issue to be akin to the promise of a library or movie theatre, which was provided as a part of the facilities, but the door to which was always locked. The sensory room had both therapeutic benefits in terms of healthcare, as well as benefits of a more general nature. This dual nature alone does not draw it squarely into the realm of the Commissioner.

[80] Having regard to the meanings of retirement village, rest home, and disability service discussed above, with particular regard to the function of the sensory room, I find he was entitled to access under the Occupation Rights Agreement. As such there is jurisdiction for a finding that not providing access was a breach of the Occupation Right Agreement, and the Panel had jurisdiction to make such a finding.

[81] For clarity, I wish to record that if the issue were with the types of activities contained within the sensory room, or that caregivers did not take Mr Flanagan to the room enough as a part of a treatment plan, I would have found that to have fallen squarely under the Commissioner's jurisdiction.

[82] Implicit in my decision above is a finding that the Panel struck out only the care elements of Matter One, but that the services dispute remained. Given this, I do not propose to address the *functus officio* argument.

Conclusion

[83] In terms of the Panel's decision, I consider that they were correct in acknowledging they could consider care issues in deciding matters under their

jurisdiction. However, I believe that their decision went further than that and focused on *how* services were provided, which as a care issue, was *ultra vires*.

[84] However, there is no hard “line in the sand” as to subs (2) acting as a complete exclusion, but rather it is a matter of fact and degree. In this case, analysis of the facts of the complaint and the evidence, leads to the conclusion that by failing to provide adequate access to the sensory room, Summerset breached the Occupational Right Agreement, leading to a legitimate complaint under the RV Act.

[85] Although I have taken a different approach to the Panel, my finding on Matter One is substantially the same. As such I would not propose to interfere with the outcome.

[86] Finally, I note that Summerset brought this appeal as a matter of principle and were not seeking to change the practical outcome for Mrs Flanagan. Furthermore, Summerset met Mrs Flanagan’s costs on this appeal so no issues arise as to costs.

Judge AA Zohrab
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/08/2023 at 1 pm