FINAL DECISION OF THE DISPUTES PANEL

In the matter of a dispute under the Retirement Villages Act 2003

Applicants: Ronald Currie and Claudia Currie ("the Applicants")

Respondent: Windsor Lifestyle Estate Limited ("the Respondent")

(also referred to collectively as "the Parties")

The Process since the Preliminary Decision as to Parties and Jurisdiction

1. On 20 September 2023 I issued a Preliminary Decision as to Parties and Jurisdiction ("the PD"), based on what was known to me at that time. This was comprised of 44 paragraphs, and it is attached to this Final Decision as Annexure 1. This was issued to the parties on or about 30 September 2023. The decision concluded that the Applicants were "residents" on the basis of a combination of documents (other than the Encumbrance and Management Deed, which would be considered later) from which a prima facie occupation right could be constructed (paragraphs 35 to 40), and the Panel had jurisdiction to determine the one issue known about at that time (paragraphs 41 to 42).

2. I subsequently proceeded to traverse (by consent, via e-mail) the necessary preliminary matters set out in Regulation 13 of the Retirement Villages (Disputes Panel) Regulations 2006 ("the Regulations") with the Parties. In the course of this [in respect of Regulation 13(1)(c) Identification of Issues], the Applicants indicated that there was more than one issue to be determined, as set out in attachments to the Dispute Notice dated 24 February 2023 ("the Dispute Notice"). As a result of this, on 10 November 2023, I issued an Order requiring the Parties to forward to me by 5pm on Thursday 16 November 2023 all communications relating to the content, delivery and receipt of the Dispute Notice issued by the Applicants. The Parties both responded to such Order within the required time frame.

3. I could find no evidence of an attachment to the Dispute Notice, but, more significantly, both Parties forwarded to me a copy of a letter dated 23 March 2023 from the Respondent's lawyers, Anthony Harper, to the Applicants. Paragraph 2 of that letter stated: "We refer to the dispute notice dated 24 February 2023 and the associated e-mail dated 25 February 2023 which elaborated on the basis for the dispute. As the

dispute notice does not provide any information on the matter in dispute, our client intends to treat the dispute notice and e-mail **together** as the dispute notice…"

4. The letter further stated in paragraph 3: "We note that the Dispute notice fails to state which of the grounds set out in section 53 of the Retirement Villages Act 2003 ("the RVA") the Dispute notice concerns. Notwithstanding this omission, as the background to the matter is well understood by all involved, the Operator has decided not to require a corrected dispute notice and is proceeding on the basis that the dispute is on the grounds set out in section 53(1)(a) and (d), being a dispute concerning decisions of the operator affecting the resident's occupation right and relation to an alleged breach of a right a referred to in the Code of Residents' Rights. Please advise us if these are not the intended grounds."

5. I had not seen this letter before, and I am uncertain as to why neither party had forwarded it to me. At best the non-disclosure of the letter was inadvertent, and at worst it was deliberately misleading. I elected to apply the best interpretation and treat it as an inadvertent non-disclosure by both parties.

6. The content of the letter clearly altered the composition of the Dispute Notice, and the issues to be identified for determination. It was now comprised of the Dispute Notice dated 24 February 2023 and the associated e-mail dated 25 February 2023, under cover of which the Dispute Notice was forwarded. The issues to be determined were those disclosed in these documents, which were collectively regarded as the Dispute Notice ("the accepted Dispute Notice").

7. I did not accept that the single page of the Dispute Notice did not disclose any issue, as I had already found, based on what was known at the time, that the issue disclosed was "ORA in relation to the covenant on the title" (paragraph 41 of the PD). On examination and analysis of the accepted Dispute Notice, I identified the following issues:

   (a) Whether the Applicants have an Occupation Right Agreement for Unit 4, comprised of the Encumbrance and Management Deed.

   (b) Unfair treatment of the Applicants, including bullying, harassment and attempted exploitation in the taking of the Applicants' unit.

   (c) The unlawful request by the Respondent to the Applicants to sign a termination of the Management Deed attached to the unit title as a covenant.

   (d) The status of the Management Deed to protect the rights of the Applicants as owners and residents.

(e) The use of the Village land as security for a loan of $62 million from the ASB.

(f) Compensation for all costs.

(g) Damages for the effect on the well-being of the Applicants.

8. I was satisfied that the first 4 of these issues (a, b, c and d) fell within the ambit of section 53(1)(a) and (d), and I therefore had jurisdiction to deal with them. I referred to these 4 issues as “the accepted issues”, because they arose from the accepted Dispute Notice. I had no jurisdiction to determine the last 3 issues (e, f and g) [other than consideration of parts (relating to the behaviour of the Parties) in respect of costs under section 74 of the RVA.] I set out the further issues and the jurisdiction in respect of the further issues in an e-mail to the parties dated 30 November 2023.

9. The Respondent’s lawyer objected to the expansion of the issues for determination, maintaining that the PD was a final decision. I rejected that contention, setting out comprehensive reasons in an e-mail to the Parties dated 30 November 2023, pointing out that the PD itself made it very clear that it was a **preliminary** decision (heading; paragraphs 18, 37, 40, 43 and 44). I further stated: “If it was perceived by the Respondent as a final decision, this was entirely incorrect and without basis. It is not open to the Respondent to unilaterally declare it as a final decision when it was made very clear that it was not”. I further stated in an e-mail to the parties dated 11 December 2023 that the identification of one issue stated in the Dispute Notice “was predicated on the assumption that the Dispute Notice was comprised of a single page dated 24 February 2023. That was a mistake arrived at on the basis of what I had been given. As indicated above, neither party had advised me of anything different. The true position, however, as we now know, was different. As I have stated, in terms of Regulation 20, I consider that ‘the substantial merits and justice of the case’, as well as natural justice, necessitate the mistake to be corrected while it can be. If any grounds are required to correct an error made on the basis of both parties to the matter failing to disclose a significant document, then I consider these to be sufficient. If that were not so, then a miscarriage of justice could occur. I would be both surprised and disturbed if either party suggested otherwise.”

10. On 18 December 2023 I forwarded to the Parties a “Notice of Matters Agreed Upon or Decided by the Disputes Panel in Preliminary Consultations”. I invited any further comments from the Parties by 5pm on 22 Dember 2023. No further comments were received.

11. Though frequently raised by the Applicants, I have made it clear to them that I am confined to only determining issues which have been identified

in the accepted Dispute Notice and/or which are within the jurisdiction set out in section 53 of the RVA. This does not include the following:

(a) The method and propriety of how the Village or the business of the Village was acquired by the Respondent;

(b) Changes to the rules of the Village;

(c) The claim of ownership of the Village;

(d) Non-compliance of rules with Unit Titles Act and RVA;

(e) Compliance with disclosure requirements;

(f) The awarding of compensation or damages.

12. On 20 January 2024 I forwarded to the Parties a Notice of Hearing, in respect of a hearing scheduled for 19 February 2024. I set out dates for exchange of Statements of Evidence. On or about 15 February 2024 I received from the Applicants a list of 38 alleged items of unfair treatment. Both myself and the Respondent were only aware of a few of these, and the Respondent needed time to consider and respond to them. To ensure procedural fairness, it was necessary to cancel the 19 February 2024 hearing date. A new hearing date of 25 March 2024 was arranged, and this was acceptable to the Parties.

13. The hearing took place on 25 March 2024 and covered the agreed Issues (a), (b), (c) and (d) set out in paragraph 7 above.

Preliminary Comments

14. Radius Residential Care Limited and the Respondent

Though they are well aware that the Respondent is the registered proprietor of most of units in the Village, and the holder of management rights for the units in the Village, it is apparent in the evidence that the principal officers of Radius Residential Care Limited are the ones who, with the full knowledge and consent of the Respondent, have been active in dealing with the Applicants. Radius is the holding company for the Respondent, and the holder of the Encumbrance as trustee for the Respondent as beneficiary (who may require Radius to transfer it to them at any time). For all practical purposes, Radius has acted on behalf of the Respondent. In addition to actions by the Respondent, I have therefore regarded all actions in these matters undertaken by Radius to be those of or on behalf of the Respondent. I refer to Radius Residential Care Limited either by its full name or simply as “Radius” or “Radius Care”.

15. **Provisions Governing the Conduct of the Dispute**

The Panel is not obliged to adhere to strict rules of evidence or court rules. The procedural basis for conducting a dispute is set out in sections 64 and 67(1) of the RVA, and in Regulations 20(1) and (2) of the Retirement Villages (Disputes Panel) Regulations 2006. It is useful to set these out:

Section 64 - "The disputes panel may conduct the dispute resolution in any manner it thinks fit, but it must comply with any other relevant provision of this Act and any regulations made under this Act."

Section 67(1) – "The disputes panel may admit any relevant evidence at the hearing from any person, whether or not the evidence would be admissible in a court and whether or not the person is present at the hearing."

Regulation 20(1) – "Subject to the Act and these regulations, a disputes panel must conduct a dispute resolution hearing in a manner that is most likely to ensure the fair and expeditious resolution of the dispute."

Regulation 20(2) – "A disputes panel must determine a dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case."

The Issues

While I will deal with the Issues separately, Issues (a) and (d) are obviously related, and Issues (c) and (d) are related.

Issue (a)

Whether the Applicants have an Occupation Right Agreement for Unit 4, comprised of the Encumbrance and Management Deed.

16. The Respondent has accepted and acknowledged, both prior to the hearing and in evidence at the hearing, that the Applicants have an Occupation Right Agreement comprised of the Encumbrance and the Management Deed. The Parties are therefore in agreement on this Issue (though the Applicants query whether the RVA applies to it, which I will consider in paragraphs 70 to 79 below).

17. There is therefore no need for me to determine this Issue, including, in the context of this Issue, whether the Applicants obtained consent from the Respondent to reside in Unit 4. I will, however, examine the subject of consent in my consideration of Issue (b), Item 5 (paragraphs 88 to 94 below).

18. There is little point in relying on the Encumbrance and the Management Deed to comprise and Occupation Right Agreement unless these two documents are valid and effective. Their efficacy underpins such reliance. I alluded at the hearing to the Management Deed actually being an

agreement, and to it not being signed by the Respondent. Before leaving this Issue, therefore, there are three underlying matters to cover-off:

(a) The validity of the Encumbrance and the Management Deed.

(b) Whether the Encumbrance and Management Deed "run with the land" and therefore bind successors in title.

(c) Whether section 27 of the RVA applies to the Encumbrance and Management Deed (that is, does the RVA apply?).

(a) The Validity of the Encumbrance and the Management Deed

The Encumbrance

19. We are considering here the validity of Encumbrance No. H842594.3 ("the Encumbrance") registered against Certificate of Title SA 42B/103 ("the Title") for Principal Unit 4 on Unit Plan S.49465 ("the Unit").

20. "An encumbrance is any memorial on the title, which interferes with any otherwise lawful use of the land by the registered proprietor, by creating a charge or interest over the land for the benefit of another" [Hodge v Applefields Limited (1997) 3 NZ ConvC 192,500 (HC) at 192,503 per Hansen J].

21. The Encumbrance is dated 10 November 1988 and was signed by Francis Patick O'Connor and Claudia Kevey O'Connor as Encumbrancers. At that time, they were the registered proprietors of the Title. It was registered against the Title on 15 December 1988. The Encumbrancee named in the Encumbrance is Ohaupo Developments Limited, the operator of the Village at that time. Ohaupo Developments Limited transferred the Encumbrance to Radius Residential Care Limited by way of Transfer T5997819.5 dated 27 April 2004 and registered on 10 May 2004. Radius Residential Care Limited holds the Encumbrance in trust for the Respondent, by virtue of a Deed of Assignment of Management Deeds and Declaration of Trust dated 31 August 2007 (Clause 4.1). When directed by the Respondent, Radius will formally transfer the Encumbrance to the Respondent (Clause 4.1). The real owner and present Encumbrancee under the Encumbrance is therefore the Respondent.

22. The relevant statutes in 1988, in respect of Encumbrance, were the Land Transfer Act 1952 and the Property Law Act 1952. Section 101 of the Land Transfer Act 1952 is entitled "Forms of Mortgage", and sub-section (1) refers to "an encumbrance instrument" (or a mortgage instrument) as being "required for the purposes of charging any land or estate or interest under this Act or making any such land or estate or interest security for

the payment of any money." Section 2 of the Property Law Act 1952 does not define an "encumbrance" but simply specifies that it "includes a mortgage in fee or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum; and **encumbrancer** has a corresponding meaning, and includes every person entitled to the benefit of an encumbrance, or entitled to require payment or discharge thereof." Section 101 was replaced on 25 August 2002 by section 45 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, which substituted a new section 101 into the Land Transfer Act 1952. The only change made was with reference to the priority amount in mortgages, in sub-section 101(2)(e). Section 101(2)(e) was replaced on 1 January 2008 by section 364(1) of the Property Law Act 2007, but this only relates to priority amounts in mortgages and is not relevant. The provisions relating to encumbrances were unchanged in the new section 101. The Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 was repealed on 12 November 2018 pursuant to section 248(1) of the Land Transfer Act 2017, which repealed the entire Land Transfer Act 1952. Section 101 was replaced by section 100 of the Land Transfer Act 2017, which states in sub-section 4 that an encumbrance must "(a) be executed by the encumbrancer; and (b) contain the prescribed information." Sub-section (2) has the same requirements in respect of mortgages. The "prescribed information" is set out in Schedule 2 of the Land Transfer Regulations 2018, which commenced on 12.11.18. Schedule 2 indicates that an encumbrance must contain: "An operative provision that gives effect to the purpose of the instrument, the nature of the security (whether an amount of money, an annuity or a rent charge), the amount secured by the encumbrance, and the other terms of the encumbrance (including covenants, conditions and powers), if applicable". So that is the current position under the Land Transfer Act. As far as the Property Law Act 1952, this was repealed on 1.1.2008 by section 366(c) of the Property Law Act 2007.Section 288 of the Property Law Act 2007 (formally section 72 of the Property Law Act 1952) implies into encumbrances the provisions set out in Part 4 Schedule 4 of that Act. Sections 289 and 290 of the Property Law Act 2007 (formerly section 73 of the Property Law Act 1952) impose on any person who buys a property subject to an encumbrance the requirement to pay all moneys and perform all obligations set out in the encumbrance.

23. The requirements set out in section 100(4) of the Land Transfer Act 2017 and Schedule 2 of the Land Transfer Regulations 2018 (formerly section 101(4) of the Land Transfer Act 1952) have been complied with. There is an operative provision ("DO HEREBY ENCUMBER the said land for the benefit of the Encumbrancee"), a rent charge and amount secured ["an annual rent charge equal to ten per centum of the rateable value of the land or $20,000 (whichever is the greater)" but if there is no breach in any year of the Encumbrancer's obligations then the annual rent charge is

"reduced to ten cents"], and other provisions set out in the annexed Management Deed . It is usual to expressly exclude any powers to enter into possession or exercise a power of sale as mortgagee, in the event of default by the mortgagor, but this was not done in the Encumbrance. Indeed it specifically reserved for the Encumbrancee "all the powers and remedies given to mortgages and rent charges by the Land Transfer Act 1952 and the Property Law Act 1952."

24. The requirements of section 100(4)(a) of the Land Transfer Act 2017 (formerly section 101(5)of the Land Transfer Act 1952) as to execution by the encumbrancer have been satisfied. The Encumbrance was executed by Francis Patrick O'Connor and Claudia Kevey O'Connor as Encumbrancers. It was not signed by Ohaupo Developments Limited as Encumbrancee, but there was no legal requirement for the Encumbrancee to sign it.

25. The requirement in the 1952 Act and the 2017 Act are essentially the same. Since all of the requirements in section 100 of the Land Transfer Act 2017 (formerly section 101 of the Land Transfer Act 1952) and Schedule 2 of the Land Transfer Regulations 2018 have been met, I consider that the Encumbrance is a valid document.

The Management Deed ("the Deed")

26. The Deed is referred to in the fifth paragraph of the Encumbrance as:" the Deed a copy of which attached hereto". It is dated 10 November 1988 and is signed by Francis Patrick 'Connor and Claudia Kevey O'Connor as the Encumbrancers/Residents. It is not signed by Ohaupo Developments Limited as the Encumbrancee/Operator, presumably because section 4 (1) of the Property Law Act 1952 specifies that "Every deed…shall be signed by the **party** to be bound thereby…". In short, a deed is a document containing obligations that only one party needs to perform, and is therefore signed by one party only. Similar requirements are found in section 9(1) and 9(2) of the Property Law Act 2007 – a Deed must be in writing and must be executed (before an independent witness) and delivered by the person to be bound by it. . The Deed, however, is not like this. It contains 10 obligations [clauses 2(a) to 2(h), clauses 5(a) and 5(b)] to be performed by the Encumbrancer/Residents, and 16 obligations [clauses 4(a) to 4(o), clause 6] to be performed by the Encumbrancee/Operator. In my view, therefore, it is not a deed but an agreement, which requires the signature of all parties to be bound thereby. Since it is not signed by the Encumbrancee/Operator, it is, prima facie, an invalid document. It is saved, however, by two things (which I will look at in sequence):

(a) a contract can be implied; and

(b) the Parties have agreed that the Deed is part of the Occupation Right Agreement between them. There is, in effect, a new agreement comprised of two components – the Encumbrance and the Management Deed.

27. A contract may be implied-in-fact from the actions, conduct and circumstances of the parties to an agreement. These can be pre-contractual or post-contractual. The basic elements required are an offer of terms, acceptance of those terms, consideration that involves the parties exchanging something of value (such as money or mutual promises), and a mutual intention to be legally bound by the terms of the agreement. These are all present. We do not need to infer terms and conditions as these are already in the Deed. It is evident that after the Deed was made, both parties acted in a manner as though they were bound by it. Their intentional conduct, where the other party knows or at least has reason to know the other party will interpret the conduct as assent to an agreement, even if it has not been signed, is sufficient to found a binding contract.

28. Section 11 of the Contract and Commercial Law Act 2017 includes in the definition of "contract": (a) a contract "made by deed or in writing, orally, or partly in writing and partly orally; or (b) **implied by law."**

29. As stated in paragraph 16 above, the Parties have accepted that the Encumbrance and the Deed comprise the Occupation Right Agreement between them. The terms of the Deed have therefore been accepted by the Parties as a contract binding upon them both, as part of such ORA.

30. I therefore consider that the Deed is a valid document.

31. I find that the Encumbrance and Management Deed are valid, effective and efficacious documents, which can comprise an Occupation Right Agreement accordingly.

(b) Do the Encumbrance and Management Deed "run with the land" and therefore bind successors in title?

32. The term "run with the land" simply means that if a registered interest remains on a title to land (the burdened or servient land) when it is transferred to someone else (such as on a sale, or transmission on the death of an owner). It is not discharged. It continues on the title. It may, if it is a charge or encumbrance, continue to bind subsequent owners. This is made clear in section 73 of the Property Law Act 1952 (now sections 289 and 290 and Schedule 4 Part 5 of the Property Law Act 2007) [see paragraph 22 above].

The Encumbrance

33. The Encumbrance is a document registered against the Title pursuant to the Land Transfer Act 1952. It has not been discharged, and remains on the Title. As we have seen, an encumbrance is regarded as a mortgage (section 101 Land Transfer Act 1952), and section 104(1) of the Property Law Act 1952 provides that any person who accepts a transfer of land subject to a mortgage will become personally liable to the mortgagee. It is the same under section 100 of the Land Transfer Act 2017 and section 203(1) of the Property Law Act 2007 respectively, so the situation has not changed. I therefore have no problem with the Encumbrance "running with the land". The situation with the Deed, however, is not as straightforward, because of the nature of the covenants contained in the Deed and their resultant legal enforceability.

The Management Deed

34. Neither the Land Transfer Act 1952 nor the Property Law Act 1952, which were the property statutes in place at the time when the Deed was promulgated in 1988, define "covenant". However, a "covenant" is, in law and in ordinary usage, simply a promise. The Property Law Act 2007 is somewhat more helpful and in section 4 it defines a "covenant" as "a promise expressed or implied in an instrument…". Is the Deed, then, an "instrument"?

35. At the time the Deed was executed in 1988, land covenants were usually created by the registration of a Transfer Instrument or an Easement Instrument or by way of the device of an Encumbrance. Encumbrances were provided for in section 101(4) of the Land Transfer Act 1952, and section 4 of the Property Law Act 1952, and had come to be used as a device to endeavour to secure collateral covenants over servient land. Section 2 of the Land Transfer Act 1952 defines "instrument" as "any printed or written document…relating to the transfer of or other dealing with land…". The Property Law Act 1952 simply states that "Instrument includes deed, will, Proclamation taking land, and Act of Parliament" (thereby not excluding many other types of documents). The Property Act 2007 gives a wider definition: "Instrument – (a) means any use of words, figures, or symbols (for example, an agreement, contract, deed, grant, or memorandum, or some other document that is certified, executed, or otherwise approved by or on behalf of a party or parties, or a judgment, order, or process of a court) that – (i) creates, evidences, modifies, or extinguishes legal or equitable rights, interests, or liabilities(without being lodged, filed, or registered under an enactment, or after being so lodged, filed or registered, or both)".

36. On this basis, I am satisfied that the Deed contains "covenants", and that the Deed and the Encumbrance are both "instruments".

37. The Deed contains approximately 26 covenants, comprised of 24 which are positive in nature (The party will **do** this or that) and 2 which are negative in nature (the party will **not do** this or that). The question, however, is whether these covenants run with the land or do not run with the land, This is determined by the type of covenant(s) that have been created, how the covenant(s) have been created, and whether the covenant(s) benefit any other title or titles. The Respondent has made legal submissions (25-31) on this aspect, and I have taken these into consideration.

Covenants Running with the Land

38. There are, broadly, three types of covenants:

(a) Positive covenants – Section 4 of the Property Law Act 2007 defines these as:

"A covenant, including a covenant expressed or implied in an easement, under which the covenantor undertakes to **do** something in relation to the covenantor's land that would beneficially affect the value of the covenantee's land or the enjoyment of the covenantee's land by any person occupying it".

(b) Restrictive (or negative) covenants – Section 4 of the Property Law Act 2007 defines these as:

"A covenant, including a covenant expressed or implied in an easement, under which the covenantor undertakes to **refrain from doing something** in relation to the covenantor's land which, if done, would detrimentally affect the value of the covenantee's land or the enjoyment of the covenantee's land by any person occupying it".

(c) Covenants in gross - A "covenant in gross" is a covenant which is personal in nature and does not have any land to which its benefit attaches (=dominant land). The Property Law Act 2007 confirmed this definition in section 307A (which was inserted on 12 November 2018 by section 242 of the Land Transfer Act 2017). Section 307A states: "In sections 307A to 307F and 318A TO 318E, covenant in gross means a covenant that – (a) is expressed in an instrument coming into operation on or after the commencement of this section; and (b) requires the covenantor to do something, or to refrain from doing something, in relation to the covenantor's land; and (c) benefits another person, **but is not attached to other land."**

39. As far as covenants on titles, in order to "run with the land", the common law required land which has the burden of the covenant(s) [this is the land that the covenant(s) are imposed upon, requiring the owner(s) of such land to observe such covenant(s), which is usually referred to as "the

servient tenement" (the land which "serves")], and also land which has the benefit of the covenant(s) [this is the land which benefits from the covenants being observed, the owner(s) of which can enforce the covenant(s), and is usually referred to as "the dominant tenement" (the land which is dominant because it has an enforceable right against the servient tenement)]. **The common law test was that in order for a covenant to "run with the land" there had to be both servient and dominant land. The covenant had to burden the servient land and benefit the dominant land.**

40. While that was the position at common law, in equity the development of restrictive covenants (=negative) allowed the burden of a covenant to run with the servient land if it "touched or concerned the land." The words "touch and concern" were first put forward by Bayley J in **Congleton Corporation v Pattison** (1808) 10 ease 130 at 135, and were defined in that case as meaning that "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land."

41. The possibility of both positive and negative covenants running with the land was reflected in section 64A(1) of the Property Law Act 1952, which applied "to every covenant, whether express or implied under this or any other Act, and whether positive or negative in effect, where (a) **The covenant relates to any land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land;** and (b) There is no privity of estate between the covenantor and the covenantee." In terms of sub-section (6), the section did not apply to covenants made before 1 January 1987. The covenants in the Deed were made on 10 November 1988, so section 64A applies to them **if they satisfy the requirements of sub-section (1).** Section 64A(2) says that "every covenant **to which this section applies** shall…(a) be binding in equity on – (i) Every person who acquires a fee-simple estate in the land…and (ii) Every other person who for the time being is the occupier of the land.." They do not satisfy the requirements of sub-section (1) unless there is land which bears the burden and land which gains the benefit. On the face of it, there is no land which gains the benefit, and therefore the requirements of sub-section (1) are not satisfied, and the applicability in sub-section (2) is not satisfied. The covenants are not binding in equity accordingly. The Property Law Act 1952 was repealed on 1 January 2008 by section 366(c) of the Property Law Act 2007. However, similar words were used in the succeeding equivalent section in the Property Law Act 2007, which provided in section 303 (Legal effect of covenants running with the land) that the section "applies to a restrictive covenant, and also to a positive covenant coming into operation on or after 1 January 1987 (which is the application date specified in section 64A(6) of the Property Law Act 1952, as inserted by section 3 of the Property Law Amendment Act 1986), in either case whether expressed in an instrument or implied

by this Act or any other enactment in an instrument, if - (a) **the covenant relates to the land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land;** and (b) There is no privity of estate between the covenantor and the covenantee."

42. Since the covenants in the Deed were made on 10 November 1988, it is apparent that section 303 could possibly apply if the requirements of the section are satisfied. To satisfy the requirements the covenants in the Deed would need to be positive or negative covenants, and to be positive or negative covenants there would need to be dominant land and servient land (see section 4 definitions set out in paragraph 38 above, and the words in section 303(1)(a) above.) In the present case, there is no dominant land. The Applicants own the servient land, but there is no dominant land owned by the Respondent. Sub-section 2 is the same – a covenant to which the section applies [namely those described in sub-section (1)(a)] is only binding on an owner or occupier in equity if it is a covenant of the nature described in sub-section (1)(a), namely one with land which is burdened and land which is benefitted.

43. The Respondent's solicitor has submitted (paragraphs 21(d)(iv) and 30 of their submissions) that positive and negative covenants coming into effect after 1 January 1987, continue to be binding in equity on successors in title of the burdened (servient) land. The relevant section that is relied on is section 303(2). This states: "Every covenant to which this section applies, unless a contrary intention appears, is binding in equity on – (a) every person who becomes the owner of the burdened land (whether by acquisition from the covenantor or from any of the covenantor's successors in title, and whether or not for valuable consideration, and whether by operation of law or otherwise; and (b) every person who is for the time being the occupier of the land.". The important words are "Every covenant **to which this section applies**…", and it is clear from sub-section (1) that the section only applies to positive and negative covenants (after 1 January 1987) if "(a) the covenant burdens land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land..". That is, there must be dominant and servient land, which there is not. The section cannot, therefore, apply to the covenants. **Without more**, the covenants are not binding in equity on successors in title pursuant to section 303(2).

44. Without traversing the history of the debate, the position in New Zealand (that dominant land is required to create a valid covenant which runs with the servient land) was confirmed in **Anzco Foods Waitara Limited v Affco NZ Limited** [2006] 3 NZLR 351, and **in Omaha Beach Residents Society (Inc) v Townsend Brooker Limited** [2010] NZCA 413).

45. **At first look**, since the covenants are not positive or negative covenants because there is no dominant land, the covenants in the Deed are

"covenants in gross". They may be positive or negative in effect, but are nevertheless covenants in gross. The covenantor is the Applicants, and the covenantee is the Respondent. The Applicants own the servient land, but there is no dominant land owned by the Respondent which benefits from the covenants (but this position could change – see paragraphs 33 to 69 below).

46. Section 307A (together with sections 307B to 307F) of the Property Law Act 2007 commenced on 12 November 2018, so these sections do not apply to covenants expressed in instruments prior to that date, such as those in the Deed. The situation is summed up by D W McMorland in "McMorland on Easements, Covenants and Licences" (5th edition) in paragraph 17.027 on page 194: "Secondly, as to covenants in gross…the common law rule clearly applied requiring benefitted land before the burden of a negative covenant, or now a positive covenant, could run with the burdened land. The rules relating to the enforceability of covenants therefore did not enable the burden of a covenant in gross to run with the burdened land…". Covenants in gross entered into before 12 November 2018 are not interests in land as a general principle. **Without more**, such covenants are not binding and are unenforceable.

47. The Respondent's solicitor submitted (paragraph 27 of their submissions) that covenants in gross remain enforceable against the Applicants in equity because of section 303 of the Property Law Act 2007. I have already dealt with this contention in paragraphs 41 to 43 above, and for the same reasons the argument fails. Section 303(2) applies only to positive and negative covenants, which are those having dominant land and servient land [section 4, section 303(1)(a)]. It does not apply to covenants in gross which have no dominant land.

48. It follows that, **on the face of it**, the covenants in the Deed are not interests in land and are not unenforceable. **However, I say "at first look", and "without more" (in paragraphs 43 and 45 above) and "on the face of it" (in this paragraph) deliberately, because the situation is retrieved by three things:**

    (a) The covenants in the Deed are secured by the Encumbrance;

    (b) The Encumbrance is a mortgage;

    (c) There is case law indicating that, in a unit title situation, the observance of covenants on the servient land is beneficial to any unit owned by the village, and to all of the other unit titles in the body corporate (eg because it may preserve the quality of the units, the care and maintenance of common property, ensure the units are insured, and enhance or preserve the value of the other units). Each unit title owned by the village is a dominant tenement, and the covenants may therefore be positive and negative covenants rather than covenants in gross.

Alternatively, there are some indications that no dominant land may now be required in respect of obligations imposed by statute, namely the Unit Titles Act 1972 or 2010.

I will examine each of these in sequence.

Covenants in Gross Secured by an Encumbrance

49. There were situations where it was desired that the burden of covenants in gross should run with the burdened (servient) land. This was achieved mainly by the use of an encumbrance instrument. The Respondent's solicitor correctly submits (paragraph 28 of their submissions) that the issue of enforceability "must however be considered taking into account the interface between the Management Deed and Encumbrance. The performance of the obligations/covenants under the Management Deed, is expressly secured by the Encumbrance." I agree.

50. McMorland deals with Encumbrance instruments in paragraph 17.030 on page 199. He states:

"The method most likely to have been used in New Zealand is an adaptation of the form of encumbrance instrument provided (now) by the Land Transfer Act 2017" (formerly section 101 Land Transfer Act 1952) "which may be registered against the title to the burdened land thus giving the encumbrance an interest in the land. 'In such a document the covenantor creates a defeasible rentcharge in favour of the covenantee, it being provided that the rentcharge is to be unenforceable as long as certain covenants affecting the covenantor's land are observed and performed' ([Brookfield [1970] NZLJ 67 at 70). The amount secured by the rentcharge would have to be adequate to ensure the performance of the covenants, but any serious blot on the title can be avoided by limiting the rights of the encumbrance. Because positive covenants entered into before 1 January 1987, and covenants in gross entered into before 12 November 2018 are not interests in land, notice cannot render them binding on a purchaser. The purpose of the encumbrance is not, therefore, to give notice, but to cause the covenants contained In the instrument to bind purchasers of the burdened land by virtue of section 203 of the Property Law Act 2007." (formerly section 104 of the Property Law Act 1952) – see paragraphs 53 to 60 below.

This is the situation that we have in the present case.

51. The Respondent's solicitor correctly alludes in paragraph 31 of their submissions that there is a significant number of articles and a substantial body of case law in New Zealand as to propriety of the use of an encumbrance (with a nominal rentcharge) as a device to secure the performance of non-monetary (in the sense of not securing a loan) obligations by future owners. I do not intend to traverse all of the academic articles, which put forward the views of those against and those in favour

of such a device. What is certain, however, is that the New Zealand courts have accepted that an encumbrance can be validly used in this manner. This has been confirmed in New Zealand case law, including **Underwood v Bevin** [1992] 3 NZLR 129 (CA), **Jackson Mews Management Limited v Menere** [2009] NZCA 536; [2010] 2 NZLR 347 (at paragraphs 52, and 60 to 63) and **Menere v Jackson Mews Management Limited** [2010] NZSC 3; [2010]2 NZLR 347] (which are discussed in more detail in paragraph 55 and 58 to 59 below); **FM Custodians Limited v Pinot Rouge New Zealand Limited** [2011]12 NZCPR 155 (at paragraph 22); **Parihoa Farms Limited v Rodney District Council** [2010] NZHC 1532 (at paragraphs 74 and 75); **Navilluso Holdings Limited v Davidson** [2012] NZHC 2766 (at paragraphs 21 and 24); **Newhaven Waldorf Management Limited v Allen** [2015] NZCA 2770 (at paragraphs 64 and 75); **Escrow Holdings Forty-One Limited v District Court at Auckland** [2016] NZSC 167 (at paragraph 32).

52. There is a suggestion in **ABCDE Investments Limited v Van Gog** [2013] NZCA 351 that an encumbrance and contractual management agreements are separate documents and separately enforceable. In that case there were 23 units, one of which was owned by the building managers (the encumbrancers), and 22 of which were owned by private individuals (the encumbrancees). The relationship between the building managers and the owners was governed by a series of contractual instruments including a memorandum of encumbrance. When taking possession of units new owners signed agreements with the managers authorising the managers to operate the letting of their units to the public for short term visitor accommodation. These agreements were not signed until after the encumbrance was executed. It was argued that the encumbrance did not contain all essential terms necessary to give rise to an enforceable contract, and further that it was necessary for the building managers to enter into an appropriate agreement with the Body Corporate governing the relationship between the owners and the building managers in order to translate the exclusive right to let into an effective right, giving the encumbrance its “vitality” . These arguments were rejected. The Court held that: (a) the contractual exclusive right to exercise a letting service stood alone and was enforceable in its brief terms, and (b) the prohibitory effect of the encumbrance was enforceable on its own. It did not require incorporation of any additional terms. Therefore management rights in a separate document were enforceable against registered proprietors. This may be distinguished, however, from the arrangements between the Parties, in that the Encumbrance and the Management Agreement were made on the same date, the Encumbrance expressly refers to the Management Agreement, the Encumbrance (with the same terms and conditions in the management agreement annexed) was registered against the titles for all the units, there were no separate contracts signed after the Encumbrance was registered, the Encumbrance and the Management Agreement are in the same document and were linked

together, and the covenants do not purely relate to “management rights” [which Thomas Gibbons refers to and defines as “the business associated with physical maintenance and management of unit developments” (Thomas Gibbons, [2013] NZLJ 44).

The Encumbrance is a Mortgage

53. The enforceability of covenants in a management deed secured by an encumbrance arises because an encumbrance is regarded as a mortgage, within the definitions of “mortgage” contained in the Land Transfer Act 1952, which states in section 2: “Mortgage means any charge on land created under the provisions of this Act for securing- …(d) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, **rentcharge,** or sum of money other than a debt:”, and the Property Law Act 2007 which states in section 4: “Mortgage includes…(a) any charge over property for securing the payment of amounts or the performance of obligations…”.

54. On the approach in the **ANZCO case** (referred to in paragraph 44 above), it is the status of an encumbrance as a mortgage that renders it enforceable against successors in title.

55. It was stated in **Jackson Mews Management Limited v Menere** [2009] NZCA 536; [2010] 2 NZLR 347 and **Menere v Jackson Mews Management Limited** [2010] NZSC3; [2010] 2 NZLR 347. (in paragraph 13 of the CA judgment and paragraph 5 of the SC judgment) that section 81(2) of the Property Law Act 1952 did not apply, and [because of section 75(1)] **the Property Law Act 2007 applied to all mortgages, whether before, on, or after 01 January 2008** (when such Act became effective), so sections 4, 97(2) and 203 all need to be considered, no matter when the mortgage was entered into. It therefore follows that they need to be considered in respect of the Encumbrance in that it is a mortgage.

56. Section 203 of the Property Law Act 2007 states:

203 Person who accepts transfer, assignment, or transmission of land personally liable to mortgagee

(1) If a person accepts, subject to a mortgage, a transfer, assignment, or transmission of mortgaged land –

(a) The person becomes personally liable to the mortgagee -

(i) for the payment of all amounts **and the performance of all obligations** secured by the mortgage; and

(ii) for the observance **and performance of all other covenants** expressed or implied in the mortgage; and

(b) The mortgagee has all remedies under or in connection with the mortgage directly against that person as if that person were the person who gave the mortgage.

(2) Sub-section (1) applies whether or not the person who accepts the transfer, assignment or transmission has signed the instrument of transfer, assignment or transmission."

I have already mentioned section 288 and Schedule 4 Part 5 of the same Act (see paragraph 22 and 32 above).

57. In the **Parihoa** case, Dobson J observed at paragraph commented on the distinction between "obligations" and "covenants", and concluded at paragraph 68: "However, the term 'obligation' is not necessarily exclusive of covenants. Section 203(1)(a) requires performance of 'all *other* covenants', therefore contemplating that some obligations will also constitute covenants."

58. Possibly the leading case is **Jackson Mews Management Limited v Menere** [2009] NZCA 536; [2010] 2 NZLR 347 and **Menere v Jackson Mews Management Limited** [2010] NZSC3; [2010] 2 NZLR 347. This case is similar in its background factual situation to the present case in that it concerned an encumbrance over unit titles in a retirement village purporting to secure a covenant that the residents enter into a management services agreement. A resident, Menere sought a discharge of the encumbrance by tendering the full amount of the rent charge ($9.90, being 10 cents per annum for 99 years). Tender of this amount was not accepted. Initially the High Court had ordered the discharge of the encumbrance (**Menere v Jackson Mews Management Limited** (2008) (NZCPR 898). In the Court of Appeal it was stated at paragraph 9 "that the High Court decision has caused concern in conveyancing circles the hope has been expressed that we would reverse it...The consternation stems from the fact the encumbrance device (used in this case) has been so widely relied upon for registering **covenants in gross** that the effect of the High Court decision is to render the device useless…So the decision is of great significance not only to the respondents and their fellow residents in Jackson Mews but to many others in retirement villages and housing estates where the encumbrance device has been used. While any other obligations were still to be performed, the Court declined to allow the amount secured by the encumbrance (which was regarded as a mortgage) to be repaid and refused to allow a discharge of the encumbrance. Chambers J stated at paragraph 53: "....in cases where mortgages/encumbrances secured obligations in addition to the payment of money, no discharge of the mortgages/encumbrances should take place until all obligations had been performed." Baragwanath J referred (at paragraph 61) to the common law rule stated in **Kreglinger v New Patagonia Meat and Cold Storage Co Limited** [1914] AC 25 (in which

a collateral right in a mortgage to buy sheepskins for 5 years was allowed to continue for the 5 years despite the mortgage being paid in full after only 2 years had elapsed. The law of equity would intervene when a lender sought to rely on security for a loan for any purpose other than to secure its repayment.), as confirmed by section 81(2) of the Property Law Act 1952 (right to redeem the mortgaged land even though the time appointed for redemption has not arrived), which was superseded by the equivalent section 97(2) of the Property Law Act 2007(right to receive a discharge of the mortgage on payment to the mortgagee of all amounts and the performance of all other obligations secured by the mortgage), but restricted the application of these rules to “land intended as security for a loan” (at paragraph 61). Baragwanath J indicated at paragraphs 62 to 65 that there could be no right to redeem (=repay and receive a discharge) of the encumbrance “since it was not the purpose of the document to create a loan”. Rather, the obligations were to be regarded as a contract which contracting parties had to perform (regardless of whether they were the initial parties to the contract). He stated at paragraph 65: “Here the High Court fell into the error of extrapolating one principle – that dealing with loans on security, so far to embrace a fact situation – that of a 99-year contract for services protected by the rent charge, which is properly classified as falling within another – the very different principle that contracts are to be performed. Today’s decision of this Court corrects that error.” The Court of Appeal therefore reversed the High Court decision.

59. The case was taken by the Applicant, **Menere**, to the Supreme Court. The Supreme Court refused leave to appeal, noting that the words of section 97(2) of the Property Law Act 2007 required the mortgagee to discharge the property from the mortgage upon “payment of all amounts **and the performance of all other obligations** secured by the mortgage.” While any other obligations were still to be performed, the Court declined to allow the amount secured by the encumbrance (which was regarded as a mortgage) to be repaid and refused to allow a discharge of the encumbrance. Baragwanath J stated at paragraph 5 of the SC decision: “To conclude that the applicant is entitled to a discharge would defy common sense; the obvious purpose of the obligation to pay a nominal amount (if demanded) is to secure performance of the management agreement, which could not be brought to an end unilaterally if there were no breach by the respondent.” The effectiveness of the encumbrance as a device to secure an artificial rent charge as a means of also imposing obligations to be performed by the property owner (in this case a unit owner under the Unit Titles Act 1972) was therefore recognised. This was not just in respect of the initial unit owner(s) but also all subsequent owners of the unit, who, though not the initial parties to the encumbrance registered against the title, were nevertheless bound to observe the same arrangements. Chambers J stated at paragraph 52 (CA): “……it is clear in our view that the right to a discharge under section 97(2) has not accrued. That is because, for good reason, the respondents and their

successors in title, just like all the other current unit owners and their successors in title, must perform the other obligations secured by the encumbrance, namely continuing to be a party to the services agreements and continuing to pay the fortnightly levies.”.

60. When the Encumbrance was registered on 15.12.1988, the owners of Unit 4 were Francis Patrick O’Connor and Claudia Kevey O’Connor. They transferred Unit 4 to the FP and CK O’Connor Family Trust on 05 April 1995, with the consent of the Village owner at that time (see paragraphs 10 and 26 of the PD). The subsequent transmissions and transfers which took place were simply for the purposes of updating the trustees of such trust. All such transfers were effected subject to the Encumbrance, and it follows (by virtue of section 203 and the case law) that all such transferees were bound by the Encumbrance and were obliged to comply with the covenants in the Management Deed. The current registered proprietor, the FP and CK O’Connor Family Trust (by its trustee Claudia Maree Currie), is so bound, as is the Respondent. Claudia Maree Currie is personally liable as mortgagor, being the current person named on the title as trustee. Whether it can be enforced against her is another question.

61. It is interesting to consider whether the limitation on the right to redeem the mortgage and obtain a discharge (which could not be done unilaterally but only if there was a breach by the mortgagee) reflected the view that encumbrances, though defined as mortgages, were not to be treated as mortgages unless they secured a loan. At paragraph 61 in the **Jackson Mews Management** case (CA) Baragwanath J clearly indicated that section 97(2) (right of the mortgagor to receive a discharge from the mortgagee on payment of all amounts and the performance of all obligations secured by the mortgage), “**must be confined to land intended as security for a loan**”. As stated by Dobson J in the **Parihoa** case at paragraph 54: “On Baragwanath J’s approach, if a mortgage has been registered for purposes other than to provide security for a loan, then the statutory recognition of an equity of redemption in s 97 has no application. His concurring judgment is introduced with an observation to the effect that all contracts are to be construed according to the presumed intent of those who are parties to them. His reasoning required all other forms of mortgage to be treated as contracts, to be enforced on their terms.” An encumbrance did not qualify. It did not secure a loan, so the right to redeem in section 97(2) did not apply. It secured the performance of obligations, and such obligations were enforceable as a contract. Its discharge would prejudicially affect all other residents in the retirement village, who were concerned to ensure that the obligations contained in any management agreement would continue to be performed. For the same reasons, though there is no case law on the matter, it seems logical that the exercise of a power of sale would properly be refused because it would result in the encumbrance being expunged from the title by

operation of law (by virtue of it being a mortgage) if a successful mortgagee sale was achieved. That would, in turn, remove all of the other continuing obligations which would prejudicially affect the other residents because there would no longer be a document on the title requiring the registered proprietor to comply with obligations which were beneficial to all of the residences in the village. In an article entitled "Revisiting encumbrances in light of the Law Commission proposal for statutory covenants in gross" written in or about late 2010, Kay Keam commented at paragraph 4.5: "In the encumbrance it is usual to contract out of the powers implied in mortgages by the PLA (Property Law Act 2007). Such excluded powers include the power of sale, the right to enter into possession and the right to collect rents from land. Particularly where the rent charge is a nominal amount, this will render the rent charge 'virtually valueless in itself' but as noted by Brookfield (EM Brookfield, "Restrictive Covenants in Gross" [1970] NZLJ 67 at 70] the intended remedy (although its effectiveness is debatable…) is enforcement of the covenants themselves." While it is usual to expressly exclude any power to enter into possession, exercise any power of sale, and collect rents as mortgagee, this was not done in the Encumbrance.

Positive and/or Negative Covenants with or without Dominant Land?

62. In the **Jackson Mews Management** case the Court did not primarily concern itself as to the nature of the covenants (positive, negative, or in gross), as the arguments centred around whether a mortgage (=encumbrance) securing a rent charge could be repaid and discharged while other obligations in the mortgage remained extant. The Court decided it could not be redeemed. "The essential value of the encumbrance instrument from the encumbrancee's point of view lies in its existence (thereby requiring the encumbrancer to do certain things and not to do other things) rather than the value of any payment that will be received under it. Payment of the rentcharge is simply not the point of the instrument." (Associate Judge Osborne in the **Navilluso** case at paragraph 54). In **Jackson Mews**, however, the court did consider that the covenants in that case were positive covenants intended to benefit developments, because there was a dominant tenement present, namely Unit 46 owned by Mews Management in which the village manager resided. At paragraphs 50 and 51, Hammond and Chambers JJ stated:

"The encumbrance recorded that Mews Management would be providing certain services to the encumbrancer under a services agreement. Mews Management also covenanted that it would procure and retain in full force and effect for the duration of the encumbrance "Memoranda of Encumbrance on the same terms as this Memorandum from the other registered proprietors of all Units (other than Unit 46) in Jackson Mews.' (Unit 46 was exempted, as it was the manager's unit owned by Mews Management).In return, Mrs Reid encumbered her fee-simple estate in unit 21 'for a term of 99 years with an

annual rental charge of 10 cents to be paid on the first day of April in each year if demanded by that date the first payment if so demanded being due on the first day of April 1994.' That encumbrance was made expressly subject to further additional covenants. The most important for current purposes was her covenant to enter into the services agreement, by which the retirement village was to be maintained and serviced by Mews Management. In order to ensure that Mews Management was remunerated for those services, she covenanted to pay the fortnightly levy as fixed from time to time. **Mews Management, as owner of Unit 46, benefitted from Mrs Reid's covenants**, just as it did from the like covenants of every other unit owner. **There was in this case, none of the problems associated with covenants in gross,** which is why the argument was focussed entirely on when the right to redeem arose under section 81(2) (now section 97(2))."

63. It is evident from this that if there is a unit owned by the village operator, then that unit gains the benefit of the obligations imposed on the other units in the village. It therefore constitutes a dominant tenement, and the requirement of having a servient tenement (with the burden of the obligations) and a dominant tenement (with the benefit of the obligations) is met. It is therefore useful to examine whether that situation existed, or now exists, in the current situation.

64. I will first examine the historical situation. At the time the Encumbrance was registered against the title for Unit 4 (CT SA 42B/103) on 15 December 1988, it is unknown how many units were owned by Ohaupo Developments Limited (the Encumbrancee) or Gloss Financial Ventures Limited (later Ohaupo Financial Ventures Limited). These two associated companies owned the land on which the village and rest home were situated. Gloss Financial Ventures Limited owned Unit 4, and it transferred Unit 4 to F P and C K O'Connor on 15 December 1988, the same date that the Encumbrance was registered. The directors of the two companies at that time were Graeme John Bates and Petra Joanna Bates, and when Graeme ceased his directorship then Petra continued as the sole director. Searches of the titles on 01 August 2007 for the 22 units in the Village indicate that 20 units were privately owned, but two units, namely Units 12 and 15 (CT 264424 and SA48C/221 respectively), were in the name of Petra Joanna Bates. Historical searches for these two titles indicate that Ohaupo Financial Ventures Limited, formerly Gloss Financial Ventures Limited, remained as the owner of Unit 12 until 9 November 2006 when the property was transferred to Petra Joanna Bates. Unit 15 was in the ownership of Graeme John Bates and Petra Joanna Bates until it was transferred to the sole name of Petra Joanna Bates on 6 September 2004. It is therefore clear that there was at least one unit, namely Unit 12, which was owned by the village owner (Gloss Financial Ventures Limited) at the time the Encumbrance was registered. There could be others revealed by historical searches, but one is enough according to the **Jackson Mews** case. Unit 12 could therefore be

regarded as a dominant tenement (=land) gaining the benefit of the covenants in the Management Deed, and on this basis the covenants could be regarded as positive and negative covenants running with the title for Unit 4, as opposed to covenants in gross having no dominant tenement.

65. It is also appropriate to consider the current situation. Searches of the titles on 22 November 2021 indicate that by that date all but 4 of the units in the village had been transferred to the Respondent, Windsor Lifestyle Estate Limited. Only Units 1,4, 6 and 19 remained in private ownership. Searches of the historical titles for just 5 of the units indicate a range of dates at which the Respondent acquired ownership, which accords with its intention to gradually acquire units over time. The representative 5 units and dates, in chronological order from earliest to latest, were: Unit 8 – 21 December 2007, Unit 21 – 14 February 2008, Unit 2 – 15 February 2012, Unit 10 – 18 April 2013, and Unit 3 – 14 March 2018. The point of these representative searches is to establish whether there were units owned by the Respondent (as Village owner and operator) that could be regarded as gaining the benefit of the adherence to the covenants contained in the Encumbrance. As indicated in paragraph 55 above, one is enough, but there are many. I have only looked at 5 of them. It is evident from these that at all material times there was at least one unit, and likely many others, which were owned by the Respondent (who is also, by virtue of the Declaration of Trust referred to in paragraph 18 above, the Encumbrancee under the Encumbrance), which therefore gained such benefit. These titles owned by the Respondent/Encumbrancee could be regarded as dominant tenements, and therefore (since there is a dominant tenement gaining the benefit and a servient tenement bearing the burden) the covenants in the Management Agreement could be regarded as positive and/or negative covenants running with the title for Unit 4, as opposed to covenants in gross having no dominant land.

66. The question of when the Occupation Right Agreement (ORA) of the Applicants commenced may be raised. Whether it may be regarded as commencing from the inception date (15.12.88), or the time the Applicants took physical possession in 2017, or whether it is regarded as commencing on the hearing date of 25 March 2024, when the ORA comprised of the Encumbrance and the Management Deed was formally acknowledged and accepted in evidence by the parties, or some other date, is academic. It is apparent that at all material times, in relation to the Encumbrance on Unit 4, there was at least one or more other units owned by the Respondent which gained the benefit of the covenants imposed as a burden on Unit 4.

67. The case of **Landmark Property Holdings Limited v Shen Empire Limited** [2022] NZHC 60 lends further support to the contention that, for unit titles, a covenant requiring payment of a levy is a positive covenant

running with the land and binding successors in title. A land covenant was created in a Transfer Instrument (not an encumbrance) registered against 18 **unit titles**. This created a scheme of arrangement in respect of the building by means of positive covenants running with the titles pursuant to section 126A of the Property Law Act 1952. The Body Corporate was authorised to impose levies for outgoings "…for the purposes of (a) ensuring that units and the common property are controlled, managed, administered, used and enjoyed in a manner which is necessary, expedient or appropriate having regard to the nature and size of the Building". The plaintiffs contended that the covenants were positive covenants, which by virtue of registration against the relevant titles run with the land and bind the successors of the original covenantor and covenantee. On the other hand, the defendants contended that the covenants were covenants in gross which were unenforceable because when the covenants were created the law did not provide for registration and enforcement of covenants in gross. The law permitting their enforcement did not come into effect until 12 November 2018. The covenants in question were referred to as "levy covenants", and Duffy J first determined (at paragraph 28) that there was nothing in the Unit Titles Act 1972 or the Unit Titles Act 2010 that expressly prohibited using positive covenants to this end (as was recognised in **Myers Park** A**partments Ltd v Sea Horse Investments Ltd** (2006) NZCPR 454 at [41] – [45]).Section 126 of the Property Law Act 1952 required that a positive covenant required the covenantor to do something positive in relation to the covenantor's land that would beneficially affect the value of the covenantee's land or enjoyment of that land by any person occupying it. In the Court's view, actions were not limited to physical interactions with the land and the payment of levy contributions was sufficient because "such contributions benefit all owners because they are part of the one collective when it comes to the outgoings related to the unit title subdivision, which includes the building and the land it stands on" (paragraph 32). "If no levy contributions could be demanded of unit owners, the value and the enjoyment of the unit title holding overall would be detrimentally affected, possibly to a substantial degree" (paragraph 34). Duffy J therefore found that they were positive covenants which ran with the land and were enforceable by unit owners. The covenants could not be dispensed with. Apart from the covenants, however, Duffy J noted that the unit titles themselves brought with them various obligations to contribute because the Unit titles Act 1972 recognised that unit owners should be compelled to make contributions towards the outgoings of the unit title subdivision. "It follows that levy obligations must necessarily run with the land; they are not something that can be divorced from the ownership of a unit title and viewed as personal obligations entered into as between the original parties to a land covenant. In short, the covenants were secondary to the statutory obligations imposed by the Unit Titles Act 1972.

68. Clause 2(a) in the Management Deed requires the Resident to pay the "Annual Administration Charge", the composition of which is set out in clause 1(f). This was effectively the same as the land covenants in the **Landmark** case, so these provisions are effectively positive covenants running with the land and binding successors in title. While the discussion in that case was confined to levy covenants, it is logical that the same reasoning could be applied to any other covenants which will directly or indirectly benefit other units (eg observing Village Rules and by-laws, maintaining units in good repair), and therefore such covenants may also be regarded as positive covenants running with the land. However, even without them, it is clear that there was and still is a statutory obligation under (now) the Unit Titles Act 2010 to pay levies and abide by rules imposed by the Body Corporate under that Act.

69. I therefore conclude in respect of the matters set out in paragraph 18(a) and (b) above that:

(a) The Encumbrance and the Management Deed, which comprise the Applicants' ORA, are valid and effective documents.

(b) They bind the Applicants as occupiers/residents since they constitute their ORA. They bind the Trust as registered proprietor and Encumbrancer because they are on and run with the title for Unit 4. They bind the Respondent as Encumbrancee (to whom such rights were transferred by Radius).

(c) The covenants in the Management Deed run with the title for Unit 4 and bind successors in title. That includes the FP and CK O'Connor Family Trust. They also bind the Respondent.

(d) It does not matter whether such covenants are regarded as covenants in gross or positive and negative covenants, as both run with the land. If covenants in gross, they are secured by the Encumbrance. This is a mortgage and it cannot be redeemed while other covenants and obligations are still to be performed. If positive and negative covenants, they have a servient tenement (the title for Unit 4) carrying the burden, and at least one, and likely more, dominant tenement(s) (one or more of the other units) which gain the benefit, thereby satisfying the legal requirements. This brings me to consider the matter in paragraph 18(c) above:

Does Section 27 of the Retirement Villages Act 2003 (RVA) apply to the Applicants' Occupation Right Agreement?

70. Section 27 of the RVA provides that occupation right agreements must comply with the requirements set out in section 27(1), which refers in subsection (a) to Schedule 3 in the Act (which sets out in 1(a) the "topics" to be included in an ORA), and in subsection (b) to "any other

provisions…required by this Act, or regulations made under this Act." That would include Regulations 6-12 in the Retirement Villages (General) Regulations 2006 ("the General Regulations").

71. The wider issue here is whether the RVA is retrospective. It is not. However, it applies to the world in existence on the date of commencement of the Act, namely (apart from one or two sections) on the 1st day of February 2004. While the Village came into existence before the RVA commenced, there is nothing in the RVA to support the contention that its provisions do not apply to villages pre-dating the RVA. If it was to apply only to future villages, it would need to specify that - for example, under section 6(4) or under transitional provisions. The Village fell within section 6 of the RVA and therefore it had to be registered as a retirement village within 6 months of 01 May 2007.

72. So what was the position as at 1 February 2004? As at that date, there was a village comprised of 22 units having unit titles issued pursuant to the Unit Titles Act 1972, most of which had the Encumbrance (with accompanying Management Deed) registered against them. The question arises, then, as to whether, in relation to occupation rights comprised of the Encumbrance and the Management Deed, which is what the Applicants now have, the requirements imposed by section 27 of the Act needed to be complied with, resulting in such documents being varied or replaced entirely. In this regard, it is useful and appropriate to consider the intentions of those who were involved in promulgating the relevant legislation [the RVA, the Retirement Villages (General) Regulations 2006 and Code of Residents' Rights (which both commenced on 1 May 2007), and the Retirement Villages (Disputes Panel) Regulations 2006 (which commenced on 1 October 2006)]. I have therefore looked at the New Zealand Law Society Seminar booklet entitled "Retirement Villages – the Full Impact of the Act" of March 2007 ("the Seminar booklet"), which was a seminar conducted by Michelle Burke and John Greenwood.

73. (a) On page 4 of the Seminar booklet it states: "Existing residents' occupation right agreements **do not need to be altered** but must be read together with the Code of Practice from 25 September 2007 with the Code of Practice prevailing over any less favourable term in such occupation right agreements."

(b) This is re-iterated on page 78, in answer to the question "Do existing occupation right agreements need to be changed as a consequence of the impact of the new legislation?". The answer given is: "No. Only **new occupation right agreements entered into after 1 May 2007** require compliance with Part 4 of the General Regulations 2006 and from 25 September 2007 occupation right agreements ill also need to comply with the Code of Practice requirements. A difficulty arises where some operators have attempted to change existing agreements ahead of 1 May

2007. This is a significant exercise and one where possible abuse could arise where some operators seek to persuade residents of the benefits of entering into new agreements requiring, by way of example, increases in deferred payment structures... and claiming that there are benefits on entering into agreements when a number of those benefits flow from the new legislation and not because of operator's initiatives."

(c) On the same page, the question "Do villages which are unit title based need to comply with the new legislation?" is answered in the affirmative.

(d) On page 23 it reminds us (as we have seen) that an occupation right agreement may be in one or more documents.

(e) On page 16 it is pointed out that in a Disclosure Statement the village operator must insert a brief description of what type of occupancy right is available or offered within the village, as indicated from Regulation 14(4) of the General Regulations. It is noted that the type of occupancy right or occupancy rights described in Regulation 14(4)(a) include, in sub-paragraph (iii) a freehold unit title under the Unit Titles Act 1972, and in sub-paragraph (x), "another legal ownership structure", and 14(4)(c) requires disclosure of "what the legal ownership structure is for the rights (if any) that are covered by paragraph (a)(x)." This would cover occupation rights comprised of an Encumbrance with a Management Deed registered against a freehold unit title.

(f) Page 79 confirms that Disclosure Statements need to be given to all existing residents by 1 May 2008, pursuant to section 12(4) of the RVR.

74. This all accords with the approach taken by the Respondent, in that it recognised occupation rights comprised of an Encumbrance securing a management deed, registered against a unit title. I refer to the following confirmations:

(a) In its Disclosure Statement of 23 August 2007, it stated at clause 1.3:

"The Village has been completed as a unit title development. The Village is comprised of Body Corporate S49465. Most of the unit titles are owned directly by the Residents as unit titles under the Unit Titles Act 1972. In most cases the Resident has a management agreement granted to (now) Windsor Lifestyle Estate Limited and has given an encumbrance to (now) Windsor Lifestyle Estate Limited to secure the rights of Windsor Lifestyle Estate Limited under the Management Agreement, which is registered over each individual Resident's unit title. The Operator, Windsor Lifestyle Estate Limited, intends to acquire unit titles as they become available and offer licences to occupy to residents of the Village. This disclosure Statement is in respect of the licences to occupy."

(b) This was repeated in the Disclosure Statement of 2 December 2021, except that the words “Most of” were replaced by the words “A number of.”

(c) In the “Actions arising from meeting” document (being actions arising from the Village AGM on 1 October 2018), which is Document 132 in the Bundle of Documents, three different ownership structures are listed under “Outcome” as being present in the Village:

(i) Unit Title owned by the resident, with a Management Agreement and registered encumbrance in favour of WLEL. This is the legacy structure, that pre-dates the RVA and Radius Care’s ownership. The plan that Radius Care has been following is to have WLEL acquire each of the unit titles as they become available and then sell as ORA’s. The prices have been negotiated, usually with the estate of the deceased resident.”

(ii) Unit Title owned by the resident, with an Occupation Licence or ORA that links ownership of the Unit title with the OL or ORA, so that when the OL/ORA is surrendered the Unit title is also required to be sold. This option was introduced by Radius Care for some instances where the incoming resident needs to obtain mortgage finance to assist with the purchase. The plan that Radius Care has been following for these is to have WLEL acquire each of the Unit titles at valuation as they become available and then sell as ORA’s after the units have been refurbished.

(iii) Unit Title owned by WLEL and resident’s only interest is under an ORA or OL.”

It is the first of these three ownership structures that applies to the Applicants’ unit.

75. The Applicants took over an ownership structure of the first type, which was entered into by the original residents, Frank O’Connor and Claudia O’Connor, in or about 15 December 1988. That structure has at no time been changed or upgraded. It continued to be recognised by the Respondent (eg in 2018, in 2021), and has been accepted and acknowledged by the Respondent at the hearing on 25 March 2024.

76. In the light of paragraphs 70 to 74 above, I therefore see no reason why the structure of the Encumbrance/Management Deed against a Unit Title, applicable to the Applicants, needs to be changed to comply with section 27. If I am wrong in this, then the Applicants may come back to this Panel now, or in the future (eg if consent to a sale of their unit was withheld by the Respondent on the pre-text that the existing Encumbrance/Management Deed structure did not comply with section

27), without the need for any further hearing or submissions, and I will make an order under section 69(1)(a) of the RVA to render the structure compliant with section 27(1). This does not require the replacement of the Encumbrance/Management Deed by a new Licence to Occupy or a new Occupation Right Agreement. It can be done by way of a variation of the Management Deed (see paragraph 234 below).

77. It is apparent from the evidence that the Applicants have a significant fear, possibly caused by their perception that compliance with section 27 would compel them to enter into a Licence to Occupy or Occupation Right Agreement of a type that has a large Village Contribution (sometimes called a Deferred Management Fee) of 20% of the price/value, which would amortise and be lost over a period of years (compared to 5% on sale of the unit in terms of the present Management Deed). They consider that the Respondent has "changed the rules" to their potential detriment. Such a perception in incorrect. The requirements of an occupation right agreement set out in Schedule 3 of the RVA and in Regulations 6-12 of the General Regulations make no mention of any monetary arrangements or requirements. The matters that are set out are essentially operational rather than financial. For that reason, I see no reason why, should it ever be required, any "topics" that are absent in the Encumbrance and Management Deed could not be inserted by way of a variation of the Management Deed. Each Village may make their own requirements as far as how the purchase price of an occupation right agreement is divided up, and various other discretionary matters (eg whether to allow a share of appreciation to flow back to the resident).The Respondent has accordingly indicated in evidence that its decision to adopt ORA's that contained such Village Contributions was purely a commercial decision made because the retirement village industry was heading that way. It is not, however, a legal or statutory (mandatory) requirement. As indicated in paragraph 73(b) above, any attempt to change existing structures in a manner which may be detrimental to the resident can be properly resisted.

78. A concern raised by both Parties was whether section 27 would need to be complied with in respect of any future occupation right agreement that may be contemplated when Unit 4 is sold. In the Respondent's Statement of Position dated 21 February 2024, the Respondent stated in paragraph 16 that "The Applicants will need to comply with section 27 if they sell." I agree, but without any need to accept a new ORA of the type that the Respondent currently uses. As indicated in paragraphs 76 and 77 above, a compliant occupation right may be achieved by an Order of this Panel under section 69(1)(a). This is perhaps an aspect of Issue (d) (The status of the Management Deed to protect the rights of the Applicants as owners and residents), so I will re-visit it in Issue(d) [paragraphs 224 ff] of this decision.

79. I therefore find that:

(a) The RVA does apply to the Encumbrance and the Management Deed.

(b) However, the Encumbrance and Management Deed held by the Applicants do not, as far as the Applicants are concerned, need to be amended to comply with section 27 of the RVA.

(c) If necessary, if a compliant occupation right agreement is required, I will make Orders under section 69(1)(a) to vary the Management Deed to make it compliant with section 27.

80. For the sake of completeness, I therefore record that, in the light of paragraphs 16 to 78, Issue (a) is determined in favour of the Applicants.

Issue (b)

Unfair treatment of the Applicants, including bullying, harassment and attempted exploitation in the taking of the Applicants' unit.

81. The Applicants produced a list dated 19 February 2024 of 38 items that they consider amounted to "unfair treatment". This is the second document listed on page 1 of the Bundle of Documents. I rejected 11 of these (Numbers 7, 8, 27, 29-34 and 36) as either being outside of the jurisdiction of this Panel or occurring after the date of the Dispute Notice. In respect of those remaining, I will deal with them in sequence. Some of them overlap so where that is the case I will deal with them together or simply refer back to a prior item that dealt with the same issue.

82. Before doing so, it is appropriate to look at the relevant parts of the Code of Practice (COP) and Code of Residents' Rights (CRR) that "unfair treatment" may fall under, and also look at some definition as to what such a wide-reaching term may embrace.

83. Clause 16 on page 17 of the COP outlines an operator's obligations in respect of the safety and security of residents. Sub-clause 1a requires staff conduct and management practices to ensure safety and security. Page 18 is more helpful in that it mentions under "Codes of Behaviour" some examples of what a Code should seek to prevent, including (but not limited to) bullying, harassment, unfair discrimination, victimisation, exploitation, breaches of personal privacy, and codes under the Human Rights Act 1993 and the Privacy Act 1993. Under "Management Practices" it suggests, among other things, regular contact and communication with residents, and their right to be treated with courtesy, and addressing issues raised by or on behalf of residents. **What is evident from these examples is that the types of unacceptable**

behaviour and unacceptable management practices that could be within these parameters are not closed.

84. The CRR has 3 rights which could be relevant to the current dispute:

Right 2 Information - You have the right to information relating to any matters affecting or likely to affect the terms and conditions of your residency.

Right 7 Right to be treated with courtesy and have rights respected - You have the right to be treated with courtesy and have your rights respected by the operator.

Right 8 Right not to be exploited – You have the right not to be exploited by the operator, the people who work at the village, and the people who provide services at the village.

85. The definition of "unfair" is broad. It means "not based on or behaving according to the principles of equity and justice; not following established or standardised or approved rules; not conforming to approved standards, as of justice, honesty or ethics; arbitrary; biased; discriminatory; dishonest; illegal; immoral; inequitable; one-sided; improper; shameful; unethical; unjust; unjustifiable; unlawful; unconscionable; unwarranted; wrong. "

86. That said, each item of "unfair treatment" raised by the Applicants would need to fall within the broad parameters set out in the COP and/or the CRR. While the types of unacceptable behaviour are not closed, it seems evident that such behaviour would in most instances need to be deliberate (intended) behaviour, rather than negligent (careless, inadvertent) behaviour, though one can imagine situations where behaviour may be so seriously negligent that it would affect safety and security. There is also reckless (rash or impetuous, with no regard for the consequences) behaviour that could impact upon the safety and security of residents. Any of these types of behaviour could amount to behaviour which is discourteous (rude, with a lack of consideration for the hearer or other people), menacing (suggesting the presence of danger or harm), threatening (having a hostile or deliberately frightening quality or manner), malicious (having or showing a desire to cause harm to someone), coercive (using force or threats), bullying (seeking to intimidate or harm), harassing (characterised by using aggressive pressure or intimidation), discriminatory (making or showing an unjust or prejudicial distinction between different categories of people on the basis of some characteristic or position), victimising (singling someone out for cruel or unjust treatment), exploitive (making use of a situation or treating others unfairly in order to gain an advantage or benefit), unjust (not based or behaving according to what is morally right or fair or lawful), unfair (not based on or behaving according to principles of equality and justice), peremptory(insisting on immediate attention or obedience, especially in

a brusque or imperious way), arbitrary (unrestrained and autocratic in the use of authority), high-handed (condescending or presumptuous; overbearing), autocratic (domineering; taking no account of other peoples' opinions or wishes) and/or harsh (cruel or severe). It is easy to allege that all behaviours which are perceived by one party as not fitting in with what they might want must fall within these parameters, but that is not the case. Each allegation needs to be objectively considered on its own merits or demerits.

87. "Harassment" and "bullying" are two words alleged by the Applicants, and behaviour of this nature is expressly mentioned on page 18 of the COP as being something which the operator should take steps to avoid. "Respect" and "courtesy" are mentioned in Right 7 of the CRR. None of these terms are defined, so it is useful to enquire whether other statutes can be of some assistance. Interestingly, these words are variously used in a couple of other statutes. "Harassment" is the subject of its own statute – the Harassment Act 1997 – in which sections 3 and 4 indicate that it must be a specified act or continuing acts that cause a person to fear for his or her physical safety. That means physical safety, but it obviously has a mental effect (fear). It is not useful for considerations under the COP (unless an operator were to start beating up residents physically!). Both words are used in Rule 10.3(a) and (c) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which list six types of conduct that a lawyer must not engage in. The same Rules also mention "courtesy" and "respect" in Rules 10.1 and 12, as standards that lawyers must observe when dealing with "all persons" (10.1) and "others" (12). These terms are not defined. Obviously, these statutes do not set their own thresholds as to what amounts to harassment, bullying, discourtesy and disrespect, and those bars are set by the courts or the professional governing body. What I am required to assess, in relation to bullying, harassment, discourtesy and disrespect, and any other behaviours (since the types of behaviour are not closed), is whether they amount to that which may affect the safety and security and the rights of the Applicants in terms of the COP and CRR. In the absence of any statutory definitions, I will therefore need to resort to the ordinary dictionary understanding of these words.

Items of Alleged Unfair Treatment

Item 5 - "No documenting of approval by Senior Management (The Facilities Manager's (at the time) consent)"

88. I am considering this Item of unfair treatment first because it is central to the consideration of a number of other important Items. This Item relates to the apparent failure by the Respondent to record, and if necessary act upon, the consent to occupy Unit 4, which the Applicants maintain was given to them. Such consent was sought by the Applicants in order to

satisfy the requirements of clause 2(h)(ii) in the Management Deed (page 16 in the BOD). Clause 2(h) states (as an obligation of the Resident):

(h) Not to Sell or otherwise dispose of Home

Not to sell, transfer, assign or otherwise dispose of, lease, let or part with possession of the Home to any person who:

(i) Is under the age of 55 years, and

(ii) Has not been approved by the Company as a suitable Resident, and

(iii) Has not agreed to enter into a Management Deed with the Company substantially in the same form as this Deed.

89. In paragraphs 10 and 26 of the PD, and paragraph 60 of this decision, I dealt with the consent of the Village to the transfer of Unit 4 to the FP and CK O'Connor Family Trust and the occupation of Unit 4 by Frank Patrick O'Connor and Claudia Kevey O'Connor.

90. There were two occasions on which occupation of Unit 4 was discussed by the Applicants with the Respondent:

(a) The first is set out in paragraph 5 of the affidavit of Shannon Joanne Coleman (page 120 in the BOD), a witness for the Applicants. She indicates in paragraph 3 that she has been a tertiary lecturer, foundation owner of a Tertiary Distance Education business and working in education. [Mrs Coleman is married to Claudia Currie's cousin, but being related to or friends of a party does not mean that evidence should be assumed to be biased. Simon Greenleaf, a leading authority on evidence, put it this way: "If the witness could be supposed to have been biased, this would not destroy their testimony to matters of fact; it would only detract from the weight of their judgment in matters of opinion. The rule of law on this subject has been stated by Dr Lushington: 'When you examine the testimony of witnesses nearly connected with the parties, and there is nothing very peculiar tending to destroy their credit, when they depose to mere facts, their testimony is to be believed; when they depose as to matter of opinion, it is to be received with suspicion' (Dillon v Dillon 3 Curteis's Eccl. ep.96,102)"]. I found Mrs Coleman a very credible witness. In paragraph 5 of her affidavit, which was confirmed (apart from paragraph 2 which I excluded) at the hearing, she states: "…when Frank O'Connor, Claudia's father, had to move into the rest home at Radius Windsor Court in April 2013, I was with Claudia when she went to the Manager's Office to deal with some paperwork. Claudia told the Facilities Manager (at that time), that the Trust's house would not be sold, that they would be coming and going from it to visit her dad and when Ron retired from

his job in Rotorua they would be moving there permanently.“ The Respondent has contended in Footnote 4 on page 5 of their submissions that this earlier discussion with The Facilities Manager (at the time) at the time Mr O'Connor moved into the care facility was in general terms and no approval was sought or given. While the express question "Do we have consent to occupy?" may not have been expressly asked, and the answer "Yes, you have" may not have been expressly given, the lack of any objection to the contrary from The Facilities Manager (at the time), an employee (Facilities Manager) of the Respondent with ostensible authority, could readily be perceived by the Applicants as constituting consent, without more. The Applicants are lay persons not versed in the finer distinctions of express or implied approval, but the ordinary and usual understanding of this discussion could reasonably have been taken to amount to concurrence by the Respondent.

(b) The second occasion was in January 2014, following the death of Mr O'Connor on 14 January 2014. The Applicants met with the Facilities Manager, The Facilities Manager (at the time). In an e-mail dated 3 May 2021 at 4.46 pm, the Applicants asked The Facilities Manager (at the time) to confirm that this meeting took place, as she had left the employment of the Respondent and was then residing in Australia. The e-mail was sent to the e-mail aussiehaggis@hotmail.com, which the Respondent has accepted as genuine. In the e-mail the Applicants stated:

"Hi ████, We trust everything is going well for you in Australia. ████ the reason we are getting in touch with you is that we have an issue with Radius regarding the occupancy of our house, Unit 80, owned by the Frank O'Connor Family Trust, of which Claudia is now the sole trustee following the passing of Frank O'Connor. We need clarification from you, ████ that we indeed had a meeting with you to inform you that Frank, Claudia's father passed away and that we wouldn't be selling the unit but occupying it ourselves when I retired from work in Rotorua in November 2017. The meeting took place in early 2014. Frank passed away on 14 January 2014. If you could help us and clarify the above we would be very grateful as that is all Radius requires for their records."

The Facilities Manager (at the time) e-mailed a reply on the same day at 8.58 pm (Document 5 on page 23 in the Bundle of Documents). She said:

"Good afternoon Claudia Yes, we did have a meeting and it was confirmed that as joint owner with Frank, you and Ron would be occupying Unit 80, upon retirement. Regards ████████████ ████

91. I also e-mailed The Facilities Manager (at the time) to the same e-mail address on two occasions – on 11 July 2023 and 26 July 2023 – asking for her recollections of the meeting. For reasons best known to herself she declined to reply. The e-mails did not "bounce back".

92. It is noted that The Facilities Manager (at the time) had obviously accepted that the Applicants were residents, and they were treated as such by her. That is indicated in her letters to them of 25 May 2017 (page 100 in the BOD) and 13 July 2017 (page 34 in the BOD).

93. The Respondent has accepted that the conduct of the Respondent prior to 2019 "was capable of being interpreted by the Applicants as consent..." (paragraph 16 of The Respondent's solicitor at Sharp Tudhope's Statement of Evidence dated 12 February 2024 in the Bundle of Documents page 139 and confirmed in paragraph 37(b)(viii) the Respondent's Submissions dated 16 April 2024). I agree. In particular, I consider that the two occasions that the Applicants met with The Facilities Manager (at the time) (as outlined in paragraph 90 above) could reasonably have been interpreted by the Applicants as consent for them to occupy Unit 4. I re-iterate that while the question "Do we have consent to occupy?" may not have been expressly asked, and the answer "Yes, you have" may not have been expressly given, the lack of any objection to the contrary from The Facilities Manager (at the time), an officer with ostensible authority, could readily be perceived by the Applicants as constituting consent, without more. The Applicants are lay persons not versed in the finer distinctions of express or implied approval, but the ordinary and usual understanding of these discussions could logically and rationally have been taken to amount to concurrence by the Respondent. This was affirmed by the subsequent actions of the Respondent in treating the Applicants as if they were residents, which I have outlined in paragraphs 28-35 of the PD annexed to this Decision.

94. I find that consent to occupy was obtained by the Applicants, and they either assumed that nothing further was required or did nothing in the expectation that it was the Respondent's responsibility to issue any new documents. This brings me to consider two aspects:

   (a) Who is responsible for issuing ORA documents?

   (b) Was the issue of new ORA documents in this case even necessary? (See paragraph 102 below)

(a) Who is responsible for issuing ORA documents?

It is normal practice for the village operator to be responsible for issuing ORA, documents. This could be supported not only by normal practice, but also by section 35 of the RVA, which requires "operators of a retirement village to ensure that, at the commencement of the resident's

occupation right, there is no legal impediment to the occupation of the residential unit for residential purposes – the absence of a completed occupation right document could constitute such an impediment. In my view it was therefore the responsibility of the Respondent to do this if it needed to be done. This did not occur. I am not sure why The Facilities Manager (at the time) did not pass on to those in the organisation responsible for issuing documents. It is apparent that either she did not consider it necessary, or simply forgot about it (inadvertence). In the event, clause 4(b) of the Management Deed requires the Respondent to "**Maintain proper records** and books of account", while clause 4(o) of the Management Deed requires the Respondent to "Generally attend to the management and administration of the Village." In addition, Regulation 8 of the General Regulations sets out the operator's obligation to run the village properly. It requires that "An occupation right agreement must include a provision requiring the operator of the retirement village- (a) to use reasonable care and skill in ensuring that the affairs of the village are conducted properly and efficiently; and …(e) to use reasonable care and skill in the exercise and performance of the operator's powers, functions and duties." Further, Regulation 49 of the General Regulations requires that in a deed of supervision between an operator and the statutory there must be a provision requiring the operator of the village "(a) to use reasonable care and skill in ensuring that the affairs of the village are conducted properly and efficiently." It would be reasonable to expect that the recording of consents and the issue of any documents considered necessary would be done efficiently.

(b) Was the issue of new ORA documents in this case even necessary? (see paragraphs 102(b) to (f) below).

In the absence of any record of consent having been kept and, if it was considered necessary, any superceding new ORA being presented, actions undertaken by the Respondent after 2019 did not consider whether the Applicants, having been treated as residents for a number of years, might actually be residents pursuant to an occupation right constructed from a combination of documents, which I concluded in the PD. Such actions also did not consider whether the Applicants could be residents under the original Encumbrance and Management Deed structure. The Respondent eventually "discovered" in late 2018 that the Applicants were in occupation yet there were no apparent records of approval, and that resulted in a letter dated 24 January 2019 from their lawyer, Sharp Tudhope (Document 1 on page 14 in the BOD) which requested copies of any approvals, and a further letter from Anthony Harper to Mrs Currie dated 4 November 2020 (Document 3 on page 21 of the BOD). This eventually elicited a response from North End Law dated 12 November 2020 (Document 14 on page 48 of the Bundle of

Documents). It is this last letter that the Respondent indicates (on page 17, paragraph 37(b)(ii) of their submissions dated 16 April 2024) first "raised" the issue of approval/consent having been given. The Respondent says that the letter was in "vague terms" and "provided no details of compliance with the management deed." It nevertheless "raised" the issue. Right 7 of the CRR does not require a certain level of specificity to be achieved before rights are to be respected. An approved right to occupy was raised, and it deserved to be taken seriously and fully investigated. Ignoring it did not indicate respect for the right. It is apparent that the Applicants did nothing formal from January 2014 to November 2020 to inform the Respondent of the consent situation. They should have. It could have prevented a lot of future aggravation though I do not consider that it would have averted this dispute – it would simply have come to a head sooner. That said, their acquiescence is understandable in the light of their being treated as residents from 2014 to 2019. Be that as it may, it does not change my finding that the Applicants did obtain consent from the Respondent to occupy Unit 4 (formerly known as Unit 80).

95. Quite apart from the consent/approval being mentioned in the letters of North End Law of 12 November 2020 and Norris Ward McKinnon of 28 May 2021, both to Anthony Harper, the Applicants maintain that a copy of The Facilities Manager (at the time)'s confirmation of consent was shown to, or mentioned to, the CEO of Radius Care on two occasions:

(a) At the meeting at the home of the Applicants on 1 August 2022 (or 5 August according to the Applicants) (mentioned on Documents on pages 71 and 73 of the BOD). There is some evidence of this in that in his e-mailed letter to the Applicants on 12 August 2022 (Document 22 on page 70 of the BOD) The CEO of Radius Care makes reference in paragraph 5 to putting the Applicants "in a position as close as possible to the situation you would have been in, if your right to occupy had **been documented in 2014.**" This indicates that he was therefore aware of the significance of the year 2014, which was the year in which the consent was given by The Facilities Manager (at the time), and was aware that it had not been documented. I am therefore satisfied that a copy of The Facilities Manager (at the time)'s confirmation of consent was shown to the CEO of Radius Care at that time.

(b) At the meeting at the home of the Applicants on 23 September 2022, chaired by Peter Carr JP (Document 24 on page 77 of the BOD). It is not recorded in any Minutes whether this occurred, but Mr Carr has confirmed to me that it was mentioned at that meeting.

96. What I am required to determine, however, is specifically whether the non-recording of the consent by The Facilities Manager (at the time) in 2013 and/or early 2014 amounts to "unfair treatment". I do not consider it does. While the results of not recording it may have caused future unpleasant events, there is no evidence to suggest that The Facilities Manager (at

the time)'s lack of action was deliberately intended at that time to be unfair. It would be difficult to attribute to her any deliberate and wilful plan to be unfair to the Applicants by not officially recording the outcome of the meetings with her. She was not **deliberately and intentionally** ignoring their rights, nor being discourteous. It was certainly inefficient or inadvertent or careless if it needed to be done, or may not have been done because she did not think it was necessary.

97. I therefore determine Item 5 as follows:

(a) The Applicants obtained consent from the Respondent in late 2013 and early 2014 to occupy Unit 4.

(b) The consent was obtained in a manner and in circumstances which could reasonably and ordinarily be construed as amounting to approval to occupy Unit 4.

(c) The failure by The Facilities Manager (at the time) to record the consent was not unfair. Since this is the subject of Item 5, it follows that Item 5 is determined in favour of the Respondent.

Item 1 – Letter from The Respondent's solicitor at Sharp Tudhope of Sharp Tudhope, Lawyers, dated 24 January 2019. This is Document 1 in the Bundle of Documents.

98. On 24 January 2019 the Respondent's Sharp Tudhope, wrote to the Applicants (Document 1 on page 14 in the BOD). As stated in paragraph 2 of that letter, Sharp Tudhope carried out "a review of all occupancy agreements and other entitlements to reside at the Village", and it arose "as a consequence of some matters that have been raised in general meetings of the Village residents. It referred in paragraph 3 to transfers and transmissions registered against the title for Unit 4 between 1995 and 1998, which was before the Respondent acquired the Village. Paragraph 5 referred to approvals being required from the Respondent for "a suitable resident" pursuant to clause 2(h) of the Management Deed, and sought copies of approvals for those transactions and Management Deeds entered into by the owners subsequent to Francis Patrick O'Connor and Claudia Kevey O'Connor. It further sought copies of approvals for Ron Currie as a resident, and a Management Deed entered into by Ron and Claudia Currie.

99. Paragraph 4 referred to the penalties set out in the Encumbrance for breaches of the Management Deed, namely a rent charge to the value of 10% of the rateable value or $20,000, whichever is the greater. The question of whether any breaches occurred is central to a number of other

Items raised by the Applicants, and it is therefore appropriate to deal with it as part of the consideration of this Item.

100. It is apparent from this letter that a number of assumptions were made:

(a) Assumption 1 - That Frank Patrick O'Connor and Claudia Kevey O'Connor may not have obtained consent in 1995 to transfer Unit 4 to their family trust; and

(b) Assumption 2 - That the intervening transfers from FP and CK O'Connor to FP OConnor, CK O'Connor and JN Fitzgerald in 1995, the transfer (with concurrent prior transmission from CK O'Connor to FP O'Connor and JN Fitzgerald in 1998, and the transfer from FP O'Connor and JN Fitzgerald to CM Currie in 2014, were all transactions which may have breached clause 2(h) of the Management Deed (Not to Sell or Otherwise dispose of Home); and

(c) Assumption 3 - That the Applicants had not obtained approval as "suitable residents" to occupy Unit 4.

None of these assumptions were correct, and I will examine each of them.

101. Assumption 1

(a) As indicated in paragraph 10 and 26 of my Preliminary Decision as to Parties and Jurisdiction dated 20 September 2023, the transfer of Unit 4 to the FP and CK O'Connor Family Trust, with continuing occupation by FP and CK O'Connor, was done in 1995 with the consent of Ohaupo Developments Limited, the owner of the Village at that time. This was confirmed to me in writing by Petra Bates, the surviving director of Ohaupo Developments Limited, on 18 July 2023. Mr and Mrs O'Connor were occupying Unit 4 when the Respondent acquired the Village, and therefore no further consents were required from Ohaupo Developments Limited. Since a family trust is created by private deed and is not registered anywhere, it has no ability to own real estate in its actual name. Instead, property is held in the names of the trustees of the trust, who hold it as mere trustees (in trust for the beneficiaries of the trust). The transfer in 1995 was therefore to Francis Patrick O'Connor, Claudia Kevey O'Connor and John Noel Fitzgerald (their solicitor, and an independent trustee), which was a common structure. The Trust became the owner of Unit 4, and still is the owner of Unit 4.

(b) I do not consider that the transfer to the Trust breached clause 2(h) of the Management Deed. While it was technically a sale (which would normally be carried out at market value, with a debt-back for an equivalent amount owed by the Trust to FP and CK O'Connor, which was forgiven), it did not breach the requirements of 2(h) (i), (ii) and (iii). The persons (FP and CK O'Connor) occupying (that is, in actual

possession) of the Unit were both over 55, the Village owner had approved them as "suitable Residents" (they had already been there 7 years), and they (as occupiers) and the Trust (by its trustees, two of whom were the occupiers, as registered proprietor) were both bound by the provisions in the existing Encumbrance and Management Deed, because, as we have seen, it is in law a mortgage). In this regard, there is an interesting aspect arising from the difference between section 104 (1) of the Property Law Act 1952 and section 203(3) of the Property Law Act 2007. Section 104(1) indicates that, when land is acquired which is subject to a mortgage, then successors in title are bound by that mortgage and, **"notwithstanding anything to the contrary in any mortgage"**, **no additional covenant or contract is required. If any additional covenant or contract is procured, then it is of no effect whatsoever.**

(c) Looking first at section 104, it states:

(i) **(3) Notwithstanding anything to the contrary in any mortgage**, it shall **not** be obligatory on **any mortgagor or any person acquiring land as aforesaid to procure** or execute any covenant or contract for the payment of principal, interest**, or other money** secured by or the observance **or performance of the covenants, conditions, or agreements contained or implied in the mortgage,** and no covenant, contract, or condition by the mortgagor or by any such person acquiring the land as aforesaid (whether expressed in a mortgage **or in any instrument collateral to the mortgage**) **to procure the execution of or to execute any such covenant, condition or agreement shall have any effect whatsoever."**

(ii) The result is that the requirement in clause 2(h)(iii) for the mortgagor (former owner) or the purchaser (new owner) to procure or enter into any further Management Deed [being a contract, and an instrument collateral to the mortgage(=encumbrance)] from the trustees of the Trust was not obligatory even though (=notwithstanding) clause 2(h)(iii) may have required it. No new Management Deed was required.

(iii) Section 104 applied to the world as it was when the Village came into existence in or about 1988, and continued to apply until it was superseded by section 203 on 01 January 2008. If section 104 of the Property Law Act 1952 applied to the Management Deed, then sub-section (4) states that the "section applies to all mortgages where land subject to the mortgage is acquired as aforesaid after the commencement of this Act". This means that all transfers of the land which were made up to the date when the Property Law Act 1952 was replaced by the Property Law Act 2007, that is, from 01

January 1953 until 01 January 2008, would be subject to the same provisions, and that covers the transmission and transfers in 1998. even though they may not have signed the original document.

(d) Conversely, section 203(3) states that “Sub-section (1) is **subject to** anything to the contrary expressed or implied in the mortgage or any other instrument”, so that acquiring land subject to a mortgage may still be subject to a requirement in the mortgage requiring additional documents, namely a further Management Deed. There are therefore two quite different outcomes, and the question is which Act might apply to each transaction. Back to **Jackson Mews** -

(e) The **Jackson Mews case**, which stated that section 203 of the Property Law Act 2007 applied to all mortgages whether entered into before, at, or after that Act, had not been decided in 1995. It was not decided until 2010. Further, it is unclear whether that case could be distinguished in that the blanket application of section 203 could be confined to the principle in that case (namely that any document which might be a mortgage could not be redeemed if it did not secure a loan, and could not be redeemed while other covenants were still to be performed), or whether it applies to all matters arising from mortgages. The case was concerned with the entitlement to redeem in terms of section 81 (2) of the Property Law Act 1952, which was replaced by section 97 of the Property Law Act 2007 but with the addition of the words “and the performance of all other obligations secured by the mortgage”. These words proved to be pivotal in that they resulted in the Supreme Court refusing leave to appeal because it was absolutely clear that there were still other obligations in the encumbrance which were to be performed, and therefore a discharge of it was impossible. The payment of $9.90 to discharge the encumbrance was tendered after the Property Law Act 2007 came into force. As stated in paragraph 52 of the CA judgment, it was therefore **unnecessary for the Court to decide what the respondent’s rights were prior to 1 January 2008 when the Property Law Act took effect,** because it was clear that as from that date there was no right to discharge the encumbrance (=mortgage) because section 97(2) prohibited it while there were still other obligations in the encumbrance to be performed by the respondents and their successors in title. The decision was based, then, on the change of wording in section 97(2), which was applied to the world as it was when the case first came before the High Court on 1 October 2008, after the 2007 Property Law Act had come into effect. Following this line of reasoning, it may be contended that section 104(3) of the Property Law Act 1952 would apply to obligations in the Encumbrance up till 1 January 2008 when the Property Law Act 2007 came into force, and section 203(3) would apply to obligations under the Encumbrance after that date. If clause 2(h)(iii) is taken as an obligation in the Encumbrance, then pursuant to section 104(3) it would

have no effect whatsoever for transactions prior to 1 January 2008, and pursuant to section 203(3) it would have effect in respect of transactions after 1 January 2008. On that basis, clause 2(h)(iii) would not apply to any transfers or transmissions prior to 1 January 2008 and would apply to any transfers after 1 January 2008.

(f) It is possible that the requirement in clause 2(h)(iii) of the Management Deed was therefore at worst unlawful and at best unnecessary when it was promulgated in 1988, as section 104(3) of the Property Law Act 1952.applied regardless of anything to the contrary in the mortgage. I tend to the view that it was lawful but unnecessary. Even if it was lawful, then it was unenforceable (of no effect whatsoever). If it was unenforceable ab initio, then nothing can be done to change that. That leads to the resultant conclusion that, at least until 2010 when **Jackson Mews** was decided [making the Property Law Act 2007(section 203) apply retrospectively],and possibly thereafter if that case is distinguished, clause 2(h)(iii) (requiring a new Management Deed to be procured) was unenforceable and therefore would not need to be complied with. If, however, the statement in Jackson Mews that the Property Law Act 2007 applies to all mortgages, no matter when they were entered into, and if it applies to all terms in the mortgage and not simply to the right to redeem, then there would be an arguable case that the requirement in clause 2(h) to procure a new management agreement was valid (albeit unnecessary – see sub-paragraph (g) below).

(g) I do not consider that I need to determine whether section 104 or section 203 applies to this particular requirement, because in the event, as we have seen, in law the covenants in the existing Management Deed, whether covenants in gross (contained in a mortgage) or positive/negative covenants, run with the land, and continue to bind successors in title, namely the Trust. It is the Trust that would be disposing of the property. The requirement to procure a new management deed was therefore unnecessary and superfluous.

102. Assumption 2

(a) When looking at the transmission in 1998 (to FP O'Connor and JM Fitzgerald), the transfer in 1998 (to FP O'Connor CM Currie), and the transmission to Claudia Currie in 2014, one needs to know what one is looking at. These were not sales, transfers, assignments or dispositions to another party, in terms of clause 2(h) in the Management Deed. They were simply updates of the trustees of the Trust, brought about by deaths, retirements, and appointments of trustees. When a trustee retires or dies, or a new trustee is appointed, it is necessary to update

the ownership record of all assets to reflect the names of the remaining trustee(s). The owner of Unit 4 did not change. It was at all times, and still is, the FP and CK O'Connor Family Trust.

(b) The Inland Revenue Department does not consider that there is a "disposal" when land is transferred on a change of trustees of a trust. This is set out in an Interpretation Statement issued on 14 June 2022 under IS22/03. The reasons were as follows:

(i) Page 21, paragraph 85 – "In the Commissioner's view, the ordinary meaning, case law and legislative history and context indicate that 'disposal' in the land sale rules: - requires complete alienation of the land by the disposer – the land must be 'got rid of' by the person; and – requires dealing with the land -so that one person loses ownership of the land and another gains it (or gains a corresponding interest in respect of the same underlying land). As such in the Commissioner's view, 'disposal' in the land sale rules does not include transfers to self (in the same capacity."

(ii) Page 31, paragraphs 102 to 104 – "102 The Income Tax Act treats all the trustees of a trust as essentially a single person. This is because of the definition in s YA1, which provides (relevantly) that: 'trustee – A) for a trust – (i) means the trustee only in the capacity of trustee of the trust; and (ii) includes all trustees, for the time being, of the trust'. 103 Because of this definition, where land is transferred because the trustees of the trust have changed, any 'disposal' would have to be a 'disposal to self'. 104 As noted at [85], in the Commissioner's view, 'disposal' in the land sale rules does not include transfers to self (in the same capacity). As such, the Commissioner does not consider that a transfer of land on a change of trustees of a trust will be a disposal for the purposes of the land sale rules."

(c) It follows that since these are not disposals, then no consent from the Respondent would have been required.

(d) As far as the question of "parting with possession", it is unclear what "possession" means. At all material times the Trust had and still has legal possession. As far as actual possession (=occupancy) of Unit 4 is concerned, Frank Patrick O'Connor and Claudia Kevey O'Connor were occupiers with the consent of the operator at the time they transferred Unit 4 to their Trust (see paragraph 101(a) above). Frank Patrick O'Connor, one of the original owners/occupiers, continued to live in the Unit until I he could no longer do so and went into care (late 2013), John Noel Fitzgerald was an independent solicitor trustee and at no time occupied Unit 4, so he could not part with possession. It was essentially vacant from 8 January 2014 (when Frank died) until 2017

when Ron Currie retired and the Applicants took up occupancy, and, as we have concluded in paragraph 94 above, the Applicants obtained consent in 2014 to occupy the Unit. Ron Currie occupied the Unit as the spouse of Claudia Currie, which is permitted in terms of sub-paragraph (c) in the definition of "resident" in section 5 of the RVA and clause 2 of the COP, and which most occupation right agreements permit. All of these occupiers were over 55 years of age. None of them were third parties who had no connection with the original owners or their family trust. I do not consider that there was any "parting with possession" in that sense, which was what the requirement was designed to prevent. In any event, it is likely no further Management Deed needed to be procured, for the same reasons as are set out in paragraph 101(c) to (f) above.

103. Assumption 3

As set out in paragraphs 88 to 94 above, I am satisfied that in late 2013 and early 2014 the Applicants obtained consent to occupy Unit 4.

104. I am therefore of the view that the 3 assumptions made in the letter were incorrect, and therefore the requests made in paragraph 6 of the letter were without basis. A lot of distress and aggravation could have been avoided if these matters had first been investigated by the Respondent, particularly the aspect of consents and the nature of the intervening transfers. Aggravation could also have been avoided if the Applicants had responded to the letter by producing early confirmation of some kind that they had obtained consent. They did not ultimately obtain confirmation from The Facilities Manager (at the time) until 3 May 2021.

105. There are further arguments which impact upon whether a breach of the Management Deed occurred. Many of these are outlined in the letter dated from Norris Ward McKinnon to Anthony Harper (Document 15 at page 51 in the BOD). These are:

(a) Possession never given to a person meeting all 3 criteria in clause 2(h);

(b) The Management Deed is personal to Mr and Mrs O'Connor and does not bind the Applicants;

(c) Radius failed to obtain any replacement Management Deed;

(d) The rent charge is an unenforceable penalty;

(e) Equity would in any event intervene to prevent the exercise of any remedies, based on the equitable doctrines of election, estoppel, waiver or acquiescence (laches), and unconscionability. I do not

consider that I need to go into these in any significant detail, but I will comment on each of them.

106. Possession never given to a person meeting all 3 criteria in clause 2(h) – Clause 2(h) contains agreement by the resident **not to** sell, assign or otherwise dispose of, lease, let or part with possession of the home to **any person** who is under the age of 55**, and** has not been approved by the Company (=operator) as a suitable resident, **and** has not agreed to enter into a Management Deed with the Company substantially in the same form as this Deed." Since the clause says "and" and not "or", for a breach to have occurred, the resident would have to have parted with possession to a person who had not fulfilled all 3 of these criteria. That did not occur. If Mr O'Connor is taken as the surviving original resident, and the Applicants are taken as "any person", then the Applicants would need to fulfil all 3 criteria. When the Applicants took possession in 2017, Mrs Currie was 69. Her spouse, Mr Currie, was 68. No breach of criteria (i). They had been approved as residents in early 2014 by a person in a position of apparent authority. No breach of criteria (ii). They were willing to enter into a further Management Deed if it was necessary, though they considered the existing Management Deed as binding upon them. No breach of criteria (iii). Even if we went back to when Mr and Mrs O'Connor transferred the Unit to their family trust in April 1995, all 3 criteria were still satisfied. I therefore agree with this argument.

107. The Management Deed is personal to Mr and Mrs O'Connor – This argument centres on the words "on the part of the Encumbrancers of the Deed" contained in the fifth paragraph of the Encumbrance. "The Encumbrancers" were Mr and Mrs O'Connor, and there is no provision in the Encumbrance, nor in the Management Deed, extending the meaning of that to their successors other than their personal representatives on the death of either of them. The Management Deed recognises this by requiring agreement from any new resident to a new Management Deed in substantially the same form [clause 2(h)(iii) and clause 6], whereupon the original resident is released from liability under the Deed. Now, as we have seen, the Encumbrance is a registered mortgage, and it runs with the land and binds any successors in title. We have also seen that the covenants in the Management Deed also run with the land. The Trust is therefore bound, and the trustees are personally bound. The Applicants and Respondent have agreed [Issue(a)] that for all practical purposes the Encumbrance and Management Deed shall constitute the ORA for the Applicants, so both parties (as occupiers and operator) are contractually bound by it. The argument that the Encumbrance and Management Deed were exclusive to and Mr and Mrs O'Connor only has therefore been effectively nullified.

108. Radius failed to obtain any replacement Management Deed - I have covered this in paragraph 94 above, and have agreed with this conclusion,

though I have also seriously doubted whether it was lawful from the outset to even require one (see paragraphs 101(c), (f) and (g) above).

109. The rent charge is an unenforceable penalty – I will look at this when considering Item 3 – see paragraphs 123 to 125 below.

110. Equity would in any event intervene to prevent the exercise of any remedies – I will look at this when considering Item 3 – see paragraphs 126 below.

111. On the basis of paragraphs 89 to 107, I therefore find that no breach occurred when the 1995, 1998 and 2014 transactions on the title for Unit 4 took place.

112. In the event, I am again required to determine whether the **actual letter** from The Respondent's solicitor at Sharp Tudhope constitutes unfair treatment of the Applicants. While The Respondent's solicitor at Sharp Tudhope was not aware of the historical consents, and, with respect, seemingly unaware of the nature and effect of what he was looking at on the title, and he made some incorrect assumptions accordingly, there is no evidence to suggest that he knew that the assumptions he made were incorrect yet deliberately and knowingly proceeded to make them. He was not "trying it on." The letter was an inquisitorial letter of the kind that one might expect in the circumstances that he says he became aware of at some time in late 2018. It sought information about approvals, and management deed documents. Again, it was polite and recommended that the Applicants obtain legal advice, and it enclosed the title, encumbrance and management deed. It alluded in paragraph 4 to penalties for a beach of the management deed – which, though factual, may have been better left out – but it made no accusation that a breach had actually occurred. While it may have been concerning for a layperson to receive, they were encouraged to seek legal advice. Again, in these circumstances, it would be difficult to conclude that The Respondent's solicitor at Sharp Tudhope was writing in bad faith or in a malevolent intimidatory manner. He was simply doing his job as a lawyer in asking appropriate questions to clarify the situation.

113. I am therefore satisfied that the letter does not constitute unfair treatment, and I determine Item 1 in favour of the Respondent.

Item 2 - 2019 Stopped treating us as residents

114. The Applicants maintain that from early 2019, following receipt of The Respondent's solicitor at Sharp Tudhope's letter of 24 January 2019, they ceased to be treated as residents and became "persona non grata", because it was considered by the Respondent that they did not have an

occupation right agreement and were therefore not residents. There are a number of documents relevant to this allegation:

(a) Minutes of a Special General Meeting of Windsor Estate Body Corporate S.49465 on Thursday 22 March 2018 (page 208 in the BOD) – This was a Body Corporate Meeting. The Applicants are both recorded as being present as “Members of the Body Corporate”. Also, at the meeting as “Guests” were The Facilities Manager (at the time), the Village Manager, Michelle Slabber, Radius Care Finance Director, and Mike Hablous, an independent consultant. It is apparent from this that the Applicants were both regarded as members of the Body Corporate.

(b) Minutes of a Special General Meeting of the Windsor Estate Body corporate S.49465 on Monday 16 April 2018 (page 210 in the BOD) – This was a meeting of the Body Corporate. Again, both of the Applicants are recorded as being present under “Members of the Body Corporate.” The Facilities Manager (at the time) and Mike Hablous are listed as “Guests”. Under “General Business”, paragraph d. (Page 11 and page 216 in the BOD) states: “Concern was expressed that Ron Currie had been constrained from speaking during the meeting. The Respondent's solicitor at Sharp Tudhope noted that Ron’s name was not on the title of the unit he occupies and therefore he was not a member of the Body Corporate and has no right to speak. He may only speak at the discretion of the Chair.” Presumably Claudia Currie would have a right to speak, but not Ron Currie. However, we are presently looking at whether a distinction was being made between the Applicants and other unit owners, rather than whether Mr Currie had any right to speak and vote, which I will consider under Item 11. It is also salient to notice that this was a Body Corporate meeting, not a residents’ meeting. The Unit Titles Act 2010 and Unit Titles Regulations 2011 apply, except to the extent that they may be excluded by section 11 of the Unit Titles Act. Mr Currie was therefore being treated in terms of these statutes. It is indicative, however, that notwithstanding the Minutes recording both under “Members of the Body Corporate”, the Respondent’s position had changed from the March meeting and it was now nevertheless making a separation of the Applicants, based on who was recorded on the title for Unit 4.

(c) Minutes of the Annual General Meeting of Windsor Estate Body Corporate S.49465 on was held on 3 September 2018.(page 218 in the BOD). This was a meeting of the Body Corporate. Claudia Currie is recorded as being present under “Members of the Body Corporate. Ron Currie is recoded as being present as a “Guest”. Also attending as “Guests” were Vicki Partridge, Interim Village Manager, and Mike Hablous, Consultant. The Chair was The Respondent’s solicitor at Sharp Tudhope. Strangely, however, while not regarded as a member

of the Body Corporate, Ron Currie is nevertheless recorded as seconding a motion (page 219 in the BOD) and asking questions about painting of the units and the LongTerm Maintenance Plan (page 221 in the BOD). Under "General Business", paragraph 1, headed up "Right to Speak", it states: "Ron Currie raised his right to speak at Body Corporate meetings. The Chair responded by saying that as Ron was not a title holder he was not a member of the Body Corporate. Therefore he had no statutory right to speak. Ron then asked if he provided a letter from Claudia Currie appointing him as her representative could he then speak. The Chair replied that would be insufficient - Claudia needed to complete a proxy form and to submit it prior to the meeting before Ron gained any statutory right to speak. The Chair noted that notwithstanding these requirements he would allow Ron to contribute at the meeting as Ron had already done." It is noted that allowing his participation seems inconsistent with regarding him as not being a member of the Body Corporate and therefore unable to speak or vote. However, again, I am not concerned at this stage with the right for Mr Currie to speak and vote – I will deal with this under Item 11. What it does indicate, however, is that the position of the Respondent had changed from the March meeting, and the Respondent was now making a separation of the Applicants, based on who was recorded on the title for Unit 4.

(d) In the Minutes of the Annual General Meeting of Windsor Lifestyle Estate dated 28 January 2022, Claudia Currie is recorded in the "residents that registered themselves as being present at the meeting", but is also recorded under "Apologies".

(e) On 12 August 2022, the CEO of Radius Care, wrote to the Applicants following a meeting with the Applicants on 1 August 2022, and a telephone conversation with Mr Currie on 11 August 2022. It is Document 22 on page 71 of the BOD. In paragraph 4 of that letter he stated: "Radius Care is **not** addressing your complaint as made in accordance with the Code of Practice**, which applies to 'Residents' of the Village** as defined in the Code of Practice. In any case, as previously relayed to you, we see no substance to the claims in your complaint." It is apparent that the CEO of Radius Care did not regard the Applicants as "residents" and therefore saw no need to deal with their complaint. I will discuss this further under Item 22 below.

(f) The Minutes of the Annual General Meeting of Windsor Lifestyle Estate dated 14 September 2023 (Document 2 at page 16 of the BOD and Document 17 at page 57-58 of the BOD). This was a meeting of Residents (the Village). Neither of the Applicants are recorded under "Residents Registered as being present at the meeting" (page 57). However, the minutes record (page 58) that "Ron asked about Jan's

role”. This refers to Ron Currie, and to Jan, representing the Statutory Supervisor.

115. It is evident from these documents that in late 2018 the position of the Respondent moved from regarding the Applicants as residents and members of the Body Corporate, to regarding them both as non-residents, and regarding at least Mr Currie as a non-member of the Body Corporate. Given that they had been treated as residents since 2014 (see my Preliminary Decision dated 20 September 2023, which the Respondent has entirely accepted), and as Body Corporate members at least up to April 2018, I consider that this was discourteous in the extreme. To be publicly “called-out” in this manner in meetings would have been humiliating and embarrassing, as well as a breach of privacy. The position taken by the Respondent was pre-emptive. It would have been better for the Respondent to keep its concerns private and confidential until it had fully and thoroughly investigated the position maintained by the Applicants, or had them investigated and/or determined by an independent enquiry. It would have been much more sensitive to maintain the status quo as far as treatment of the Applicants, and address any perceived “irregularities” privately. Ultimately that has become the task of this Panel. Until that was done, treating them in this manner was premature, high-handed, humiliating, discriminatory and discourteous.

116. I therefore determine Item 2 in favour of the Applicants.

Item 3 - November 2020 – April 2021 Letters from The Respondent’s solicitor(s) at Anthony Harper of Anthony Harper

117. This Item refers to two letters written by Anthony Harper - the first on 04 November 2020 to Claudia Currie (Document 3 at page 21 of the BOD) and the second on 16 April 2021 to North End Law (Document 3 at page 18 of the BOD). Before looking at these particular letters, it is useful to set out the chronology of letters between the parties, and a summary of the significant parts in each:

(a) **24 January 2019 - Sharp Tudhope to Mr and Mrs Currie** (Document 1 on page 14 of the BOD) – I have already discussed this at paragraphs 99 to 113 above.

(b) **04 November 2020** - Anthony Harper to Claudia Currie (Document 3 on page 21 of the BOD) – In the absence of evidence from Mrs Currie of approval for her and Mr Currie to occupy Unit 4, the Respondent had concluded that breaches of the Management Deed has occurred in respect of the transfers on 22 September 1998 and 16 April 2014, and that each of these breaches was a continuing breach until remedied. As a result, **demand was made for outstanding rent charges from**

2014 to 2020 amounting to $152,000 (Invoice is Document 13 on page 46 of the BOD). It was stated that Mrs Currie, as registered proprietor, was personally liable for the rent charges, and if the Invoice was not paid within one month of the date of the letter then the Respondent would **exercise its remedies under the Encumbrance, including the power to enter into possession of the unit and the power of sale.** There was a further indication that annual rent charges for the period 1999 to 2013 amounting to $330,500.00 would not be sought but Radius reserved its rights to recover these in the future. It was recommended that Mrs Currie seek legal advice.

(c) **12 November 2020 - North End Law to Anthony Harper** (Document 14 on page 48 of the BOD) – This was in response to Anthony Harper's letter of 4 November 2020. The allegation of breaches of the Management Deed was refuted. It was stated that the Trust had owned a home in the Village **with the full knowledge and consent of the Village Management since 2014. While there had been changes to the trustees of the Trust, there had been no sale, transfer, assignment or disposition by the trustees.** The reference to entering into possession and exercising the power of sale was regarded as heavy-handed and possibly a breach of could be seen as a breach of the COP because it was bullying, harassment or victimisation and a failure to treat Mrs Currie with courtesy and respect.

(d) **28 January 2021 - North End Law to Anthony Harper** (Document 14 at pages 49-50 of the BOD) – This was a further letter in response to Anthony Harper's letter of 4 November 2020**. It re-iterated the Respondent's position that no breach of the Management Deed had occurred because ownership and possession had been consented to by the Village Management at all material times. The history of such consents from 1988 to 2014 was outlined.**

In addition, mention was made of an approach by the Applicants to Steven Heeson at Radius Care in May 2017 to move into Unit 4,. Reference was made to correspondence in July 2017 to build a small deck and cross-brace some pillars, which was processed by the Facilities Manager (The Facilities Manager (at the time)) and consented to. At the 2017 AGM Mr and Mrs Currie were listed as residents. It was stated that all actions taken by the Applicants since 2017 in respect of Unit 4 had been consented to. No breach of the Management Deed had occurred as none of the events in clause 2(h) had occurred. Reference was made to occupation being possible by someone other than the owner provided there was no letting arrangement. Mrs Currie was entitled to live in Unit 4 with her husband. The possibility of appointing Mr Currie as a trustee of the Trust was mentioned. An alternative proposal to transfer Unit 4 to the personal names of the Applicants, with consent being obtained, was mentioned.

(e) **16 April 2021 - Anthony Harper to North End Law** (Document 3 on pages18-20 of the BOD) – Anthony Harper indicated they had met with the Managing Director and General Manager of Villages and were instructed to respond to the letter from North End Law of 28 January 2021. They disagreed that there had been no breach of the Management Deed and disagreed that ownership and occupation of Unit 4 had been consented to. The view of Radius in respect of the ownership history was outlined, with the conclusion that only occupation by Mr and Mrs O'Connor was intended. **Any consent to the occupation by the Applicants was denied**, with the possibility of a mistaken belief that Mrs Currie was Mrs O'Connor, because they had the same Christian name, being raised. The Respondent did not agree with Mr Currie being a trustee and did not consent to the transfer to the joint names of the Applicants as trustees. **The allegation of a breach of clause 2(h) was maintained, and an updated Invoice dated 27 April 2021 was enclosed for annual rent charges up to 31 March 2021, totalling $186,000.00** (Document 13 on page 47 of the BOD), adding a further $34,000.00 to the amount demanded in the Invoice of 4 November 2020. A proposal to settle at the 2014 value of $185,000, on the basis all outstanding annual rent charges would be waived, was put forward.

(f) **28 May 2021 – Norris Ward McKinnon to Anthony Harper** (Document 15 on pages 51 to 55 of the BOD) – This was in response to Anthony Harper's letters of 4 November 2020 and 16 April 2021. This refuted that any breach of the Management Deed had occurred, refuted that there was any continuing breach, and confirmed that in early 2014 Radius had agreed to the Applicants' occupation of Unit 4. It indicated the rent charge was an unenforceable penalty, there was a possible limitation period, and there were various equitable doctrines which would prevent any enforcement of the Management Deed. It put forward a solution of a replacement management deed to be put forward for consideration. It declined the offer to purchase Unit 4 for $185,000.00.

(g) **27 June 2022 – Anthony Harper to Norris Ward McKinnon** (Document 18 at page 60 of the BOD) – This was in response to the Zoom meeting held between the parties on 3 May 2022. Interestingly, it was not in response to Norris Ward McKinnon's letter of 28 May 2021. It put forward information on the application of the Retirement Villages Act 2003 to the Village and the Management Deed, and again put forward the offer of settlement with Radius buying Unit 4 at the 2014 value of $185,000.00, with a new ORA for the Applicants. Documents were enclosed to facilitate this.

118. I have outlined the chronology and contents of these letters because it is important to determine:

(a) At what point it was first indicated to the Respondent that consent had been obtained by the Applicants to reside in Unit 4;

(b) When, in relation to that, the threats of recovery of annual rent charges, entry into possession, and exercise of the power of sale, were made;

(c) Were there other factors relevant to the exercising of remedies, which should have been considered?

The threat of recovery of annual rent charges of $152,000 (and possibly a further $330,500.00), entry into possession and exercise of the power of sale was first made in Anthony Harper's letter of 4 November 2020.The first advice of ownership and occupation having been obtained with the consent of the Village, and no breach of clause 2(h), was made in North End Law's letter of 12 November 2020.

119. In paragraph 11 of its submissions, the Respondent accepted that reference to consent documents was alluded to in correspondence from the Applicants' lawyers, but maintains that no actual written source documents as to consent were provided until August 2023 when I provided to the Respondent a copy of The Facilities Manager (at the time)'s confirmatory e-mail of 3 May 2021. In paragraph 9 of his Statement of Evidence dated 11 March 2024(pages 152 to 156 in the BOD), The Respondent's solicitor at Sharp Tudhope maintains that although written approval was mentioned in the letter from Norris Ward McKinnon to Anthony Harper dated 28 May 2021 (Document 15 at page 51 of the BOD) **he was not aware** of this e-mail having been provided to Radius or its representatives before it was sent to Anthony Harper by the Panelist on 13 August 2023." In his Statement of Evidence dated 12 February 2024 The Respondent's solicitor at Sharp Tudhope states at paragraph 12 (with reference to the Applicants' assertion that they obtained consent in 2014): "Radius does not **have a record** of this consent and the Village Manager has since left Radius' employment." The assertion that The Respondent's solicitor at Sharp Tudhope was "not aware" and that Radius had "no record" does not, however, mean that they were not aware of consent being obtained by the Applicants. He does not state that. There are indications that the Respondent was aware of the existence of written confirmation prior to August 2023.

(a) The letter from North End Law dated 12 November 2020 (Document 14 at page 48 of the BOD) mentions (as far as ownership) the "full knowledge and consent of the Village", and the letter from North End Law dated 28 January 2021 Document 14 at page 49 of the BOD) states that "the Village Management has been informed at all times of the ownership of the unit and the occupation by Mr and Mrs Currie since 2017 and has consented to all actions taken by Mrs Currie as owner."

(b) It is this letter that the Respondent indicates (on page 17, paragraph 37(b)(ii) of their submissions dated 16 April 2024) first "raised" the issue of approval/consent having been given. The Respondent says that the letter was in "vague terms" and "provided no details of compliance with the management deed." It nevertheless "raised" the issue. Right 7 of the CRR does not require a certain level of specificity to be achieved before rights are to be respected.

(c) Norris Ward McKinnon's letter of 28 May 2021, paragraphs 21 to 23, referred to the meeting in early 2014 with The Facilities Manager (at the time), which the Facilities Manager (at the time) confirmed in her e-mail of 3 May 2021. Paragraph 23 indicated that this had "recently been confirmed in writing".

(d) In the Complaint dated 1 July 2022 (Document at page 129 in the BOD) there was reference to the Applicants having consent **in writing**. It was shown to the CEO of Radius Care at the meeting held on 1 August (or 5 August) 2022, and mentioned to him at the meeting chaired by Mr Carr on 23 September 2022.

(e) In the e-mail dated 10 January 2023 from Caitlin Cherry of "Consumer" to Claudia Currie, which is Document 28 in the BOD, Caitlin Cherry states: " I have heard back from Radius who have said this is the first they have heard that the village manager at the time had approved you as residents – and that their lawyers, to their knowledge, have never been provided evidence of this You sent me the e-mail from the Facilities Manager (at the time) confirming this – has this ever been sent to Radius or their lawyers? If not, could I send a scanned copy to them?" The Applicants have advised me that they responded by telephone to Caitlin Cherry indicating that she did not need to forward a copy of the Facilities Manager's email to the Respondent as Radius already knew of the consent and they were not telling the truth. On this basis I conclude that the Respondent was not forwarded a copy of The Facilities Manager (at the time)'s e-mail from Caitlin Cherry on or about 10 January 2023.

There were, therefore, plenty of indications before 13 August 2023 as to approval having been given by the Respondent to the Applicants to occupy Unit 4. At least two of these indicated that it had been confirmed in writing. Despite this, it was not taken on board and investigated by the Respondent.

120. The Respondent maintains that their requests to the Applicants for information were met with silence, and therefore they had no written record of any consent being given and were entitled to exercise their rights and remedies. The Applicants respond that the Respondent knew of their consent and occupation and it was up to the Respondent to keep proper records. I agree that there was silence on the part of the Applicants in the

face of requests to provide documents confirming consent, but I also consider that there was a more than sufficient "heads up" in North End Law's letters of 12 November 2020 and 28 January 2021 to put the Respondent on notice that something had occurred. It was stated twice, and there would seem to be no reason to do so unless there was basis to back it up. In my view there was sufficient material in these letters to place an onus on the Respondent to proceed with caution and investigate these assertions thoroughly before proceeding further. They were not taken seriously as concerns expressed by the Applicants which needed to be promptly addressed in terms of the Respondent's obligations under the CRR and COP. It was not reasonable for the Respondent to simply assume that the approvals and consents had not been obtained, and the Applicants were making this up. An investigation would have been relatively easy. On top of this, there was a long and clear course of dealing with the Applicants from 2014 to 2019, and particularly after they moved into Unit 4 in 2017, in which they had been treated as residents. Despite this, the Respondent continued down a heavy-handed legal route. In its letter of 16 April 2021 the Respondent continued with its demand for money. It was not until Norris Ward McKinnon's of 28 May 2021 that these demands ceased.

121. There were other compelling factors which the Respondent should also have considered before embarking upon the exercise of its rights and remedies under the Encumbrance, and in particular the exercise of a power of sale:

(a) Not the least of these is section 22 (1)(c) of the RVA. I have discussed this already in paragraph 15 of the PD, which the Respondent has accepted. It has been acknowledged by the Respondent in their solicitor's e-mail of 11 August 2023 that in terms of section 22(1), all residents did not obtain independent legal advice and at least 90% of the residents did not consent in writing to registration of the Village as a retirement village. Therefore, the Respondent, as the real holder of a security interest, namely the Encumbrance which is a mortgage (having received it by way of assignment from Radius Care pursuant to the Declaration of Trust dated 31 August 200, at page 25 of the BOD) could not exercise any right to "evict any resident or exclude any resident from the use of any facilities or any part of the retirement village to which that resident is ordinarily entitled". That includes any unit that a resident may occupy. The threat of entering into possession and exercising a power of sale (which would also ultimately result in eviction or exclusion of a resident) could not be carried out. It should be recalled that the Village had consented in 1995 to the transfer of Unit 4 to the Trust, with occupation by Mr and Mrs O'Connor. Subsequent to that, it treated the Applicants as residents, for all practical purposes, from 2014 to 2019, at least in a manner sufficient to give rise to an implied/ constructive occupation right, as outlined in my Preliminary Decision.

Entering into possession of the Trust's property and exercising the power of sale against the Trust's property, would deprive the Applicants of the use of Unit 4.

(b) I have considerable doubt, in any event, whether a court would allow an Encumbrance, even though it is technically defined as a mortgage, to be used as the basis for a power of sale. In **Jackson Mews** the court declined to allow the mortgagor to repay the rent charge and obtain a discharge of the Encumbrance. It therefore denied the equity of redemption, which is a mortgagor's right in terms of section 81 of the Property Law Act 1952 and section 97 of the Property Law Act 2007. The primary purpose of the encumbrance was to enforce the performance of obligations set out in the Management Deed, and while any of those obligations were still to be performed it would not allow the Encumbrance to come to an end. Similarly, there were obligations still to be performed by both parties in the present case, and for that reason it is likely, in my view, that the exercise of a power of sale would be prevented.

(c) Section 79(d) of the Unit Titles Act 2010 (which is not excluded by section 11 from applying to retirement villages) affords to the registered proprietor the right of quiet enjoyment of their unit, without interruption by the body corporate or its agents.

(d) The Limitation Act 2010 ("the LA") – The prospect of the application of this Act was raised in paragraph 30 of Norris Ward McLennan's letter of 28 May 2021((Document 15 at page s 51 to55 of the BOD). It is worthy of examination:

(i) The LA sets out limitation periods relating to various claims. These include "money claims", which are defined in section 12(1): "Money claim means a claim for monetary relief at common law, in equity, or under an enactment." The "money" was "an annual rent charge equal to ten per centum of the rateable value or $20,000.00 (whichever is the greater) payable on the 31st day of March in each year." This was "reduced to ten cents" if no default occurred.
(ii) Section 12(2)(a) states that: "A claim for monetary relief includes a claim – (a) for money secured by a mortgage".
(iii) As we have seen, the Encumbrance is regarded as a mortgage.
(iv) Section 11 of the LA sets out defences to money claims filed after the applicable period. It states:

"11 Defence to money claim filed after applicable period

(1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after

the date of the act or omission on which the claim is based (the claim's **primary period**).

(2) However, sub-section (3) applies to a money claim instead of sub-section (1) (whether or not a defence to a claim has been raised or established under sub-section (1)) if –

(a) The claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and

(b) The claim is made after its primary period.

(3) It is a defence to a money claim to which this sub-section applies if the defendant proves that the date on which the claim is filed is at least –

(a) 3 years after the late knowledge date (the claim's **late knowledge period);** or

(b) 15 years after the date or the act or omission on which the claim is based (the claim's **longstop period**)"

(v) The Sharp Tudhope letter of 24 January 2019 (Document 1 at pages 14 to 15 of the BOD) indicated in paragraph 2 that a "review of occupancy agreements and other entitlements to reside at the Village" titles had been undertaken, and in paragraph 3 it listed a transfer on 5 April 1995 and a transmission and transfer on 22 September 1998 as occurring in respect of Unit 4, and further alluded in paragraph 4 to the penalties for breaches of the Encumbrance – the implication being that the aforesaid transfer and transmission/transfer could constitute such breaches. The Anthony Harper letter to Mrs Currie dated 4 November 2020 defines the alleged breaches in paragraph 3, namely the transfer to Frank Patrick O'Connor and Claudia Currie (as surviving and new trustee respectively) on 22.9.98 and the transfer to Claudia Currie (as surviving trustee) on 16 April 2014. It is apparent that by the time the alleged breach was made out in Anthony Harper's letter, at least 6 years (=the primary period) had elapsed after the date of such transfers.

(vi) It could be argued that the Respondent has "late knowledge" of the acts or omissions (=breaches). Sharp Tudhope's letter indicates that the alleged breaches were not discovered until the review that took place in late 2018 or early 2019, so at best the date of Sharp Tudhope's letter (24 January 2019) could be taken at the "late knowledge date", That would mean that, in terms of section 11(3) of the LA, it would be a defence to a claim if the date on which it was filed was more than 3 years from the late knowledge date, namely by 24 January 2022, **or** 15 years after the act or omission (namely by 22.9.13 in respect of the first alleged breach, and 16.4.29 in respect of the second alleged breach.

(vii) However, section 11(3) does not say "and" between sub-paragraphs (a) and (b). It says "or", indicating that either defence is available. Since it is clear that more than 3 years has elapsed since the "late knowledge date". The "late knowledge period" has expired, and any claims would therefore be statute-barred.

(viii) The "late knowledge" argument is also likely to be defeated by the doctrine of constructive notice. The Land Register is a public record of registered interests against land, accessible to anyone. It may be considered to be constructive notice to anyone that certain interests have been registered, as at the time they are registered. The Land Transfer Act 2017 only expressly excludes it in relation to notice of unregistered interests in cases of fraud (section 6).

(e) The Encumbrance creates a security interest, which prima facie gives the Encumbrancee (the Respondent) the right to take possession or sell the property if the Encumbrancer does not perform the obligations in the Encumbrance. The Encumbrance was disclosed by the Respondent as a security interest on registration of the village as a retirement village in 2007.It is therefore a mortgage (see section 101(1) of the Land Transfer Act 1952, section 2 of the Property Law Act 1952, section 5 of the RVA, and section 87 of the Property Law Act). The Encumbrance is over Unit 4. It is a mortgage, and this gives rise to whether it is a credit contract, whether the Respondent (or Radius) is a financial service provider, whether the Respondent needs to be registered as such, and whether if not so registered any right in respect of the mortgage is unenforceable. It is convenient to follow this sequence to see what conclusion it leads to:

(i) Section 7 of the Credit Contracts and Consumer Finance Act 2003 (the CCCFA") defines a "credit contract" as "a contract under which credit is or may be provided". Section 6 indicates that "credit is provided if a right is granted to a person to – (a) defer payment of a debt; or (b) incur a debt and defer its payment; or (c) purchase property or services and defer payment for that purchase (in whole or in part)". The Encumbrance (page 160 in the BOD) secures "an annual rent charge equal to ten per centum of the rateable value of the land….or $20,000 (whichever is the greater)." It goes on to state that "if during the twelve months immediately preceding the 31st day of March in any yea there shall have been no breach of the obligations on the part of the Encumbrancers of the Deed a copy of which is attached hereto then such annual rent charge shall be reduced to ten cents." This looks very like the incurring of a debt (=credit) as at 1 April in each year, and deferring its payment until 31 March the following year, whereupon it is reduced to 10 cents provided there has

been no breach. Until it is determined that there has been no breach, the Encumbrancer has a potential liability to the Encumbrancee (=creditor) for a debt (=credit) equivalent to 10% of the rateable value or $20,000.00 (whichever is the greater) in any year. It is therefore a credit contract. The accords with the usual rule that "if there is a mortgage then there is a credit contract".

(ii) All providers of credit contracts must be certified to provide that service, pursuant to section 131B of the CCCFA.

(iii) Section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("the FSPA") defines "financial service", and sub-section (e) states that this includes "being a creditor under a credit contract". If the Encumbrance is a credit contract, then the Respondent is the creditor providing the credit service."

(iv) Section 11(1)(a) of the FSPA requires all persons in the business of providing financial services to be registered for that service. A person is qualified to be so registered if they are not disqualified under section 14. The Respondent is not disqualified in terms of that section, and therefore needs to be registered if it provides financial services. It is, of course, arguable that because the Respondent is not generally engaged in the business of providing credit then it is not a provider of consumer credit contracts. It is noticeable, however, that the Encumbrance, as a security interest, or a replacement thereof, is registered against most of the titles in the Village.

(v) Section 99B(1) of the CCCFA sets out the consequences of a creditor not being registered as a financial services provider under the Act. These are: "(a) neither the creditor nor any other person may, in relation to a consumer credit contract to which the creditor is a party, - (i) enforce any right in relation to the cost of borrowing; or (ii) require the debtor or any other person to make full prepayment or a part prepayment on the basis of a failure by the debtor or other person to pay the costs of borrowing; and (b) neither the debtor nor any other person is liable for the costs of borrowing under such a contract in relation to any period during which the creditor is unregistered."

(vi) Section 29 of the Credit Contracts and Consumer Finance Amendment Act 2014 amended the former section 41 of the CCCFA, and provides that "A consumer credit contract must not provide for a credit fee or a default fee that is unreasonable."

(vii) I do not consider that I need to determine whether the Respondent is engaged in the business of being a creditor under a credit contract, and a financial services provider, and a person who needs to be registered under the FSPA, nor whether the Encumbrance is unenforceable as a result of not being so registered. It does seem, however, that there is at least an arguable case to this effect.

(f) Section 53(1)(e) of the Human Rights Act 1993 may prevent a sale – see paragraph 226(a) below.

(g) A further bar to the recovery of monetary penalties and the exercise of the power of sale could be found in what is commonly known as the Rule Against Unconscionable Penalties. The penalties sought by the Respondent, arising as a result of alleged breaches by the Applicants, were $152,000.00, updated to $186,000.00 to 31 March 2021, and a potential further $330,500 for alleged breaches between 1999 and 2013. There was also an indication that a power of sale as mortgagee may be exercised. The argument here is that because the rent charge is a penalty for a breach of the Management Deed, it is governed by the consideration on penalties outlined by the Supreme Court in **127 Hobson Street Limited v Honey Bees Pre-School Ltd** [2020] NZSC 53. I will outline this in more detail in the following paragraphs.

122. Paragraph 91 of the **Honey Bees** case sets out the test in New Zealand. In sub-paragraph (a) is states: “A clause stipulating a consequence for breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation. A consequence will be out of all proportion if the consequence can fairly be described as exorbitant when compared to the legitimate interests protected.” At sub-paragraph (f) it states: “The bargaining power of the parties will be relevant as to the nature and extent of the innocent party’s interest in performance of the primary obligation... But where there is evidence of unequal bargaining power, or where one party is not legally advised, a court will scrutinise more closely the innocent party’s claims as to the interests protected, and also the issue of proportionality. However, whatever the relative bargaining positions of the parties, the issue for the court remains whether the consequences of the breach are out of all proportion to the innocent party’s legitimate interests in performance.”

123. On this basis, one needs to ask what the Respondent’s “legitimate interests in performance” actually were. The Norris Ward McKinnon letter (Document 15) suggests that the legitimate interest of the Respondent could not be anything more than to ensure that it can legitimately undertake the management of the Windsor Lifestyle Estate”. This accords with the fact that the Respondent initially acquired management rights,

not ownership, and after that it acquired ownership of various units as they became available. There is only one unit which had the old Encumbrance/Management Deed structure, namely that of the Applicants, established well before the Respondent acquired the management rights, and in respect of which it was anticipated by the makers of the RVA that it was not necessary to replace until it came to an end. If it was contended that the "legitimate interests" of the Respondent embraced the enforcement of obligations in such historical documents against legitimate unit title owners and /or elderly residents with little money or resources, while not investigating their claim of approval for their occupation of Unit 4, then in my view that would be stretching such interests too far.

124. There are other cases in which the principle of unconscionable penalties was considered.

(a) In the **Parihoa** case (referred to earlier at paragraphs 44 and 50 above), Dobson J indicated in paragraph 90 that some element of unconscionability or oppression was necessary for equity to intervene to prevent the enforcement of a contract, but in the **Honey Bees** case some 9 years later the court (at paragraph 88) declined to import "oppression" as a requirement of penalties doctrine, focussing more on the exploitation of unequal bargaining power.

(b) In **Kreglinger** cited in paragraphs 53 and 54 of **Parihoa,** it was established that equity would intervene, or section 97 of the Property Law Act 2007 may give relief, when a lender seeks to rely on security for a loan for any purpose other than to secure its repayment. The "loan" in the Encumbrance was the rent charge of 10% of the rateable value or $20,000, but it was only payable in the event of a breach. If the real aim or a collateral aim of the Respondent was to forcibly secure the ownership of Unit 4 and eject the Applicants, so that it could apply an alternative ORA for any new residents that it was offered to, then that could be seen as unconscionable.

(c) In **Body Corporate 396711 v Sentinel Management Limited** [2012] NZHC 1957, the Court considered whether a management agreement in a unit title development was unenforceable on the grounds that it was harsh and unconscionable bargain in terms of section 140 of the Unit titles Act 2010. On the particular facts of that case, it granted partial relief. More importantly, having considered a large number of cases and texts, it had some interesting observations regarding service contracts for the management of unit title developments. It concluded that service contracts for the management of unit title developments operated in an atypical contractual context which suggested that wider grounds of intervention than traditional contract law provided might be justified. It noted that the standard of harshness was likely to be more relevant to the commercial

aspect of the service contract, in commercial terms, had not to be oppressive in the way that that term was understood in the and in that sense in the Credit Contracts and Consumer Finance Act 2003. The “powers aspect” of the contract would normally fail to be assessed on the standard of unconscionability. Simple unfairness, unreasonableness or commercial unsoundness would not suffice. Something like “moral obloquy” or outrageousness came closer to expressing the nature of the reaction and the view the Court had to take of the transaction in order to justify relief. In the context of the Management Deed conferring [in clause 4(b) and 4(o)] management rights on the Respondent, and the respondent not only manages the village but also the Body Corporate, the exercise of any remedies thereunder should not venture into the realms of moral disgrace (especially one which may bring public condemnation) and/or outrageousness.

125. It is my assessment that, without full and substantial investigation as to whether any breaches may have occurred, particularly in the light of indications that consent had been obtained by the Applicants for their occupancy, the penalties presented to the Applicants for such alleged breaches could be seen as unenforceable penalties because they were outrageously out of proportion to the legitimate interests of the Respondent, and exorbitant when compared to the legitimate interests protected (management rights).

126. Equity would intervene to prevent the exercise of any remedies, based on the equitable doctrines of election, estoppel, waiver or acquiescence (laches), and unconscionability. I have considerable sympathy for these doctrines. The doctrine of election provides that a person must accept both the benefit and the burden in one instrument, or reject both. The Management Deed contained benefits and burdens for both parties. The Applicants had the benefit of occupation. The Respondent had the benefit of continuing payments. Both complied with the Deed. It follows that if one is gaining the benefit of continuing payments, it should not reject the burden of occupation by those paying. Estoppel arises where it is unconscionable for a person to go back on their word when it is unconscionable to do so, or from resiling from underlying assumptions that have been acted upon when it is unconscionable to do so. Promissory estoppel is when a promise is made without consideration but is nonetheless enforced to prevent injustice. If the promisor should have reasonably expected the promissee to rely on the promise and if the promise did actually rely on the promise to his or her detriment, then the promise will be enforced. In this context, if consent to occupy had been given by an employee of the Respondent with ostensible authority, it is unconscionable to then deny that consent and allege breaches accordingly, with resultant penalties. The Respondent would be estopped from denying the consent. Waiver or Laches is a doctrine by which the court may deny relief to a claimant who has unreasonably delayed or been

negligent in asserting a claim. The argument put forward in the Norris Ward McKinnon letter is that the Respondent was aware of the consent to occupy since 2014, treated the Applicants like Residents from 2014 until late 2018, did not exercise its rights until after that, and therefore should not be entitled to exercise them. As far as unconscionability, I have already examined that.

127. It is noted that in Document 26 on page 83 0f the BOD, which is a an e-mail from Caitlin Cherry of "Consumer" to the Applicants, it includes a response from The CSO of Radius Care, CSO of Radius Care, which was made at some time between 26 October 2022 and 9 November 2022 (since it is part of Caitlin Cherry's e-mail of 9 November 2022), The CSO of Radius Care Callender stated: "Radius has made no threat of mortgagee sale to Mr and Mrs Currie's unit. Radius also asserts that it has no right to force a mortgagee sale." That statement was incorrect. The letter of 4 November 2020 from the Respondent's solicitors to Claudia Currie (see paragraph 117(b) above) clearly threatened to enter into possession and exercise the power of sale in respect of the Applicants' unit.

128. The Respondent maintains that it was entitled to exercise its remedies in the absence of any written confirmation that approval to occupy Unit 4 had been obtained by the Applicants. There are two components here. The first is whether it was unfair to exercise the remedies. Since I have found that consent to occupy was obtained, and also found that no breach of the Management Deed occurred, and also outlined other compelling reasons why the exercise of such remedies should have been considered very carefully, I consider that it was unfair to exercise the remedies. The second component is, having decided to exercise remedies, whether this was done in a manner that was unfair.

129. In the light of paragraphs 119 to 126 above, and my previous conclusion (paragraphs 100 to 111) that no breach of clause 2(h) in the Management Deed actually occurred, and the other compelling reasons as to why the exercise of remedies may have been prohibited, I am satisfied that the threats made in the Anthony Harper letters of 4 November 2020 and 16 April 2021 were without basis. They were unnecessary. The Respondent had clearly decided to adopt a strategy which was designed, in my view, to bring the Applicants to a position of submission where they would end up, voluntarily or involuntarily, with termination of the existing Encumbrance and Management Deed, and a new ORA on terms which the Respondent could dictate. A threat of a debt liability of $186,000.00, and a possible further debt liability of $330,500.00, coupled with a threat to take your home by way of mortgagee sale, would be enough to send shivers down anyone's spine. The manner in which the remedies were exercised was unfair. The Applicants were scared out of their wits by these threats. They were intimidatory, threatening and discourteous. In

my view they were sufficiently serious to amount to bullying and harassment.

130. I therefore determine Item 3 in favour of the Applicants.

Item 4 - 2014 Not updating Village records at the time of Claudia's father's death

131. Document 37 on page 99 of the BOD is a "Notice of Intention to Hold Annual General Meeting – 11 September 2020 – Invitation for Nomination of Chairperson." It shows Mr O'Connor, as the owner of Unit 80 (now known as Unit 4). Mr O'Connor died in January 2014.

132. I have examined this in paragraph 94 above. Clause 4(b) of the Management Deed requires the Respondent to "**Maintain proper records** and books of account", while clause 4(o) of the Management Deed requires the Respondent to "Generally attend to the management and administration of the Village.". In addition, Regulation 8 of the General Regulations sets out the operator's obligation to run the village properly. It requires that "An occupation right agreement must include a provision requiring the operator of the retirement village- (a) to use reasonable care and skill in ensuring that the affairs of the village are conducted properly and efficiently; and …(e) to use reasonable care and skill in the exercise and performance of the operator's powers, functions and duties." Further, Regulation 49 of the General Regulations requires that in a deed of supervision between an operator and the statutory there must be a provision requiring the operator of the village "(a) to use reasonable care and skill in ensuring that the affairs of the village are conducted properly and efficiently." It would be reasonable to expect this to be done efficiently. The failure to record Mr O'Connor's death, resulting in the continuing use of his name in official communications, can only be seen as clumsy and extremely inefficient.

133. I am required, however, to determine whether such non-recording was unfair. I do not consider that it was. While it may be seen as insensitive, thoughtless, incompetent and disorganised, there is no evidence that there was any deliberate intention to be discourteous, malicious or disrespectful to the Applicants. I therefore do not consider it to be unfair.

134. I determine Item 4 in favour of the Respondent accordingly.

Item 5 - 2014 Non-documenting of approval by Senior Management (The consent of the Facilities Manager (at the time)

135. I have examined this in paragraphs 90-94 above. I traversed the matter of consent given by The Facilities Manager (at the time) to the Applicants in late 2013, and early in 2014 (as confirmed in her e-mail of 3 May 2021). The Respondent has indicated in paragraph 37(vii) of its submissions that "the conduct of the Respondent prior to 2019 was capable of being interpreted by the Applicants as consent.". I therefore do not need to cover this ground again. I am required, however, to determine whether the fact that the Respondent's Facilities Manager (at the time), failed to record the discussions amounts to unfair treatment. I do not consider that it does. It may amount to abysmal administration and extremely poor management, or it may have been entirely inadvertent. Either way, I do not consider that it was intentionally calculated to be unfair.

136. I therefore determined Item 5 in favour of the Respondent [see paragraph 97(c)].

Item 6 - 2014 Non-offer of contract (the Deed) or information

137. (a) In paragraph 88 to 96 above I examined the non-recording of the approval by Senior Management [the consent of the Facilities Manager (at the time)], and in [paragraph 94(a)]. I concluded that it is the Respondent's responsibility to properly manage the Village and issue documentation for occupation rights. While I am satisfied that The Facilities Manager (at the time) indicated approval to the Applicants, I am also satisfied that she failed to record it and further failed to pass on instructions to the legal representatives of the Respondent to promulgate occupation right documents for the Applicants, if they were necessary. I do not consider that there was any intentional non-action here designed to be unfair to the Applicants. Clearly if the message was not passed on then those responsible for issuing documents knew nothing about it **at that stage.** Again, it was more likely to be due to very bad administration, ignorance, inadvertence and/or forgetfulness than to any deliberate attempt to be unfair to the Applicants.

(b) I have also expressed a view that it is likely that no new documents were actually required [see paragraph 101(c to 101(f) above].

138. I therefore determine Item 6 in favour of the Respondent.

Items 7 and 8 - There were excluded as being outside of the jurisdiction of this Panel.

Item 9 – 31 August 2007 – Using our Family Trust legal documents to form a trust - Doc 6

139. The F P and CK O'Connor Family Trust was established by a Deed of Family Trust dated 28 March 1995. This is the "Family Trust" referred to by the Applicants as "our Family Trust". "Doc 6" submitted by the Applicants for this Item was the Deed of Assignment of Management Deeds and Declaration of Trust dated 31 August 2007, which I have referred to in paragraph 18 above.

140. A Deed of Family Trust is made between a Settlor and Trustees to establish a family trust. It is a private document and is not registered anywhere. The Deed usually specifies a nominal amount of $10 as constituting the trust assets, and the Settlor usually transfers further assets into the trust at their market value, secured by a debt-back owed to the Settlor, which the Settlor can leave intact or elect to forgive. The trustees of the trust administer the trust and trust hold the assets in trust for the final beneficiaries of the trust, who are usually the children of the Settlor or if a child dies then that child's children. They do not need to be named, as obviously some of these potential beneficiaries may not be known at the time the trust is established. The trust can last for up to 125 years. There is generally no power for the beneficiaries to direct the trustees what to do, though there is now power for all final beneficiaries to require the trust to be wound up. The asset held by the FP and CK O'Connor Family Trust is Unit 4.

141. A Declaration of Trust in New Zealand has the similarity that it is an acknowledgment by one party that an asset or assets are held by that party in trust for another party. However, it is a short form declaration by a trustee that specified property or funds are held by that person for the benefit of another named beneficiary to be used for that beneficiary in the trustee's discretion until a set date or event, at which time the trustee must transfer he property or funds to the beneficiary. In the Declaration of Trust dated 31 August 2007, Radius Residential Care Limited assigned the management rights of the Village to the Respondent, and further acknowledged that it held the Encumbrance upon trust for the Respondent and when directed by the Respondent would transfer the Encumbrance to the Respondent. If it failed to do so, the Respondent was irrevocably appointed as attorney for Radius to effect such transfer. The real holder of the Encumbrance is therefore the Respondent.

142. These two types of document are quite different in nature, effect, purpose, function and control. the family trust deed would be of no use or interest to the Respondent in promulgating the Declaration of Trust. This simply did not happen. The private Deed of Family Trust achieved the estate planning purposes of Mr and Mrs O'Connor, for the benefit of their daughter Claudia Currie. The Declaration of Trust achieved the

commercial purposes of Radius and the Respondent as far as the structure they desired in acquiring the Village. The Deed of Family Trust would be of no use or interest to the Respondent in promulgating the Declaration of Trust. This simply did not happen.

143. I therefore determine Item 9 in favour of the Respondent.

Item 10 - 2014-18 We have numerous correspondence as residents

144. I have already traversed the numerous documents evidencing the treatment of the Applicants as residents, in paragraph 35 of my PD. The Respondent has entirely accepted the PD. Treating them as non-residents in the face of these documents was unfair. There is therefore no need to traverse this Item further.

145. It follows that Item 10 is determined in favour of the Applicants.

Item 11 - 03/09/2018 Stopped Ron from speaking at the meeting when there was a signed authority

146. There are two Minutes of Meetings in which constraints on Ron Currie to speak are mentioned – the SGM of the Body Corporate held on 16 April 2018 (Document 11 at page 44 of the BOD (in part) and in full at page 210 to 217 of the BOD), and the AGM of the body Corporate held on 03 September 2018 (at pages 218 to 224 of the BOD).

147. The Minutes of the Annual Meeting of the Windsor Court Body Corporate dated 16 April 2018 list the Applicants as present under the heading "Members of the Body Corporate." Under the heading "General Business" it is recorded in paragraph d.: "Concern was expressed that Ron Currie had been constrained from speaking during the meeting. The Respondent's solicitor at Sharp Tudhope noted that Ron's name was not on the title of the unit he occupies and therefore he was not a member of the Body Corporate and has no right to speak. He may only speak at the discretion of the Chair." I have discussed this earlier in this Decision.

148. More importantly, because it is the subject of this Item, the Minutes of the Body Corporate AGM on 03 September 2018 record Claudia Currie as present under the heading "Members of the Body Corporate", and record Ron Currie as present under the heading "Guests". Also attending as "Guests" were Vicki Partridge, Interim Village Manager, and Mike Hablous, Consultant. The Chair was The Respondent's solicitor at Sharp Tudhope. Strangely, however, while not regarded as a member of the

Body Corporate, Ron Currie is nevertheless recorded as seconding a motion (page 219 in the BOD), and asking questions about painting of the units and the Long Term Maintenance Plan (page 221 in the BOD). Under “General Business”, paragraph 1, headed up “Right to Speak”, it states: “Ron Currie raised his right to speak at Body Corporate meetings. The Chair responded by saying that as Ron was not a title holder he was not a member of the Body Corporate. Therefore, he had no statutory right to speak. Ron then asked if he provided a letter from Claudia Currie appointing him as her representative, could he then speak? The Chair replied that would be insufficient - Claudia needed to complete a proxy form and to submit it prior to the meeting before Ron gained any statutory right to speak. The Chair noted that notwithstanding these requirements he would allow Ron to contribute at the meeting as Ron had already done.” It is noted that allowing his participation seems inconsistent with regarding him as not being a member of the Body Corporate and therefore unable to speak or vote.

149. The Applicants submitted a document dated 03 September 2018 (Document 11 at page 42 of the BOD) in which Claudia Currie gave authority to Ron Currie as her representative to speak on her behalf at the meeting of both the respondent and the Body Corporate held on 3 September 2018. This is presumably the letter alluded to by Ron Currie n his question to the Chair of the meeting, which the Chair advised him would be insufficient.

150. It is salient to notice that this was a Body Corporate meeting, not a residents’ meeting. The Unit Titles Act 2010 and Unit Titles Regulations 2011 apply, except to the extent that they may be excluded by section 11 of the Unit Titles Act. Mr Currie was therefore being treated in terms of these statutes. Section 11 of the Unit Titles Act 2010 sets out what sections do not apply to retirement villages. These are sections 74, 79(g), 80(1)(a)(iv), 80(1)(j), 81(3), 81(4), 83(3), 105 to 107, 115 to 129, 132 to 138, 144 to 157, 171 to 176, 206 and 210 to 216. Therefore none of the sections mentioned in paragraph 151 below are excluded.

151. Technically, the only persons eligible to speak and vote at a body corporate meeting are unit owners. Section 76(1) of the Unit Titles Act 2010 makes it clear that a Body Corporate is comprised of the unit owners for all the units on the unit plan. Section 79(h) gives unit owners the right to attend general meetings of the body corporate, and section 88(3) states that “Members of a body corporate may attend and vote at a general meeting.” However, that is not the end of the story. There are two aspects here – the right to speak and the right to vote. Section 85 of the Unit Titles Act, and Regulation 4 of the Unit Titles Regulations 2011, require the body corporate to keep a register of all owners of principal units and accessory units. Regulation 4(1)(f) indicates that the contact details of “any **representative** of the unit owner” may be recorded on the register, while

Regulation 4(1)(g) similarly allows the contact details of "any agent appointed by the unit owner under section 81 of the Act" to be recorded on the register of owners, but this is confined to owners who are overseas for more than three weeks (section 81). Section 96 (eligible voters) indicates that owners over 16 years are eligible to vote if their name or that of their **representative** is recorded on the register of all owners. Sub-section (2)(a) defines a "representative of the owner of a principal unit" as the "guardian, trustee, receiver, **or other representative of the owner, and is authorised to act on the owner's behalf."** It is logical to conclude that a representative of the owner would, if they were recorded on the register of owners, have the right to speak. There is also the simple law of principal and agent – if the owner appointed someone in writing as their agent to attend and speak at the meeting, then so long as the agent did not depart from his/her warranty of authority, there is an argument that they should be permitted to speak. As far as voting, however, more is required, namely a written proxy (section 102 and Regulation 14). If Ron Currie was therefore recorded on the register of owners as the representative of the Trust, authorised (by the trustee Claudia Currie) to act on the Trust's behalf, then provided that he was given a proxy by the Trust, he would have the right to vote at body corporate meetings. In short, it is not the title but the register of owners that is pivotal to whether someone can vote or speak. The question then, is whether Ron Currie was recorded on the register of owners at the time.

152. While Claudia Currie authorised him to speak as her "representative", he could not do so unless he was recorded on the Register of Owners. It is apparent that Ron Currie was not recorded on the Register of Owners at the time of the meeting on 03 September 2018, nor at any time before that. The Chair was therefore technically correct in refusing to allow him to speak or vote.

153. I therefore determine Item 11 in favour of the Respondent.

Item 12 - 4 November 2020 Threatening to take Unit 4 from us (page 1, paragraph 5 the Respondent's solicitor(s) at Anthony Harper)

154. This refers to the threatened entry into possession and exercise of the power of sale in respect of Unit 4. I have considered this as part of Item 3, at paragraphs 117 to 129. I found in favour of the Applicants. See also Issue (c) at paragraphs 216 to 221 below.

155. It follows that Item 12 is therefore determined in favour of the Applicants.

Item 13 - 16 April 2021 Updated Invoice $186k - offer to buy Unit 4 from us, less 5% at 2014 price Page 2

156. I have considered this as part of Item 3 (paragraphs 117 to 130 above). I found in favour of the Applicants in respect of the demand for $186k, since there was no breach of the Management Deed. I found in favour of the Respondent in respect of the offer to buy Unit 4 at the 2014 value, as this was an offer put forward for consideration with no obligation to accept it, with an appropriate recommendation to obtain legal advice.

Item 14 – January 2021 - May 2021 The Respondent and its agents taking no notice of our lawyer's letters (there was no breach)

157. In paragraph 118 above have outlined the content of the letters from North End Law and Norris Ward McKinnon, written on behalf of the Respondent. Of particular interest here are the letter from North End Law dated 28 January 2021, and the letter from Norris Ward McKinnon dated 28 May 2021. Both of these letters indicated that consent had been obtained by the Applicants to occupy Unit 4, and no sale or other dispositions had occurred and there was therefore no breach of clause 2(h) of the Management Deed. The question is whether these letters were ignored by the Respondent.

158. The letter from North End Law dated 28 January 2021 was ignored. The reply from Anthony Harper dated 16 April 2021 took no notice of the contention that there had been no breach, and refuted that any consent had been given. It maintained the previous position set out in the Anthony Harper letter of 4 November 2020. It seems that no investigation had been made as to the aspects of breach and consent, and I have already stated in paragraph 103 that in my view there should have been. Concerns raised by a resident should be fully and promptly investigated. That did not happen. The result was a lot of continuing grief for the Applicants, and in my estimation that was unfair.

159. The letter from Norris Ward McKinnon dated 28 May 2021 invited further discussions. In paragraphs 38 to 41 it stated: "38. Notwithstanding the above, in the interests of avoiding any further inconvenience, our clients are prepared to have sensible discussions to resolve outstanding matters in a fair and reasonable way that does not involve your client attempting to impose or enforce unlawful rent charges on our clients. As part of that we invite your client to provide a replacement management deed for our clients to consider. 39. Our clients are not prepared to sell their home on the basis you have proposed. 40. However, our clients would be prepared to entertain settlement negotiations that entail Radius purchasing the Home at a reasonable price. We invite Radius to make an offer. 41. Alternatively, our clients are prepared to have a roundtable discussion with your client on a without prejudice basis."

160. This was ignored. While there were no more threatening letters from the Respondent's lawyers, the next letter from them did not occur until 27 June 2022 – almost a year later. It made no mention of The Applicant's solicitor at Norris Ward McKinnon's letter. It was written following the Zoom meeting on 3 May 2022.It adopted a more conciliatory approach and put forward a settlement proposal for consideration. Again, the lack of response to the letter (almost one year) failed to satisfy the requirement to deal with concerns raised by a resident fully and promptly. Paragraph 4 of the CRR states: "You have a right to complain to the operator and to receive a response **within a reasonable time**", while paragraph 5 of the CRR states: "You have the right to **a speedy and efficient process** for resolving disputes between you and the operator." I do not consider that these words apply to just the response to the initiating complaint, but are intended to apply to the process that takes place subsequently The lack of a prompt response allowed the situation to lurch on for another year. In my view this was unreasonable and unfair.

161. I therefore determine Item 14 in favour of the Applicants.

Items 15 and 16 – May 2021 Refusing to have a sensible discussion (The Applicant's solicitor at Norris Ward McKinnon). The non-answering by the operator to The Applicant's solicitor at Norris Ward McKinnons's letter – there was no breach

162. I have dealt with this in paragraphs 157 to 160 above. For the same reasons, I determine these Items in favour of the Applicants.

Item 17 - 3 May 2022 the Executive Chairman of Radius Care pulling plug on Zoom meeting

163. Following a formal request by the Applicant's solicitor at Norris Ward McKinnon to the Respondent's solicitor(s) at Anthony Harper on 11 April 2022, a Zoom meeting was held between the parties on 03 May 2022. The Applicants, their lawyer the Applicant's solicitor at Norris Ward McKinnon, and two non-participating support persons, Vernon Coleman and Shannon Coleman (as allowed by clause 34d of the COP and clause 6 of the CRR), were in the boardroom at Norris Ward McKinnon in Hamilton. They were joined by Zoom with the Executive Chairman of Radius Care (the CEO of the Respondent), Leon Mascarenhas (former Property and business Manager for the Respondent), Gareth Thomas (General Manager Property and Development for Radius Residential Care Limited (the holding company for the Respondent), and (from their legal offices) the Respondent's lawyers The Respondent's solicitor(s) at Anthony Harper. Mr and Mrs Coleman have provided affidavits (pages

122-124 and pages 120-121 of the BOD), and Mr Thomas has provided a Statement of Evidence (page 148 – 151 of the BOD), which contain details of the meeting held on 3 May 2022. I am not required to determine whether the meeting was early or late or what took place in the discussion. I am only required to determine whether the Executive Chairman of Radius Care ended the meeting prematurely and peremptorily.

164. In paragraphs 5 and 6 of his affidavit dated 2 February 2024, which was confirmed in evidence (as to Parts 1 and 2) at the hearing, Mr Coleman states in Part 1 paragraphs 5 and 6:

"5. The tone of the meeting from Radius Healthcare representatives was acrimonious, unhelpful, bullying and discourteous, particularly the attitude of The Executive Chairman of Radius Care who drove most of the Radius Healthcare participation.

6. The meeting was ended when The Executive Chairman of Radius Care stood up and stated 'he would see the Curries in Court', and walked out of the room with the Radius Healthcare representatives, and their Zoom screen was turned off. The Meeting closed without further interaction between the parties."

165. In paragraph 3 of her affidavit dated 2 February 2024, which was confirmed in evidence (apart from paragraph 2) at the hearing, Mrs Coleman states:

"My husband, Vern, and I have attended two meetings with Radius Management to support Ron and Claudia. The first meeting was in May 2022 and was a Zoom meeting at the offices of Norris Ward McKinnon with their lawyer, the Applicant's solicitor at Norris Ward McKinnon, in attendance. The meeting was scheduled to commence at 10am and we had travelled from Auckland to be there. We all arrived in plenty of time and the Zoom connection was set up. We could see the Radius lawyers in their offices, and we could see the Radius boardroom. We waited and waited for some length of time. Eventually The Executive Chairman of Radius Care and others came into the Radius Boardroom. They then took some time to sit down, sort their papers, connect their audio and commence talking. We were all introduced to the Radius team by the Applicant's solicitor at Norris Ward McKinnon. However, the Radius team scarcely acknowledged Ron and Claudia Currie and never addressed them by name during the short meeting. The unprofessional, disrespectful and arrogant attitude of The Executive Chairman of Radius Care in particular was nothing short of shocking to the point of bullying. The meeting concluded with The Executive Chairman of Radius Care unwilling to answer questions and ended the meeting…"

166. In paragraph 17 of his Statement of Evidence, which was confirmed in evidence at the hearing, Mr Thomas states:

"I disagree that any of the attendees at the meeting were bullying, discourteous, unhelpful or acrimonious….I do not recall anyone 'pulling the plug' or The Executive Chairman of Radius Care telling the Applicant he would see them in Court or being combative."

In cross-examination by myself, I asked Mr Thomas what he meant by the words "I do not recall" – did he mean that it did not happen, or that it may have happened but he did not recall it. He replied that he meant the latter – it may have happened but he did not recall it.

167. I found Mr and Mrs Coleman to be sincere and credible witnesses. They did not participate in the business of the meeting but directly observed what took place. I also found Mr Thomas' admission as to what exactly he meant to be significant. I prefer the evidence of Mr and Mrs Coleman, which is not rebutted by Mr Thomas' non-recollection. The "focus was on finding a solution that worked for everyone" (paragraph 17 of Mr Thomas' Statement) and a grandstanding exit of the nature described did not facilitate that. I therefore find that The Executive Chairman of Radius Care did "pull the plug" on the Zoom meeting, and this was in breach of clauses 5 and 7 of the CRR.

168. I therefore determine Item 17 in favour of the Applicants.

Items 18, 20 and 21 - These Items are related so I will deal with them together.

18 27 June 2022: Trying to bully us into signing a cashless contract for Unit 4. Attached clause 16

20. 27 June 2022: Asking us to surrender title for Unit 4 for $137k. Attached clause 16

21. 27 June 2022 Trying to force us to sign a Termination of Deed. Attached clause 16

169. Clause 15 in the letter dated 27 June 2022 from Anthony Harper to Norris Ward McKinnon (Document 18 on pages 60 to 62 of the BOD) proposed a cashless transaction with a purchase price for Unit 4 (being $185,000.00) to be applied as a journal entry towards the Entry Payment for a new ORA, for which the documents were listed in paragraph 16 of that letter.

170. I have discussed these issues in paragraphs 220 and 221 in Issue (c) below. I found that these proposals were not unusual or bullying, and were part of normal negotiations that one might expect to see in this situation. The Applicants were advised to discuss the proposals with their lawyer, and only if they were acceptable should they sign and return them to the

Respondent’s lawyer. I do not consider them unfair or unlawful accordingly.

171. I determine Items 18, 20 and 21 in favour of the Respondent accordingly.

Item 19 - 27 June 2022: Misleading information, Disclosure 2021 1.3 clause – Acquiring of units when available. Attached clause 16

172. The Disclosure Statement of December 2021 stated:

“The Operator, Windsor Lifestyle Village Limited, **intends** to acquire unit titles as they become available and offer licences to occupy to residents of the Village. This Disclosure Statement is in respect of the licences to occupy.”

173. A similar statement appeared in clause 1.3 of the first Disclosure Statement of 23 August 2007, and it has been repeated frequently in subsequent Disclosure Statements. The Applicants maintain that this statement is misleading. The statement expresses an intention only. An “intention” is something which is intended; an aim or a plan. It is not something which is mandatory or compulsory. It does not say: “The Respondent **will** acquire unit titles as they become available.” Intentions can, and frequently do, change with circumstances. The Respondent progressively followed through on this intention by acquiring ownership of most of the units in the Village over time. The method has usually been that the Respondent purchases the available unit from the resident or the resident’s estate, and, having acquired ownership, then offers an occupation right agreement to a third party. These two transactions may occur concurrently if a new resident is found, but do not need to be concurrent. Obviously, acquisition must involve a willing seller (the existing resident) and a willing buyer (the Respondent), and satisfactory terms. If satisfactory terms, including the price, are not negotiated, then the intention may not be exercised or may change.

174. The Applicants referred their situation to “Consumer” by telephone call on 26 October 2022. It was taken up by Caitlin Cherry, Consumer’s Head of Content. I am not interested in the outcome of that investigation but I am interested in the response to “Consumer”, The CSO of Radius Care Callender, CSO of Radius Care. Such response was annexed to an e-mail dated 9 November 2022 in which Caitlin Cherry sought a response from the Applicants as to Mr Callender’s statement. This is Document 26 on page 83 of the BOD. Mr Callender stated in his response, which is made at some time between 26 October and 9 November 2022: “Changes in the retirement village sector, particularly those related to the introduction of the Retirement Villages Act 2003, led to an industry wide decision to move away from the unit title structure and **gradually transition** to the more conventional licence to occupy model **as and**

when each resident left the village." The acquisition of units would be gradual, and could be taken up as and when each resident left the Village. However, this was not obligatory.

175. It is stated that "This Disclosure Statement is in respect of the licences to occupy." It is not in respect of the Management Deed, under which all units operated until they were acquired by the Respondent, and then changed the nature of the ORA when an alternative resident was found. Clause 5(a) of the Management Deed indicates that upon receiving from the Resident a notice of intention to sell, the Respondent would "endeavour to locate and nominate an alternative person to purchase the Home from the Resident", and it also allowed the resident to locate an alternative person by selling privately or through a real estate agent, subject to obtaining the Respondent's consent to such "suitable Resident" pursuant to clause 2(h).This indicates that, under the Management Deed, there was no intention on the part of the of the Respondent to acquire ownership of the unit. All they needed to do was to approve a "suitable Resident".

176. It follows from this that the mere statement of an intention is not misleading, and I determine Item 19 in favour of the Respondent accordingly.

Item 22 – 12 August 2022 No substance to the formal complaint (The CEO of Radius Care)

177. On 12 August 2022 the CEO of Radius Care, wrote to the Applicants following a meeting with the Applicants on 1 August 2022 (the Applicants say this was on 5 August 2022, but the date is not important) and a telephone call between him and Mr Currie on 11 August 2022. This is Document 22 on page 71 of the BOD. In paragraph 4 of that letter, he stated: "Radius Care is **not** addressing your complaint as made in accordance with the Code of Practice**, which applies to 'Residents' of the Village** as defined in the Code of Practice. In any case, as previously relayed to you, we see no substance to the claims in your complaint."

178. The response from the CEO of Radius Care was premature and pre-determinative. The Complaint dated 1 July 2022 expressly mentioned that the Applicants had approval in writing to occupy Unit 4. Notwithstanding this, the CEO of Radius Care had already decided that the Applicants were not residents, but had also not considered whether they could be residents because they had been treated as residents for many years, with a combination of documents constituting an occupation right agreement. I have examined this, including the definition of "resident" in the COP, in the PD, which the Respondent has fully accepted. It was therefore highly debateable whether the Applicants were not "residents".

He also pre-determined that there was “no substance” to the claims in the complaint. Again, this was premature and pre-determinative. It is not known whether the CEO of Radius Care had undertaken any significant investigation of the issues, or sought any advice. I am aware and have accepted that at the meeting with the Applicants on 1 August 2022 (or on 5 August according to the Applicants) he was shown a copy of The Facilities Manager (at the time)’s e-mail confirming that consent/approval had been given to the Applicants to occupy Unit 4. In the event his response was dismissive and perfunctory. Clauses 4 of the CRR indicates that every resident has a right to complain to the operator and receive a response within a reasonable time. Clause 5 of the CRR indicates that every resident has the right to a speedy and efficient **process** for resolving disputes between them and the operator. Clause 7 of the CRR indicates that every resident has the right to be treated with courtesy and have their rights **respected** by the operator. The dismissive approach by the CEO of Radius Care was of no assistance in resolving the very real issues, and in my view, it breached these rights.

179. I therefore determine Item 22 in favour of the Applicants.

Item 23 -19 August 2022 Changing his mind on settlement (The CEO of Radius Care)

180. This refers to an e-mail from the CEO of Radius Care to the Applicants on 19 August 2022, which is Document 22 on page 72 of the BOD. In that email the CEO of Radius Care stated: “As we have previously discussed, we do not agree with your position that you are entitled to a ‘price to live in Hamilton’ and resulting compensatory claims.” He followed that e-mail up with a further letter on 26 August 2022, which is Document 23 on page 74 of the BOD, in which he stated: “I would like to clarify that I did not inform you that I was ‘happy with Hamilton prices’ (as indicated in my e-mail below), hence there has been no ‘U-turn’. I will revert to you more formally next week with our proposed next steps”.

181. These e-mails followed a sequence of events:

1 August or 5 August 2022 - the CEO of Radius Care visited the Applicants at their home. This is mentioned in the CEO of Radius Care’s letter of 12 August 2022 (Document 22 on page 71 of the BOD) and in the Applicants’ e-mail of 15 August 2022 (Document 22 on page 73 of the BOD). The parties agreed that they both needed to move forward. The CEO of Radius Care offered the Applicants a Licence to Occupy their Unit (as per Anthony Harper’s letter to the Applicants on 27 June 2022).

11 August 2022 - the CEO of Radius Care telephoned the Applicants.

15 August 2022 - The Applicants e-mailed the CEO of Radius Care (Document 22 on page 73 0f the BOD) declining the offer of a Licence to Occupy and putting forward an alternative proposal (counter-offer) for a commercial settlement of $884,000.00 comprised of $790,000.00 to buy a property in Hamilton, $24,000.00 for legal costs and $70,000.00 damages for harassment, bullying, humiliation, mental anguish and threat of possession.

19 August 2022 – Email from the CEO of Radius Care (Document on page 72 of the BOD) disagreeing with the Applicants' claimed entitlement to "a price to live in Hamilton" and resulting compensatory claims. There was an indication to discuss the counter-offer internally with Garreth from Covenant Trustees, and with Anthony Harper, and "be in touch as soon as is practicable."

22 August 2022 E-mail from the Applicants to the CEO of Radius Care (Document 23 on page 75 of the BOD) claiming he had at no time indicated to them that they were not entitled to Hamilton prices and to compensation, and indicating it was the CEO of Radius Care who told them on the phone to counter-offer and put in writing that they were not accepting the Radius offer of a Licence to Occupy (in the letter of 27 June 2022). The Applicants alleged a U-turn by the CEO of Radius Care.

26 August 2022 E-mail form the CEO of Radius Care to the Applicants (Document 23 on page 74 of the BOD) indicating he had never informed them that he was "happy on Hamilton prices" and "hence there has been no U-turn".

182. It is apparent that there was an offer by the Respondent (to grant a LTO), followed by a rejection and a counter-offer from the Applicants (for a commercial settlement of $884,000), which was, in turn, rejected by the Respondent. In the law of contract, a counter-offer automatically revokes the preceding offer. A rejection of an offer brings that offer to an end. There is no offer and acceptance, which is required to form a binding contract. The offers and counter-offers here were never accepted and no binding contract was formed.

183. Further, section 24 of the Property Law Act 2007 (formerly section 2 of the Contracts Enforcement Act 1956) requires any contract for the disposition of land to be in writing and signed by the party against whom the contract is sought to be enforced. Section 25 widens these requirements to cover "an existing interest in land acquired by taking possession of the land", and "an existing legal or equitable interest in land". Unless these requirements are met, any alleged contract in unenforceable. The term "disposition" is widely defined in section 2 as including "any **sale,** mortgage, transfer, **grant,** partition, exchange, **lease,** assignment, surrender, disclaimer, appointment, **settlement or other assurance**." The offer and counter-offer put forward by the respective parties clearly fall within these definitions and requirements. There were

no contracts in writing signed by the party against whom enforcement of any alleged agreement might have been sought, and any alleged agreement would therefore be unenforceable in any event.

184. The process of discussions which may or may not result in offers and counter-offers is a normal part of negotiations in which the parties are trying to arrive at a satisfactory agreed settlement. I do not need to determine whether a change of mind occurred, but if it did then it is not unusual or unfair for parties to change their minds in the course of that process. At the end of the process, no terms of settlement were agreed in writing and signed by the parties. There were no enforceable contracts.

185. I therefore determine Item 23 in favour of the Respondent.

Item 24 – 23 September 2022: Meeting called by Radius, chaired by Peter Carr

186. This meeting took place at the Village on 23 September 2022, at the request of Radius. Fortunately, there is a record of what took place as the meeting was chaired by Peter Carr JP, Immediate Past President of the Retirement Villages Residents Association, and he took notes of what occurred. The "Unofficial Minutes of Meeting to Resolve Differences ay Radius Windsor Court Village Ohaupo Waikato" are Document 24 at page 77 of the BOD. They were provided to both parties by Mr Carr. Those present at the meeting were the CEO of Radius Care, The CSO of Radius Care, Chief Strategy Officer of Radius (Radius is the holding company of the Respondent), the Applicants, Mr Carr (as support person for Mr Currie), and Vern and Shannon Coleman (as support persons for Mrs Currie).

187. Under the heading "Update". Mr Carr stated: "To describe this situation as being fraught with difficulty would be an understatement. That it has degenerated into an aura of bitterness causing personal health-related stress for the Curries would be factual."

188. Mr Carr has confirmed to me that at this meeting the Applicants mentioned to the CEO of Radius Care the approval that they had obtained to occupy Unit 4.

189. There was discussion regarding the Licence to Occupy proposal previously put forward. The Applicants made it clear that they wished to move forward without any continuing relationship with the Respondent following the sale of Unit 4. A value of around $500,000.00 for Unit 4 was mentioned, which was $290,000 lower than the Applicants had put forward ($790,000), and to which $94,000 would be added for claimed costs and damages by the Applicant. This gap would be too high to explain to directors and shareholders of Radius. A possible mediation was

put forward. The result of the meeting is set out at the end of the Minutes, namely:

“(a) That the Curries do not accept an offer of mediation at this point;

(b) That they desire from Radius within one week a suitable best offer;

(c) If this offer is not workable for the Curries then they reserve the right to escalate the matter further.”

The deadline for an offer was extended to 4pm on Friday 8 October 2022.

190. I am required to determine whether this meeting was unfair. It is not. Again, it was called in an effort to negotiate a solution to the dispute. The parties presented their positions, which one would expect, and in the absence of agreement a way forward (mediation) was considered and rejected. This is all part of normal negotiation in facilitating a settlement process. It is not unfair or discourteous to disagree.

191. I determine Item 24 in favour of the Respondent accordingly.

Item 25 - 11 October 2022: “50k more than you are entitled to” (The CEO of Radius Care)

192. This statement appears in an e-mail from the CEO of Radius Care to the Applicants on 11 October 2022, which is Document 25 on page 81 of the BOD. The offer put forward by the CEO of Radius Care was $188,000.00, which is approximately $50,000.00 more than the sum of $137,362.50 (arrived at by adopting the 2014 value of the unit, namely $185,000.00, less 20% amortising over 2 years, less $10,637.50 being the 5% sale fee in terms of clause 2(a) of the Management Deed]. This is set out in Document 19 on page 66 of the BOD. The CEO of Radius Care states:

“Our full and final offer in this regard is $188k, $50k more than the amount **you are entitled to** as we previously set out in the Anthony Harper offer/opinion sent to you.”

193. I am required to determine whether the words “50k more than you are entitled to” were unfair. In this regard I have no problem with the words “50k more than the amount”, but I consider that the words “you are entitled to” were unnecessary and unhelpful. They added nothing positive. The statement could readily have been reduced to: “50k more than the amount previously set out in the Anthony Harper offer/opinion sent to you.” The words “you are entitled to” were provocative, irritating, offensive and affronting. They obviously riled the Applicants. I consider that they were disrespectful and discourteous accordingly.

194. I determine Item 25 in favour of the Applicants.

Item 26- 9 November 2022 Response to Caitlin Cherry, Consumer NZ – The CSO of Radius Care Callender statement – re dispute

195. The Applicants refer here to a response by The CSO of Radius Care, CSO of Radius Care, to an enquiry from Caitline Cherry of Consumer NZ about the dispute. This response is part of Caitlin Cherry's e-mail to the Applicants of 9 November 2022, which is Document 26 on page 83 of the BOD. The CSO of Radius Care must have made the response at some time between 26 October 2022, when the Applicants notified consumer by telephone of their situation, and 9 November 2022 when Caitlin Cherry sought comment from the Applicants on The CSO of Radius Care's response.

196. The parts that the Applicants object to as misleading are two-fold:

(a) The words: "The situation is complex and Radius care is continuing to work with Mr and Mrs Currie. We understand Mrs Currie's medical condition and we are sorry she is unwell. We are working with the family to find a reasonable resolution and as quickly as we can…".

(b) The words: Changes in the retirement village sector, particularly those related to the introduction of the Retirement Villages Act 2003, led to an industry-wide decision to move away from the unit title structure to the more conventional licence to occupy model as and when each resident left the village."

197. Looking at The CSO of Radius Care's first statement (a), the Applicants obviously consider these words misleading as in their opinion there was no empathy for Mrs Currie's medical condition and in their opinion the Respondent was not working with them to achieve a quick solution. That is the Applicant's assessment of the situation. The CSO of Radius Care, however, expressed an opposite opinion and assessment, and I am required to determine whether it was misleading and therefore unfair to the Applicants. I do not consider that it was. The CSO of Radius Care is entitled to express, and indeed one might expect him to express, a different view of matters than that of the Applicants, but he is entitled to express it. He may well have considered that what he said was perfectly correct. The comments were not made to the Applicants but to a third party, namely Consumer NZ, and Consumer NZ are the ones who would need to determine whether it was misleading or not. As is appropriate in considering any journalistic article, they sought the comments of the Applicants to The CSO of Radius Care's comments, in order to arrive at a fair and balanced evaluation of the matter. The Applicants therefore had the opportunity to respond to Consumer NZ about The CSO of Radius

Care's comments and correct anything they considered to be untrue or misleading. They did. I therefore do not consider that statement (a) was unfair to the Applicants.

198. Looking at The CSO of Radius Care's second statement (b), he is expressing a view as to a movement within the retirement villages industry away from the historical unit title model. This model was like that in the Village - namely unit titles with an Encumbrance protecting a Management Deed. This was not the only ownership structure - prior to the RVA, there was a variety of ownership structures, and a variety of resident-operator rules. Villages had to comply with the Securities Act 1978 in producing an investment statement and prospectus when issuing occupation right agreements. The RVA sought to consolidate resident-protective provisions and standardise certain essential requirements in occupation right agreements. The reasons for it are well-documented and I do not need to examine them here. Not surprisingly, it is true that there was a movement towards licences to occupy and ORAs. The CSO of Radius Care is **not** saying that the underlying title owned by a village could not be a unit title, or for that matter other types of title such as separate fee-simple titles, cross-lease titles, or company share-owning titles. What he is indicating is that instead of title ownership being in the name(s) of the resident, the village operator would own all the titles, and the resident would acquire an unregistered occupation right to occupy a unit or apartment. The second statement is a fair assessment of what took place in the industry. It is not misleading, and it is not dismissing unit titles as an underlying ownership structure. Indeed, in this Village unit titles have been acquired and continued by the Respondent, with ownership now vested in the Respondent and ORA's granted to prospective residents. Some Villages still have titles owned by residents, subject to binding requirements to comply with the RVA and village requirements upon sale, but these are not common. The Retirement Villages Association New Zealand Annual Report 2023 includes tables as to tenure structure. Under the heading "ORA Types" on page 10, it indicates that there were 41,076 retirement units in 413 villages in New Zealand. Of these, 37,983 were Licences to Occupy. Only 880 were unit titles. In the Waikato region, where this village is located, there were 4295 retirement units, of which only 226 were unit titles. This confirms the trend. I therefore do not consider that statement (b) is untrue or misleading, and it is not unfair to the Applicants.

199. I determine Item 26 in favour of the Respondent accordingly.

Item 27 - This was excluded by me as irrelevant opinion from a third party and is therefore not considered.

Item 28 – 10 January 2023: Radius: First they have heard of approval (Consumer NZ)

200. I have considered this earlier in this Decision. It relates to Document 28 on page 86 of the BOD. Caitlin Cherry of Consumer NZ reported to the Applicants in an e-mail on 10 January 2023 that she had heard from Radius and they had said “this is the first they have heard that the village manager at the time approved you as residents – and that their lawyers, to their knowledge, have never been provided evidence of this. You sent me the e-mail from the Facilities Manager (at the time) confirming this – has this ever been sent to Radius or its lawyers. If not, could I send a scanned e-mail copy to them?”

201. The first part of the response from Radius does not appear to refer specifically to any written confirmation of approval, but simply to an assertion by Caitlin that the Applicants had obtained approval. That is why she then goes on to refer to The Facilities Manager (at the time)’s confirming e-mail of 3 May 2021 (Document 5 on page 23 of the BOD) and ask whether she could send it to Radius (Radius is the holding company of the Respondent). As far as the Radius indicating on or about late 2022 (the Applicants first referred the matter to Consumer in a telephone call on 26 October 2022) or early 2023 that it had no previous inkling that consent had been given, that is incorrect. It has clearly been mentioned in North End Law’s letters of 12 November 2020 and 21 January 2021, and in Norris Ward McKinnon’s letter of 28 May 2021. Further, I have accepted that a copy of The Facilities Manager (at the time)’s confirming e-mail of 3 May 2021 was shown by the Applicants to the CEO of Radius Care at the meetings with the Applicants on 1 August (or 5 August according to the Applicants) 2022 and 23 September 2022. It is therefore clear that the Respondent had knowledge of the consent well before late 2022 or early 2023. The advice that it had no prior knowledge of it is incorrect.

202. It should be noted here, that the Applicants advised Caitlin Cherry that she did not need to send a copy of The Facilities Manager (at the time)’s confirming e-mail of 3 May 2021 to Radius, as they already knew of the approval and their statement to the contrary was untrue. I see no reason why the Applicants could not have simply agreed to Caitlin Sherry sending a scanned copy to Radius. That would have been a logical step to take as it would have drawn a response from Radius (either a further denial that they were aware or a concession that they did know), and that would have achieved a fair comment from both sides of the dispute. The Consumer article was ultimately published on 25 January 2023.

203. I am required to determine whether the incorrect advice given by Radius to a third party, namely Consumer NZ, was unfair to the Applicants. I do not consider that it was, for three reasons:

(a) There is no evidence that The CSO of Radius Care's advice to Consumer was intended to be deliberately misleading, disrespectful or discourteous. He may simply have been ignorant of the history of the matter; and

(b) Consumer NZ gave the Applicants the opportunity to comment on this advice, and the Applicants were able to advise Consumer NZ by telephone of the correct position as they saw it; and

(c) Consumer NZ had a copy of The Facilities Manager (at the time)'s confirming e-mail of 3 May 2021. They could therefore conclude from this that consent had been given, and decide for themselves whether the advice from Radius to the contrary was correct or otherwise.

204. I determine Item 28 in favour of the Respondent accordingly.

Items 29 to 34, Item 36 - These Items all occurred after the date of the Dispute Notice and were not part of the dispute. In addition, some were opinions expressed to me, some were outside of the parameters of the issues in the dispute, and some were outside of the jurisdiction of this Panel. All were dismissed accordingly.

Item 35 – Non-compliance of the 20-day rule in regard to the dispute, Code of Practice 2003

205. Paragraph 34(1) of the COP (Document 35 on page 97 of the BOD) requires that: "The operator or person dealing with the complaint on behalf of the operator must make and notify a decision on the complaint as soon as reasonably practicable and, in any event, within 20 working days of the complaint being made (or such earlier period as the operator decides)."

206. The Applicants made the complaint on Friday 01 July 2022. It is referred to in paragraph 3(c) and 3(d) of the CEO of Radius Care's letter to the Applicants dated 12 August 2022. (Document 22 on page 71 of the BOD), and receipt of the complaint on 01 July 2022 is acknowledged. The Respondent therefore had until Friday 29 July 2022 to notify a decision on the complaint. While there was an e-mail from the CEO of Radius Care on 06 July 2022 to arrange a Zoom meeting later in the week, and a meeting with the Applicants on 01 August (the Applicants maintain this took place on 05 August), there was no written response until e-mailed letter from the CEO of Radius Care on 12 August 2022, which was outside

of the 20-day time-frame. It is debateable whether this was a response at all, as it seems more of a "non-response" in that in paragraph 4 it states: "Radius Care is **not addressing your complaint** as made in accordance with the Code of Practice, which applies to 'Residents' of the Village as defined in the Code of Practice. In any case, as previously relayed to you, we see no substance in the claims in your complaint." Paragraph 5 went on to state that Radius was motivated to resolve the complaint, invited a response to the proposal in Anthony Harper's letter to the Applicants dated 27 June 2022 ("This offer will put you in a position as close as possible to the situation you would have been in, if your right to occupy had been documented in 2014."), and if this was not acceptable it invited the Applicants to quantify and advise of their expected payment". This is a response of sorts, even though it was outside of the 20-day time-frame. The question is whether that delay (10 working days) was unfair to the Applicants."

207. I do not consider that the delay of 10 working days in notifying a response was unfair to the Applicants, as it was not prejudicial to their complaint nor any subsequent processes. [There was also delay on the part of the Applicants in that they did not issue their Dispute Notice until 24 February 2023, which is outside of the 6-month period from referral to the complaints facility, under section 57(1) of the RVA, which technically expired on 31 December 2022. However, section 57(2) allows it to be issued outside of the six-month period if the parties to the dispute agree. It is evident from the correspondence surrounding the dispute notice that they did so agree. I raised this issue in a Minute dated 13 August 2023 and I invited objections within 7 days. Neither party objected.]

208. Item 35 is determined in favour of the Respondent accordingly.

Item 36 – This was excluded.

Item 37 - Any correspondence now addressed to the dead. Nomination of Chairman, Mr. O'Connor, 11 September 2020

209. I have already dealt with this under Item 4 and determined the Item in favour of the Respondent.

Item 38 - Unfair treatment has caused stress, anxiety, health and wellbeing issues to us both, the Applicants

210. I would first re-iterate what I stated in paragraph 83 above:

"Clause 16 on page 17 of the COP outlines an operator's obligations in respect of the safety and security of residents. Sub-clause 1a requires staff conduct and management practices to ensure safety and security. Page 18 is more helpful in that it mentions under "Codes of Behaviour" some examples of what a Code should seek to prevent, including (but not limited to) bullying, harassment, unfair discrimination, victimisation, exploitation, breaches of personal privacy, and codes under the Human Rights Act 1993 and the Privacy Act 1993. Under "Management Practices" it suggests, among other things, regular contact and communication with residents, and their right to be treated with courtesy, and addressing issues raised by or on behalf of residents. **What is evident from these examples is that the categories of unacceptable behaviour and unacceptable management practices that could be considered to be within these parameters are not closed."**

211. I am particularly interested here in the obligation of the operator to ensure that staff conduct and management practices ensure the **safety and security of residents**, in clause 16 on page 17 of the COP.". . The threat of losing their home by entry into possession and/or mortgagee sale by the Respondent, coupled with the threat of a potential debt liability of over half a million dollars as set out in Anthony Harper's letter to Mrs Currie of 04 November 2020 (Document 3 on page 21 of the BOD), would inevitably make the Applicants feel unsafe and insecure "Unsafe" generally means "not protected from danger, harm or **loss",** while "Insecure" means "**unsettled, uncertain, anxious, defenceless, exposed to possible harm or loss"**. **That, apart** from the examples given on page 17 of the COP (eg bullying, harassment, victimisation, exploitation) would, in my view, be sufficient to constitute a breach of the COP. It would also be disrespectful to the rights, and discourteous treatment, of the Applicants (Right 7 of the CRR).

212. "Bullying" is seeking to harm or **intimidate** someone, particularly someone who is vulnerable. I consider that threats of this nature would be intimidatory, and that the Applicants were elderly and vulnerable.

213. Apart from this, I am aware that there may be debate as to the cause of the alleged stress, anxiety, and harm to wellbeing of the Applicants. An effect does not prove a cause. I expressly excluded opinions expressed in the Affidavits of Mr and Mrs Coleman (pages 122-124 and 120-121 of the BOD) and in the Statement by Mr Kiddie (pages 125-126 of the BOD) in this regard because they were the opinions of unqualified people. They were not medical clinicians. However, I have taken into account the following:

    (a) My own observation of the demeanour of the Applicants at the hearing. Mr Currie was in tears when describing the stress and strain of this dispute on his wife.

(b) A letter from Mrs Currie's doctor, Dr Anne Walsh of Rotorua Medical Group Limited, dated 22 March 2024,. This was presented in evidence at the hearing. This states: "Claudia Currie has been a patient of mine for many years. She has been under a lot of stress and is struggling with anxiety since moving into a retirement village and the problems that have ensued."

(c) The observation made by Mr Peter Carr JP, in his unofficial minutes of the meeting held between the Applicants and the Respondent on 23 September 2022, which he chaired (Document 24 on page 77 of the BOD). Under the heading "Update" on page 1, he states:

"To describe this situation as being fraught with difficulty would be an understatement. That it has degenerated into an aura of bitterness causing personal health-related stress for the Curries would be factual.

Mr Carr attended the hearing as a support person for the Applicants. While he is not a medical practitioner, he is the Immediate Past President of the Retirement Villages Residents' Association, and he has had many years of experience in assisting and observing the effects of disputes on elderly residents. I therefore consider that what he has to say about it is worth taking notice of.

(d) In paragraph 3 of his closing Submissions dated 25 March 2024, Mr Currie states:

"I will never forget that middle of the night (same day Claudia received a letter dated 4th November 2020 from the Respondent's solicitor(s) at Anthony Harper; being woken by Claudia's crying, brokenhearted, wondering how she was going to pay $152,000.00 demanded by the respondent and the threat of repossession of Unit 4 if not paid within 30 days. No way she could pay that amount of money." He continues in paragraph 5: "I know this battle with this operator has caused Claudia anguish, anxiety, lack of wellbeing and quiet enjoyment which has affected Claudia's ongoing health issues, which I am sorry for." These are raw and heartfelt experiences. I accept the reality of them, and the observations made by Mr Currie as to the affect that this protracted and bitter dispute has had on his wife.

214. I am therefore satisfied that:

(a) The Respondent breached its safety and security obligations under clause 16 of the COP;

(b) The Respondent breached Right 7 of the CRR; and

(c) The way the dispute was handled by the Respondent, which in my view was very poorly, caused stress, anxiety, health and wellbeing issues for the Applicants, and in particular, Mrs Currie.

215. I determine Item 38 in favour of the Applicants accordingly.

Issue (c)

The unlawful request by the Respondent to the Applicants to sign a termination of the Management Deed attached to the unit title as a covenant.

216. This issue arises from the words in the letter (and accompanying documents) dated 27 June 2022 ("the Letter") from Anthony Harper, the Respondent's lawyers, to Norris Ward McKinnon, the Applicants' lawyers. The letter and accompanying documents are Documents 18 to 21 in the Bundle of Documents. There was also an earlier letter dated 4 November 2020 from Anthony Harper to Claudia Currie (one of the Applicants), which is Document 21 in the Bundle of Documents. This stated: "If you fail to make payment then our client intends to exercise the remedies afforded to it by the encumbrance, including the power to enter into possession of the unit and the power of sale". Both of these actions would effectively terminate the Management Deed. However, I will consider the latter letter as part of Issue (b) and will confine my consideration at this stage to the Letter.

217. The Letter was sent following the Zoom meeting between the Parties on 3 May 2022. It summarised the Respondent's understanding of what was discussed at that meeting, and went on to outline the Respondent's view of the interplay between the RVA and various forms of occupation right agreement, including that of a unit title and management deed protected by an Encumbrance, which was acknowledged in paragraph 6 to be within the ambit of "occupation right agreement" together with a "more modern occupation licence." The discussion of the interplay focussed on section 27 of the RVA and concluded in paragraph 9 that "even if an offer of occupation in a retirement village is made directly by the former resident, they must comply with the requirements that the occupation right agreement be on terms no less favourable than the registered version, and that it otherwise includes all the legislatively prescribed provisions." It was therefore contended by the Respondent that the Applicants needed to comply with section 27, but this was put forward without considering that the Applicants may have obtained consent to occupy Unit 4 (which had been stated by the Respondent's lawyer, Norris Ward McKinnon, in paragraphs 22 and 23 of an earlier letter to Anthony Harper dated 28 May 2021 (which is Document 15 in the Bundle of Documents), and in

paragraphs 6 and 7 of a letter from North End Law (who were then acting for the Applicants) to Anthony Harper dated 28 January 2021, which is Document 14 on page 49 of the Bundle of Documents. The contention that section 27 needed to be complied with was put forward on the presumption that the Applicants would be new residents as from early 2014, when they first discussed taking up occupation of Unit 4, and had they at that time entered into a new ORA then it would have been one which complied with section 27. On this basis, the Respondent went back to the position which would have existed had a new ORA been entered into in 2014.

218. Since I consider that consent to occupy was obtained by the Applicants, it would be a reasonable expectation for a record of this to have been kept by the Respondent. In the absence of any such record having been kept, the Letter did not consider whether the Applicants could be residents under the original Encumbrance and Management Deed structure, nor the fact that they had been treated as residents for 5 or 6 years and might therefore have a constructive/implied occupation right (see my PD attached to this Decision).

219. The Respondent maintained in evidence (paragraph 13 of The Respondent's solicitor at Sharp Tudhope's Statement of Evidence dated 12 February 2024) that they were confused by the Applicant Claudia Maree Currie having the same name as her mother Claudia Kevey O'Connor. On this basis The Respondent's solicitor at Sharp Tudhope dismissed discussions with the Applicants in 2017. However, such discussions were with The Facilities Manager (at the time), the very person who dealt with the Applicants in 2017 in respect of various improvements to the Unit, and who had met with them in late 2013 and early 2014 in respect of their indications that they would occupy Unit 4.I do not accept that the Respondent was confused. The middle names and surnames are quite different, they each had different husbands, the Applicants lived in the Village for at least two years before any review of occupancies took place in or about January 2019, and the Applicants were well known to both staff and other residents in the village who also knew their parents. These included Petra Bates, who with her husband set the village up. There would therefore have been no reason to be confused as to the identity of Mrs Currie. The Respondent also maintained that they had seen no written document either giving consent or confirming that consent had been given. I have already indicated otherwise in paragraphs 88 to 96 above. Written consent was mentioned in the Complaint dated 1 July 2022. I therefore do not accept that this constitutes a good reason for not picking up the occupancy of the Applicants. While a review took place in early 2019, resulting in a letter from the Respondent's lawyer, Sharp Tudhope, to the Applicants on 24 January 2019 , the subsequent responses to that (namely the two advices to the Respondent (in the letters referred to in paragraph 118 from North

End Law dated 12.11.20 and 28.1.21 above, that consent to occupy had been obtained)0, gave a clear “heads up” to the Respondent that the position may not have been quite as they assumed. Given the perceived gravity of the situation I consider that it would have been appropriate for the Respondent to have taken these advices seriously and followed them up. A simple question to Ms McFarlane would have confirmed the 2 advices, and possibly resulted in a different approach being taken.

220. Be that as it may, the letter of 27 June 2022 suggested a new ORA with a purchase price of $185,000.00, being the rateable value in 2014, with a Village Contribution of 20% ($37,000.00) amortising over 2 years, and the 5% plus GST sale fee deferred until termination of the ORA (usually on sale of the unit). Also enclosed was an Agreement for Sale and Purchase to purchase the unit title, Disclosure Statement, Retirement Village code of Practice and Code of Residents’ Rights. An “Authority” was enclosed to apply the proceeds of sale ($185,000) towards the settlement of the new ORA for Unit 4. In paragraph 24 of his Statement of Evidence, The Respondent’s solicitor at Sharp Tudhope for the Respondent says this proposal was put forward “as part of a wider settlement agreement.” He further states: “The Operator has not requested the Applicant to sign any termination of the Management Deed outside of this offer and the covering letter of the offer made it clear that the documents only needed to be signed if the Applicants accepted the terms of the offer.” That is correct. Paragraph 17 in the Letter mentioned the right of prospective residents to receive independent legal advice, the 15-day cooling off period after signing by the resident and the effect that cancellation during this period would have, namely reversion to the status quo. More importantly, paragraph 18 invited Norris Ward (The Applicant’s solicitor at Norris Ward McKinnon) to discuss this offer with your clients and, **if the terms are acceptable**, return copies of the signed documents to us.” In the event, the offer was rejected by the Applicants.

221. It is clear that the proposal in the Letter was put forward by the Respondent in terms of being an offer. It was sent to the Applicants’ lawyer, who was requested to discuss the offer with them. The lawyer would have been aware of the nature and effect of the offer and able to advise them appropriately. The offer was not unlawful. It was not contrary to any law. It was the normal sort of initial offer that one might expect to see from a village operator who was seeking to correct what they perceived to be an irregular situation. I accept that the offer was put forward with this focus. The terms of it may have been seen as minimal (eg adopting a 2014 value for the Unit), but that is not unusual in the initial offer. The Applicants had no obligation to accept it, and they had the protection of receiving independent legal advice. My observation is that the Letter had a polite, factual and non-coercive tenor. While the Respondent could have investigated the Applicants’ claim of obtaining historical consent to occupy and could have looked into whether it was

really necessary to achieve a section 27-compliant ORA until the unit was sold, I accept that the offer was presented in a genuine attempt to resolve the dispute. Presenting such an offer for these reasons is not unlawful. It is a normal part of the to-ing and fro-ing that may be undertaken to achieve a negotiated settlement.

222. Issue (c) is accordingly decided in favour of the Respondent.

Issue (d)

The Status of the Management Deed to Protect the Rights of the Applicants as Owners and Residents

223. The Applicants - It is clear that the rights of the Applicants as residents are protected by the Encumbrance/Management Deed structure. That has been acknowledged and accepted by the Respondent (and the Applicants) at the hearing. That situation will subsist until the death of the survivor of the Applicants (see paragraph 205 below), or their earlier departure from the Village.

224. The Family Trust - The rights of the Applicants as owners of Unit 4 is another story. The Applicants personally are not the owners of Unit 4. Unit 4 is owned by the FP and CK O'Connor Family Trust, which is a separate entity from the Applicants. The current sole trustee of such Trust is Claudia Maree Currie. The Trust is not a party to the original Encumbrance and Management Deed, but is bound by it as owner because it took title subject to the Encumbrance, which is a mortgage (section 104(1) Property Law Act 1952, now section 203 Property Law Act 2007). The Trust will make decisions as to disposal of Unit 4. There is therefore protection in the commonalities that exist – (a) both the Applicants (as occupiers/residents) and the Trust are bound by the Encumbrance and Management Deed; and (b) There are common personnel, in that Claudia Currie is both an occupier and a trustee; and (c) the aims and aspirations of the Applicants and the Trust, whether during the lifetimes of the Applicants or after their deaths, are essentially the same.

225. It is appropriate, however, as part of the consideration of the status of the Management Deed, to not only consider its present status but also its status in the future. There are two more important issues, going forward, resulting in different scenarios in respect of section 27:

   (a) Can any member of the Applicants' family live in Unit 4 during their lifetimes or after their deaths?

(i) Ron Currie – If Claudia Currie predeceases Ron Currie (or for that matter, vice-versa), Ron can continue living in Unit 4 until his or her death. The reasons are:

- The Occupation Right agreed upon in Issue (a) is with both of the Applicants.
- Most ORA's provide for a spouse to continue living in a unit or apartment following the death of their partner, and it is current best practice in retirement villages.
- Ron Currie occupied the Unit as the spouse of Claudia Currie, which is permitted in terms of sub-paragraph (c) in the definition of "resident" in section 5 of the RVA and clause 2 of the COP,
- The definition of "Resident" in clause 1.1 of Memorandum 11501256.1 (under section 209 of the Land Transfer Act 2017) dated27 June 2019, entered into between the Respndnet and the Statutory Managerv(Covenant Trustee Services Limited), states in sub-paragraph (c): "If the Occupation Right Agreement so provides, **or with the consent of the operator of a Village,** the spouse or partner of the person referred to in paragraph (b) who is occupying thedwelling with that person, or after that peroson's death or departure from the Village". The "person referred to in paragraph(b)" is "a person who, under an Occupation Right Agreement is**,** for the time being, entitled to occupy a dwelling within a Village, whether or not the agreement is made with that person or some other person."
- Preventing Ron from occupying the Unit, and preventing the sale of the Unit, could fall foul of the Human Rights Act 1993 in that it could be construed as discrimination. Section 21(1)(l) prohibits discrimination on the grounds of "family status", which includes being "(iii) married to …a particular person", and "(iv)being a relative of a particular person." The "particular person would be Claudia Currie. Section 53(1) and 53(2) render it unlawful to do a number of things in relation to land, housing and accommodation:

  "(1)(a) To refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to any other person; or

  (b)To dispose of such an estate or interest or such accommodation to any person on less favourable terms and conditions than are or would be offered to other persons; or

  (c) To treat any person who is seeking to acquire or has acquired such an estate or interest or such accommodation differently from other persons in the same circumstances; or

(d)To deny any person, directly or indirectly, the right to occupy any land or any residential or business accommodation; or

(e)To terminate any estate or interest in land or the right of any person to occupy any land or residential or business accommodation, -

by reason of any of the prohibited grounds of discrimination.

(2) It shall be unlawful for any person, on his or her own behalf or purported behalf of any principal, to impose or seek to impose on any other person any term or condition which limits, by reference to any of the prohibited grounds of discrimination, the persons or class of persons who may be the licensees or invitees of the occupier of any land or any residential or business accommodation."

There are exceptions in section 54 for residential accommodation shared with the person disposing of it (but Ron would not be sharing if Claudia was deceased, and vice-versa), and in section 55 for retirement villages in respect of sex, marital status, religious or ethical belief, disability or age, but not family status. Further, it is not within the "family status" exceptions in section 32. The ramifications of this, as far as continuation of occupancy by the survivor of the Applicants, acquisition by the Trust, consent to occupy, termination by way of forced sale, and refusal of invitees or licensees, are obvious. Any of those could present an arguable case of discrimination.

(ii) Other family members - No. While the Trust may be happy for another family member to live in the Unit, this would not accord with the requirements of the Encumbrance and Management Deed, which bind the Trust and the occupiers. As we have seen, the Applicants 'recognised that consent was required in terms of the Management Deed, for them to reside in the Village. They sought and obtained consent to live in Unit 4 after the death of Frank O'Connor (as survivor). Claudia Currie is a trustee of the FP and CK O'Connor Family Trust, the owner of the unit, and Ronald Currie is her husband. Without necessarily conceding that such consent was obtained, the Respondent has acknowledged and accepted that the Applicants have an occupation right comprised of the Encumbrance and Management Deed. The Applicants have, to be fair, obtained a right to occupy Unit 4 by a circuitous and unusual route which, for various reasons, has worked out in their favour. It cannot be assumed, however, that the same route can be taken by any other family member. The Respondent has conceded the

occupation right of the Applicants on the basis that such occupation right will terminate, in the normal manner, on the death of the survivor of the Applicants. This is the case with any occupation right. It will not automatically carry on and apply to any member of the Applicants' family. The RVA is concerned with occupation rights, not title ownership. If a family member therefore wished to live in Unit 4, then they would need to apply to the Respondent to enter the Village as a resident, in the same manner as the Applicants (and recognised by them in that they expressly sought consent), Any third party would need to do the same. If the family member, like any third party, satisfied the criteria in clause 2(h) of the Encumbrance, and there was a compliant occupation right agreement in place (if necessary, by way of an order under section 69(1)(a) of the RVA), there would seem to be no reason why a family member would be treated any differently from a third party.

(b) What might happen if the Unit was sold?

There are two options to consider here:

(i) sale to the Respondent; or

(ii) sale to a third party.

I will look at these in sequence.

226. I have previously considered, in paragraphs 70 to 76 above, whether the Encumbrance/Management Deed occupation right of the Applicants needs to be amended to comply with section 27 of the RVR. I concluded that it does not. As mentioned in paragraph 71 above, however, there is the further question as to whether any occupation right agreement offered to a future buyer of Unit 4 would need to comply with section 27.

Sale to the Respondent

227. If common sense were to prevail, whether section 27 applies to a new ORA would not be an issue which the Applicants would need to consider. By that I mean that if the Respondent was to purchase Unit 4 for market value from the Applicants or their representatives, at such time as it is available, which is the Respondent's stated intention (see paragraph 67 above), then the Respondent would then own the unit and could do with it whatever it wanted eg cancel the Encumbrance and Management Deed and replace it with their preferred type of ORA. Indeed, in paragraph 16 of the Respondent's Statement of Position (in respect of whether the RVA applies) dated 21 February 2024 ("the SP"), the Respondent states: "The Respondent has offered to purchase the unit title from the Applicants so that they could exit the Village without having to comply personally with

section 27(1) of the Act". This would be a practical and sensible solution, which has been raised by both parties, and on which the Applicants were substantially cross-examined by the Respondent at the hearing. The sticking point, however, is the substantial difference between the expectation of each party as to what is required to conclude such a sale. This was alluded to by the Respondent at the hearing as being the pivotal issue if a settlement was to be achieved.

228. On 15 August 2022 the Applicants forwarded to the Respondent a proposal for settlement of the dispute. This is Document 73 in the Bundle of Documents. In this proposal the Applicants required a sum of $884,000.00 from the Respondent to settle the dispute, comprised as follows:

Sufficient funds to enable the Curries to purchase in Hamilton		$790k
Sufficient funds to cover legal costs, current and pending		$24k
Fair and reasonable compensation for harassment, mental anguish, wellbeing, humiliation, and the threat of taking possession of the property from the Curries	$35k x 2	$70k
		$884,000.00
		==========

229. This figure did not mention the market value of Unit 4. At the hearing, Mr Currie was cross-examined as to why he had not gone to the market with Unit 4 to test how much it was worth, which was the right of the Applicants in terms of clause 5(a) in the Management Deed. It appears that the reason he did not wish to do that is because he regarded the dispute as a matter requiring a "commercial settlement" in the sum he had put forward. The settlement proposal was rejected by the Respondent on 19 August 2022, indicating that they did not consider that the Applicants had any right to claim sufficient to buy a property in Hamilton, nor any compensatory claims. This is Document 72 in the Bundle of Documents.

230. The Respondent, by its associated company Radius Care Limited (the holding company for the Respondent), obtained a Valuation Report for Unit 4 on 20 December 2021. This was done by CBRE Valuation and Advisory Services. It assessed the value of Unit 4 at that time at $380,000. Since then, the value of Unit 4 has obviously gone up. The current advertised value of units in the Village is around $500,000 - $530,000. On 22 December 2023 the Respondent put forward a settlement proposal to the Applicants, offering to purchase Unit 4 for $350,000.00, which was arrived at by taking a market value of $450,000 and deducting $100,000.00 for refurbishment of Unit 4 to an "as new" standard. This

proposal was not accepted by the Respondents. No up-to-date valuation of Unit 4 has been obtained.

231. Both parties expressed a strong desire at the hearing to try and achieve a settlement. I believe they are both genuine in that desire. It is not for me to negotiate or dictate the terms of any settlement, but it is patently obvious that if a settlement is not achieved then the parties will be back in front of a Panel or some other tribunal at some time in the future to sort out what is to happen on the sale of Unit 4. It is also patently obvious that if any settlement is to be achieved as far as a sale to the Respondent, then it will require concessions to be made on both sides. For example, the Applicants could drop their claim for $884,000 and adopt the current market value of their unit as a sale/settlement figure. The reasons are: (a) I see no merit in their claim for $790,000 since it bears no relationship to the current market value of Unit 4 and values are not determined by the prices of homes in another area that someone may wish to live in. (b). I see no merit in their claim of $24,000 for solicitor-client costs as this is presumptive in that solicitor-client costs are only awarded in circumstances where the other party is clearly in the wrong and yet has belligerently continued with proceedings; (c). The Applicants have claimed the sum of $70,000.00 damages for distress and humiliation. This Panel has no jurisdiction to make any such award. If the Applicants consider, after taking appropriate legal advice, that such a claim has any merit, then they may reserve that right and pursue it at another time in another forum. If it has no merit, then they should drop it. Such awards are certainly made in civil claims, and also in employment cases (in the latter, they are generally of a very modest nature. In the interests of settling this dispute, the Applicants could seriously consider dropping any such claim. On the other side, the Respondent could drop the deduction for refurbishment. I see no merit in the deduction of money for an "as new" refurbishment because: (a) The respondent purchased the Village in 2004, in the condition it was in at that time. It was then at least 16 years old and, since improvements are constantly being made in kitchen and bathroom fittings and other building methods and materials, was possibly already dated. It is illogical and unfair to require the pre-purchase owners of units (n this case the family trust) to foot the capital cost of upgrading a unit to a more modern standard. (b) On page 27 of the Seminar Booklet it states: "Two of the provisions in the Code that will have a significant retrospective effect are: - the removal of the right to charge for complete refurbishment including the cost of making good fair wear and tear." (c) Clause 2(e) in the Management Deed only requires the Applicants to maintain the unit in good repair, and refurbishment is not mentioned anywhere. Page 16 of the valuation of 21 December 2021 mentions only access for carrying out repairs. (d) The valuation itself indicates in its photographs that the unit has been kept in very good repair. (e)The "legacy" type of ownership mentioned in the "Actions arising from meeting" document mentioned in paragraph 67(c)(i) above makes no

mention of refurbishment being required on sale. (f) Even if refurbishment was contemplated then clause 2(e) does not fully comply with the requirements of clause 50 (2), b and c of the Code of Practice, which is retrospective in effect). The Respondent could pay to the Applicants the current market value of Unit 4 without any deductions. Both parties could then move forward. Each of them needs to ask themselves: What is the price of peace?

Sale to a Third Party

232. If the Respondent did not purchase Unit 4 and the Applicant's desired to sell it to a third party (which is their right in terms of clause 5(a) of the Management Deed), then in terms of Clause 2(h)(ii) of the Management Deed the Applicants would need to obtain the approval of the Respondent to a "suitable resident". It is noted that such approval is in respect of a "suitable resident". It is not in respect of a suitable occupation right structure that the Respondent may prefer. Indeed, clause 5(h)(iii) of the Management Deed only requires any proposed new resident to "agree to enter into a Management Deed…substantially in the same form as this Deed." However, section 27 could extend this, which brings us to consider the requirements of section 27 in respect of any occupation right agreement which may be available to proposed new residents of Unit 4.

233. (a) Section 27(1) states: "No person may make any other person an offer of occupation in a retirement village, or accept an offer by a person to become a resident in a retirement village, except in accordance with an occupation right agreement that contains, in a clear and unambiguous form, - (a)provisions and information of the kind specified in Schedule 3; and (b) any other provisions required to be specified in an occupation right agreement by this Act or regulations made under this Act…")

(b) The Respondent holds the view, expressed in paragraphs 15 and 16 of the SP, that the words "any person" are intentionally broad and apply to the Applicants in disposing of their interest, as well as to the Respondent. The Respondent therefore considers that if the Applicants wish to sell their unit title directly to a new resident, then they will need to comply with section 27(1) of the Act. In paragraph 13 of the SP, the Respondent maintains that because the unit formed part of the retirement village on 1 May 2007, and registration of existing villages as retirement villages was required under the RVA (section 10), there is no question that the Act applies to all residential units which form part of a retirement village.

(c) It may be debated as to who is making the actual offer of an occupation right. Such formal written offers are normally made by the operator after an application has been made by a prospective resident to become a resident in the village, and appropriate medical checks have been carried

out on the prospective residents. That would be to construe the words "any person" narrowly as meaning the operator, but if that was the intention then why did it not state "The operator" instead of "Any person" (which contemplates the possibility of the resident finding a suitable buyer). It is also interesting that section 25(1)(a) of the RVA also uses the words "No person." It states: "No person may – (a) make, allow to be made, or acquiesce in the making of any offer of occupation or the publication of any advertisement after the expiry of six months from the day on which this section comes into force." This seems to contemplate that even passive or indirect participants in the offer process are included. Clause 5(a) in the Management Deed affords the Applicants the right to go to the market directly and find a buyer. One must then ask what they are selling. They are certainly selling a freehold unit title, but that unit title relates to a unit which is part of a retirement village, and that retirement village had to be registered under the Act (see paragraph 234(d) below).

(d) In paragraph 13 of the SP, the Respondent maintains that because the unit formed part of the retirement village on 1 May 2007, and registration of existing villages as retirement villages was required under the RVA (under sections 10 and 25(2) of the RVA), there is no question that the Act applies to all residential units which form part of a retirement village. Section 10(1) of the RVA simply states: "The operator of a retirement village **must** ensure that it is registered." Page 3 of the Seminar Booklet summarises the registration requirements: "For new villages lodgement for registration and registration **must** occur within 6 months from 1 May 2007. Existing villages that have until 1 May 2007 complied with the Securities Act requirements concerning producing an investment statement and prospectus must also apply to register by 1 November. Under section 25(2) of the Act they have a 12 month period from 1 May 2007 where offers of occupation right agreements can continue to be made without registration, subject to their continued compliance with the Securities Act. Existing villages therefore that continue to be compliant with the Securities Act will have until 1 May 2008 to become registered. All others including existing and new villages who do not achieve registration by 1 November 2007 cannot continue to make offers of occupation after that date." In short, unless a village was registered, it could not effectively continue to carry on the business of what retirement villages do, which is to provide accommodation. The compulsory nature of registration stemmed for the desire to regularise the industry and provide consumer protections for residents.

234. On balance, I tend to agree with the Respondent. As I have said already, the RVA applies to the world as it was when the RVA commenced (see paragraph 64 above). The Village existed and it needed to be registered. The Applicants and the Respondent would therefore both need to ensure

that any new occupation right agreement for Unit 4 complied with section 27 of the Act.

235. A further reason for putting in place a new ORA for Unit 4 are sections 28, 29 and 31 of the RVA. Section 29 requires an ORA to contain a provision allowing cancellation by the resident without reason within 15 days of signing the ORA. Section 29 requires any deposit to be held by the statutory supervisor until settlement of the purchase of the ORA. Section 31 allows a resident to void the ORA by notice in writing to the operator if the ORA has been entered into in contravention of section 18(3) or section 25(1) or section 27 or section 30(1). That would be an undesirable situation for an operator.

236. That, however, does not mean that the Applicants need to adopt a new ORA of the type currently preferred by the Respondent. As mentioned in paragraphs 76 and 77 above, compliance with section 27 could be achieved by way of a variation of the Management Deed [by mutual agreement, or pursuant to an order of this Panel under section 69(1)(a) of the RVA] to incorporate into it any missing requirements. There are conflicting obligations, in that clause 6 of the Management Deed only requires the Applicants to procure from any prospective purchaser "an agreement in the same terms as this Deed or any other similar deed required by the company". However, section 27 of the RVA needs to be complied with also, and indeed the Respondent would be likely to "require" a compliant deed. The incorporation of section 27 requirements into the Management Deed by way of a variation thereof would therefore enable compliance with section 27 as well as satisfying the obligation in clause 6 of the Management Deed. The Applicants would then be at liberty to sell the unit with the Encumbrance and varied Management Deed comprising the occupation right agreement, which would then be compliant with section 27. This agrees with the Respondent's conclusion in paragraph 9 of the Letter. Since the ORA would be compliant there would be no good reason to refuse consent to a proposed new resident who was financially and medically suitable. It should be noted, however, that a sale by the Applicants to a third party would be at market value, and they would need to pay 5% (plus GST) of that sale price to the Respondent in terms of clause 5(b)(i) of the Management Deed.

237. The Applicants recognised that they were bound to by the terms of the Management Deed (which is now part of their ORA) in that they sought consent under clause 2(h)(ii) to occupy the Unit. I have concluded that such consent was given. It is therefore no different for any other occupier of the Unit, whether it is a member of the Applicants' family or a third party. In each case, they would need to be approved as a "suitable person" under clause 2(h)(ii).

238. I therefore find that:

(a) The Encumbrance and Management Deed are valid and efficacious to protect the Applicants until the death of the survivor of them or earlier termination upon them exiting the Village.

(b) If the Unit was to be occupied by a further member of the Applicants' family, or by a proposed new resident, consent from the Respondent would be required for a "suitable person" (but not the form of ORA), and a new ORA would be required which complied with section 27 of the RVA and Regulations 6-12 of the General Regulations.

(c) A new compliant ORA could be achieved by way of a variation of the Management Deed to incorporate the requirements. A variation could be done by mutual agreement or by order of this Panel under section 69(1)(a) of the RVA.

(d) I do not regard these findings in respect of Issue (d) as being in favour of either Party, as it could be regarded as being in favour of both Parties.

Preliminary Considerations as to Costs

239. 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).

240. 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.

241. 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."

242. Section 74(2)(c) allows an award of costs and expenses to "any other person…if the disputes panel makes a dispute resolution decision 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.

243. 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):

(a) The reasonableness of the costs and expenses and the amount of any award incurred by the Applicant or other person in the circumstances of the particular case.

(b) The amount or value of the matters in dispute, the relative importance of the matters in dispute to the respective parties, and the conduct of the parties.

(c) Any limitations prescribed in any regulations made under the RVR for the purpose.

244. By way of summary:

(a) I have determined Issue (a) in favour of the Applicants.

(b) In respect of Issue (b), I have determined 11.5 Items in favour of the Applicants, and 16.5 Items in favour of the Respondent.

(c) I have determined Issue (c) in favour of the Respondent.

(d) I have not determined Issue (d) in favour of either party, as it could be seen as being in favour of both Parties.

245. The Applicants have made a submission as to their costs. I have yet to hear from the Respondent. It is appropriate that I make no ruling as to costs at this juncture, pending submissions as to costs being made by both parties within 7 days of receipt of this decision. In this regard, the Applicants may make further submissions if they so wish.

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Roger Donnell

Single Member of Disputes Panel

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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.