PRELIMINARY DECISION AS TO PARTIES AND JURISDICTION

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

Applicants: Ronald Currie and Claudia Maree Currie

Respondent: Windsor Lifestyle Estate Limited

The Dispute Process to Date

1. The Dispute Notice was issued by the Applicants, pursuant to section 52(1) of the Retirement Villages Act 2003 ("the Act"), on 24 February 2023. The dispute was referred to me by the Respondent on 6 April 2023.

2. Terms of Appointment were signed by the Applicants on 18 April 2023, and by the Respondent on 10 May 2023.

3. Further particulars have been requested pursuant to Regulation 11, and provided to me by the parties to date.

4.On 13 August 2023 I issued a Minute to the parties in respect of various issues surrounding the content and time limits relevant to the Dispute Notice, and both parties have accepted that the Dispute Notice complies with the requirements and has been properly issued.

The Background

5. On or about 11 February 2004 Radius Residential Care Limited (or nominee) ("Radius") purchased from Ohaupo Developments Limited the land and buildings comprising the rest home known as Windsor Court Rest Home and Apartments, situated at 20 Sandes Street, Ohaupo. At the same time, it entered into agreements with G and P Bates and Windsor Court Rest Home Limited for the purchase of the business known as Windsor Court Rest Home and Apartments. All three agreements were inter-dependent and were to be settled simultaneously.

6. The purchase of the business known as Windsor Court Rest Home and Apartments included the acquisition of Body Corporate SA49465 management rights and rights as an Encumbrancee under certain Encumbrances registered against the titles to the individual unit titles within the retirement village. There were 22 such privately-owned units ("the Units") in the Village. Unit 4 (also known as Unit 80), occupied by the Applicants, is one of them.

7. Radius did not purchase the Units. It only acquired the management rights over them. The purchases under all three agreements were completed on or about 20 April 2004. A letter dated 5 August 2004 from the solicitor for Radius to residents informed them that Radius had "recently taken over the management responsibilities for Windsor Court Village from Ohaupo Holdings Limited by way of assignment of the Management Contracts".

8.Radius subsequently assigned such management rights (for the Body Corporate and under the Encumbrances registered against the titles for the Units) to the Respondent. This was effected by a Deed of Assignment of Management Deeds and Declaration of Trust dated 31 August 2007, which recited 01 May 2007 as the effective date of assignment. All 22 of the Units were listed in the Schedule to that Deed. A transfer of the rights under the Encumbrances was effected by a Transfer dated 27 April 2007, registered as T5997819.5 on 10 June 2004. All 22 of the Units are listed in the Annexure Schedule of such Transfer.

9. At or about 1 August 2007 all 22 of the Units were privately owned. Four of them, namely Units 1, 3, 4 and 9, were owned by family trusts. Unit 4, which is currently occupied by the Applicants, was transferred to the trustees of the F P and CK O'Connor Family Trust, namely Francis Patrick O'Connor, Claudia Kevey O'Connor and John Noel Fitzgerald, by a Transfer dated 28 March 1995 registered as B.265626 on 5 April 1995.Unit 1 was transferred to a family trust on 19 July 2002, Unit 3 was transferred to a family trust on 31 March 2006, and Unit 9 was transferred to a family trust on 1 November 2006. Units 1 and 4 were obviously transferred to family trusts before the acquisition of management rights by Radius in 2004, and Units 3 and 9 were transferred to family trusts after the acquisition of management rights by

Radius, but before such rights were assigned by Radius to the Respondent.

10.In respect of Unit 4, the 1995 transfer to the FP and CK O'Connor Family Trust was done with the consent of the then owner of Windsor Court Retirement Village, Ohaupo Developments Limited, which has been confirmed by Petra Bates, the sole director and shareholder of that company at the time.

11. The Respondent, Windsor Lifestyle Estate Limited ("WLEL") was incorporated on 12 November 2007. In an application dated 29 October 2007,(noticeably signed and dated 14 days before the company was incorporated), lodged with the Registrar of Retirement Villages on 15 November 2007, WLEL applied for registration as a retirement village under the Act. The Application stated in the Schedule: "The Village comprises: The Village has been completed as a unit title development. The Village is comprised of Body Corporate S49465. A Resident holds a stratum estate in freehold in their Residential Unit. The Village comprises of all the land registered as certificates of title numbers [23 Titles were listed, including CT SA42B/103 for Unit 4..] ".

12. At the time of registration as a retirement village, it was therefore accepted by the operator (and by the residents) that the right to occupy the Units arose from the existing private ownership of each Unit, and from the Encumbrances registered against each of the titles to the Units, which said Encumbrances referred to an attached Management Deed.

13.The Schedule in the Application further listed the Holders of Security Interests at that time, which included the two mortgages then registered against the Title for Unit 4, namely Mortgage B463895.1 to ASB Bank Limited and Mortgage 5748814.1 to the Hibernian Catholic Benefit Society. Encumbrances against the titles in favour of Radius were also recorded as security interests, which included Encumbrance H842594.3 on the Tile for Unit 4. A Certificate of Registration as a Retirement Village was issued on 15 November 2007.

14. As required by section 21(1) of the Act, the Registrar of Retirement Villages notified the Registrar-General of Land of the registration as a retirement village, and a memorial (=Notice of Registration) pursuant to section 21(3) was duly recorded against the Titles on 23 November 2007. Such memorial recorded, as required by section 21(3) of the Act,

that registration was subject to section 22 of the Act (which provides for the rights of residents ahead of the rights of holders of security interests).

15. Section 22 sets out the effect of the memorial entered under section 21. Section 22(1) indicates that unless all residents of the retirement village have received independent legal advice and at least 90% of those residents have consented in writing, the holder of a security interest or any receiver or liquidator or statutory manager of property comprising the retirement village or of any operator of the village must not exercise any right to – (a) dispose of the retirement village other than as a going concern; or (b) disclaim any occupation right agreement relating to the retirement village as onerous property under section 269 of the Companies Act 1993 or section 117 of the Insolvency Act 2006; or (c) evict any resident or exclude any resident from the use of any facilities or any part or the retirement village to which that resident is ordinarily entitled." The Respondent has indicated through its solicitor on 11 August 2023 that no consents from residents were obtained to register the Village as a retirement village, because such consents were not necessary. That is true, but by not obtaining such consents it brings into play section 22 of the Act, which in terms of sub-paragraph (c) would prevent the holder of the security interest over any of the titles for the Units from evicting any resident or excluding them from the use of facilities or any part of the retirement village to which any resident is normally entitled. Since a unit is obviously a "part of the retirement village" which "any resident is normally entitled" to use, it follows that any resident cannot be evicted or excluded from their use of it.

16. Since 2007, WLEL has acquired ownership of 18 of the 22 Units. As at 14 February 2022, only 4 of the Units remained in private ownership, namely Units 1(Visscher), 4 (Currie), 6 (Tock) and 20 (Snell and Ross). Noticeably, new Encumbrances in favour of Windsor Lifestyle Estate Limited were registered against the titles for Units 1, 6 and 20, and these secured rights or obligations or amounts which may be owing under Occupation Right Agreements. The Encumbrance on the title for Unit 4, namely Encumbrance H842594.3, remains. This Encumbrance was first registered on 15 December 1988 in favour of Ohaupo Developments Limited (the owner of the Village before the Respondent). It was transferred to Radius on 10 May 2004 under Transfer T5997819.5.

Interestingly, it has not been transferred by Radius to Windsor Lifestyle Estate Limited. It is apparent that Unit 4 is therefore the only unit that still has an Encumbrance which refers to mutual covenants in a Management Deed, and it has no formal Licence to Occupy (LTO) or Occupation Right Agreement (ORA).

The Parties

17. Section 52 of the Act indicates that "a **resident**" or the **operator**" may require a dispute to be resolved by a disputes panel by giving the other party or parties a dispute notice. Section 53 sets out the types of dispute for which "**a resident**" may give notice. Section 54 sets out the types of dispute for which "**an operator**" may give notice, while section 55 requires "**the operator**" to give notice to the statutory supervisor of certain disputes. It follows that, for the purposes of a dispute, "**a resident"** or "**the operator**" may be the applicant or respondent. Since the dispute has been raised pursuant to section 52 of the Act, it is necessary and appropriate to determine whether the parties fall within the definitions of "operator" and "resident" contained in section 5 of the Act.

18. At the outset, however, I should state that, at this stage, it will only be a **prima facie** examination of this aspect. The reason is that the nub of the dispute is whether the historical and existing basis for occupation of Unit 4 by the Applicants (namely, legal ownership of the unit together with a registered encumbrance referring to covenants in a management deed) is effective. This involves the consideration of complex and technical issues surrounding the validity and enforceability of an encumbrance, the validity and enforceability of covenants in gross, alleged breaches of the management deed, and whether a formal Licence to Occupy ("LTO") or Occupation Right Agreement ("ORA") is required. These are substantial and complicated issues which would necessarily need to be determined later.

19. The question arises as to whether the Respondent is an "operator" in terms of section 5 of the Act. Section 5 of the Act defines an "operator" as follows:

"operator, in relation to a retirement village, means any person who is one or more of the following:

(a) a person who is, or will be, liable to fulfil **all or any** of the obligations under occupation right agreements to residents of the village:

(b) a holder of a security interest who is exercising effective management or control of the retirement village:

(c) a receiver of the property comprising the retirement village, or the liquidator of the person to whom either of paragraph (a) or paragraph (b) applies."

20. WLEL is the operator named in LTO's and ORA's relating to 21 of the 22 units in the Village. It claims management rights in respect of Unit 4 by virtue of the Management Deed referred to in Encumbrance H852594.3, which (as mentioned in paragraph 8 above) were assigned to it by Radius. Those rights were the rights of the Body Corporate, and the rights under Encumbrances registered against the titles for the Units. While many of the historical encumbrances have now been discharged and replaced by encumbrances referring to ORA's, it is still responsible for fulfilling all or any of the obligations under ORA's to residents of the Village who have them. Even if it was considered that such management rights cannot be exercised or are no longer effective in respect of Unit 4 (which is another question altogether), it is sufficient if it is responsible for fulfilling all or any of the obligations under ORA's to residents in the Village that have them. In the event, it exercises the management rights of the Body Corporate over all 22 Units, including Unit 4, and it issues invoices for annual Body Corporate levy instalments to all units.

21. I am therefore satisfied that the Respondent is an "operator" in terms of sub-section (a) of the definition.

22. For the purposes of Part 4 of the Act, relating to Dispute Resolution, section 48 states that:

"resident means –

(a) a resident of a retirement village; or

(b) a former resident."

23. Section 5 of the Act defines "resident". It states:

"resident means any of the following:

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

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

(c) if the occupation right agreement so provides or with the consent of the operator of the retirement village, the spouse, civil union partner, or de facto partner of the person referred to in paragraph (b) who is occupying the residential unit with that person, or after that person's death or departure from the retirement village".

24. Central to this definition of "resident" is the existence of an "occupation right agreement." Section 5 of the Act defines this as follows:

"occupation right agreement means any **written** agreement **or other document or combination of documents** that –

(a) confers on any person the right to occupy a residential unit within a retirement village; and

(b) specifies any terms and conditions to which that right is subject."

25. The Applicants have never entered into a formal LTO or ORA with the Respondent. They have relied on the historical "registered proprietor on the title/Encumbrance and Management Deed" structure ("the Title/Encumbrance structure") that was in place from the time Unit 4 was purchased by Francis Patrick O'Connor and Claudia Kevey O'Connor, the parents of the Applicant Claudia Maree Currie, in or about December 1988, which structure was continued when Radius acquired the Village in 2004. The relevant title for Unit 4 is CT NA42B/103 ("the Title"), and the relevant Encumbrance registered against the Title is H8425943.3

("the Encumbrance") registered on 15 December 1988. The relevant Management Deed is that dated 10 November 1988 ("the Management Deed") attached to and referred to in the Encumbrance.

26. The Title traces Unit 4's ownership history. In or about April 1995 Francis Patrick O'Connor and Claudia Kevey O'Connor embarked upon an estate-planning exercise whereby they established the F P and CK O'Connor Family Trust ("the Trust") and transferred Unit 4 to the Trust (by its trustees) at market value by an Agreement for Sale and Purchase dated 28 March 1995 and a Transfer dated 28 March 1995, with a right of occupation reserved for Francis Patrick O'Connor and Claudia Kevey O'Connor. The trustees were Francis and Claudia O'Connor, and their solicitor John Noel Fitzgerald (as an independent trustee). This was a fairly normal trusteeship for family trusts. As indicated in paragraph 10 above, the transfer was done with the consent of the owner and operator of the Village at that time. Frank and Claudia O'Connor continued to reside in Unit 4, with the consent of the Trust. Again, this was a normal arrangement when a family home is transferred to a family trust. In or about 1998 Claudia Kevey O'Connor passed away, and Unit 4 was transferred to the surviving two trustees, namely Francis Patrick O'Connor and John Noel Fitzgerald. Pursuant to section 23(1)of the Trustee Act 1956, the trusts and powers of the trustees then devolve to the surviving trustee(s). Mr Fitzgerald retired as a trustee, and Claudia Maree Currie was appointed as a trustee, in a Deed of Retirement and Appointment dated 29 April 1998. The Transmission to Francis Patrick O'Connor and John Noel Fitzgerald as surviving trustees, and the onward transfer to Francis Patrick O'Connor and Claudia Maree Currie as continuing trustees, were both registered on 22 September 1998. Francis Patrick O'Connor continued to live in Unit 4, and when the Village was acquired by Radius in 2004 he was the occupier of Unit 4. He was the occupier when the Village was registered as a retirement village in 2007. Francis Patrick O'Connor passed away on 8 January 2014. Unit 4 was then transferred to Claudia Maree Currie, as the sole surviving trustee, by a Transmission registered on 15 April 2014. It has been alleged by the Respondent that these trustee updates were sales or dispositions made without the consent of the Respondent, in breach of clause 2(h) of the Management Deed referred to in the Encumbrance, and such breach gives rise to a right to damages of $20,000 per annum for each year since the breach occurred. I do not intend to deal with that

issue at this juncture. It suffices to say that the transfer of Unit 4 to the Trust was done with the consent of the then owner of the Village, and the Trust was and still is the owner of Unit 4.

27. In 2017, Claudia Maree Currie and her husband Ronald Currie began living in Unit 4. There are two issues of consent here – firstly, was such occupancy consented to by the trustees of the Trust, which owns Unit 4 ? I will deal with this later in this decision [see paragraphs 31 and 33]. Secondly, was such occupancy consented to by the Respondent? There is debate about this issue. I do not intend to traverse such issue at this time, since it involves questions of whether such consent was necessary (which, in turn, requires consideration as to whether the Encumbrance runs with the title, whether it is valid and enforceable against the Applicants, whether the Management Deed is valid and enforceable against the Applicants, and whether the Encumbrance creates any legal or equitable interest in Unit 4), who is responsible for producing any documents relating to or arising from any consent obligation, whether consent (if it was necessary) was obtained, and whether, if obtained, any consent was effective. There is sufficient other material available for consideration, at this stage, as to whether the Applicants have a prima facie occupation right in respect of Unit 4.

28. This brings me to the question of whether there is any "other document" or "combination of documents" in writing that might confer on the Applicants a prima facie right to occupy Unit 4. In this regard, there are a number of documents to consider:

(a) The Title/Encumbrance structure.

(b) Other documents.

The Title/Encumbrance Structure

29. This combination of documents existed historically on the titles for all 22 Units, and was regarded as creating occupation rights for the owners of the Units. It still subsists in respect of Unit 4 – indeed Unit 4 seems to be the only unit that still has this combination. It is therefore appropriate to consider two questions:

(a) What is the effect of the registered proprietorship on the Title?

(b) What is the effect of the Encumbrance/Management Deed?

30. As to the effect of the registered proprietorship on the Title, there are two aspects to consider:

(a) Statutory Rights of Registered Proprietors

(i) Section 79 (d) of the Unit Titles Act 2010

This section confers on registered proprietors the right "to have quiet enjoyment of their unit without interruption by other unit owners or occupiers, or the body corporate or its agents, except as authorised by this Act or the regulations." Claudia Maree Currie is on the Title in her capacity as the sole remaining trustee of the Trust. She is not on the title in her personal capacity. The Trust is the registered proprietor of Unit 4. It follows that it is the Trust which has quiet enjoyment of Unit 4 accordingly, and that quiet enjoyment cannot be interfered with by the body corporate or its agents. The Respondent is the agent for Body Corporate S49465 and it cannot interfere with the quiet enjoyment of the Trust as registered proprietor. It does not appear to have done so, though it has challenged the right of the Applicants to occupy Unit 4 without an LTO or ORA.

(ii)) Indefeasibility – The position of the registered proprietor is supported by the indefeasibility provisions in section 51 of the Land Transfer Act 2010, which give an unassailable title to a registered proprietor in the absence of fraud (=actual dishonesty or forgery). The title cannot be overturned or put

aside by competing claims for the ownership of the land.

(b) Occupation Right Granted by a Registered Proprietor

It follows from this that since the Trust is the registered proprietor of Unit 4 then it is entitled to quiet enjoyment of it. Without more, it could, in that capacity, allow whoever it wished to occupy its property. Therefore, regardless of any issue of whether there is an occupation right agreement constituted by a document or combination of documents in writing in terms of the Act, there is a bare occupation right arising from the right of the Trust as registered proprietor to allow anyone it likes to occupy its property on whatever, terms and conditions (if any) it thinks fit, so long as that is authorised by the Trust Deed of the Trust and is approved by the trustee(s) of the Trust. I will cover this next in paragraphs 31 to 33 below.

31. The Trust was established by Deed of Trust dated 28 March 1995 ("the Trust Deed"). The Settlors were Francis Patrick O'Connor and Claudia Kevey O'Connor, who were also, along with their solicitor John Noel Fitzgerald, the original trustees. The Trust was established for the benefit of the Settlors, their only daughter (the Applicant Claudia Maree Currie), spouses and partners, and Claudia's three children. This is stated in a letter from Frank O'Connor dated 5 April 1995, and on page1 (clauses 1-4) of the Trust Deed. The final beneficiary of the Trust, specified in clause 5.5.1, is Claudia Maree Currie or should she die before the date of distribution then such of her children as are living at the date of distribution. The Trust has a perpetuity (maximum length) period of 80 years, expiring on 28 March 2075.

32. The assets of the Trust are referred to as "the Trust Fund". This included Unit 4 [see paragraph 26 above]. Clause 5.4 of the Trust Deed authorises the Trustees "in their absolute discretion from time to time to pay or apply the whole or any part of the Trust Fund to or for the benefit of all or such one or more of the Beneficiaries for the time being living in such shares if more than one, and in such manner as the Trustees in their absolute discretion think fit." Clause 8.6 of the Trust Deed authorises the Trustees to "generally make or confer in favour or for the benefit of all or any of the Beneficiaries all such dispositions charges or powers in relation to the Trust Fund and the income from it or any part or parts of them as an absolute owner could lawfully make or confer in relation to any property belonging to him beneficially." The Schedule to the Trust Deed sets out various Trustee powers. Clause 1 in the Schedule empowers the Trustees to "pay, apply or appropriate the whole of any part or parts of the Trust Fund both capital and income to which any beneficiary is contingently or otherwise entitled in or towards his advancement or benefit", with 1.1 stating that "the expression 'advancement or benefit' has the widest possible meaning." Clause 16 of the Trust Deed empowers the Trustees to "let lease or bail any property whatever upon whatever terms and at whatever rent the Trustees think fit without being responsible for the inadequacy of rental... and generally to manage them as the Trustees think fit." Clause 19 of the Trust Deed empowers the Trustees to "generally deal with leases, tenancies and bailments as the Trustees think fit". The Trustees could therefore allow any Beneficiary to reside in Unit 4 upon such terms and conditions as the Trustees thought fit. Since Claudia Maree Currie and her husband Ronald Currie are Beneficiaries, the Trustees could allow them to reside in Unit 4 rent-free, provided they paid the outgoings thereon. This is what occurred, and it is a common arrangement for family to occupy a residence where it has been transferred to a Trust.

33. The Final Beneficiaries of the Trust, namely Claudia Maree Currie and her three children, all consented in writing to the occupation of Unit 4 by Claudia Maree Currie and her husband Ronald Currie, for as long as they needed or wished to reside there. It is prudent for the Trustees to obtain the consent of the Final Beneficiaries to such an arrangement, because the residence would not be earning a market rental and the Trust Fund would therefore not be increasing. It is therefore clear that

the Applicants have resided in Unit 4 since 2014 with the full knowledge and consent of the Trustees and Final Beneficiaries of the Trust.

34. Encumbrance H842594.3 was registered against the Title on 15 December 1988. It was transferred to Radius on 10 May 2004 but has not subsequently been transferred to the Respondent. Radius is the holder of such Encumbrance as a security interest. I do not intend to deal with the many issues surrounding the Encumbrance and the Management Deed(see paragraph 27 above), nor with any allegations of breach (giving rise to the possible exercise by Radius of remedies set out in the Management Deed) in this preliminary decision. There is, however, some indication in the Disclosure Statements that the Respondent regarded the persons with encumbrances/management deed arrangements as residents, whose occupancies could continue until such time as the Respondent was able to acquire a unit, at which time the original encumbrance would be discharged. For example:

(a) The Disclosure Statement dated 23 August 2007 states in clause 1.3:

"The Village has been completed as a unit title development. The Village is comprised of Body Corporate S49465. **Most of** the units 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 offer of the licences to occupy. The Body Corporate has delegated some management obligations to

Windsor Lifestyle Estate Limited."

(b) The Disclosure Statement dated 2 December 2021 had a similar statement in clause 1.3:

"The Village has been completed as a unit title development. The Village is comprised of Body Corporate S49465. **A number of** the units are owned directly by **the Residents** as unit titles under the Unit Titles Act 2010. As the Village is a retirement village, there are a number of provisions of the Unit titles Act 2010 that do not apply to the Village. Where the **Resident** owns the unit title, the **Resident** has a management agreement or occupation right 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 offer of the licences to occupy. The Body Corporate has delegated some management obligations to Windsor Lifestyle Estate Limited."

The noticeable change in these two statements, apart from a different Unit Titles Act, is that the words "Most of the units.." in the 2007 document have now been amended to "A number of the units". One can understand this change in that in 2007 all 22 of the Units were held under the encumbrance/management deed structure, whereas by 2021 the Respondent had acquired all but 4 of them and therefore only these 4 were still held in private ownership under an encumbrance/management deed structure. Of these 4, 3 of them (Units

1, 6 and 20) had a new encumbrance referring to an occupation right agreement, and one (Unit 4, occupied by the Applicants) had the original encumbrance/management deed from 1988. So the question is whether, in making the statement in the 2021 Disclosure Statement, the Respondent was only referring to Units 1,6 and 20 as comprising "A number of the units", with Unit 4 being excluded from those words, or alternatively Unit 4 was also included in those words. Unit 4 was the only one with a "management agreement", and it is apparent that both those with a "management agreement" and those with an "occupation right agreement" were regarded as residents, since it states: "the **Resident** has a management agreement or occupation right". This could indicate some intention that the historical encumbrance/management deed arrangement and the occupancy by the Applicants of Unit 4 was still regarded as a residency continuing until such time as the Respondent was able to acquire Unit 4. It is unclear, but applying the usual meaning and understanding one might reasonably conclude that all privately-owned units with an encumbrance/management deed arrangement were included in the words "A number of the units..." , and those with a management deed were regarded as "Residents".

Other Documents

35. It is apparent that the Applicants have been regarded as, and treated by the Respondent as residents since 2017 when they took occupation of Unit 4. The following documents support this:

(a) The Applicants attended and participated in the AGM of residents held in September 2016. This was followed by a letter to Claudia Currie from Brian Cree, Managing Director of Radius, referring to the discussion he had with her at the AGM regarding carparks and advising of the decision to construct a 4-bay carpark. It appears that the management staff for Radius effectively also managed matters on behalf of the Respondent.

(a) In a letter dated 13 July 2017 Paula McFarlane, the Facilities Manager for the Respondent, advised the Applicants that their request to build a small deck and to cross-brace some pillars to eliminate falls, had been approved, but their request for a garden shed had been declined.

(b) The Applicants attended the AGM on 11September 2017 and are recorded in the Minutes under the heading "Village Residents" as "Legacy unit title" holders. Claudia Currie moved the first motion, seconded by Brian Cree (the Managing Director of Radius) to accept the minutes of the previous year's AGM. Ron Currie moved the second motion, again seconded by Mr Cree, that the audited Financial statements for the year ending 31 March 2016 be accepted. Ron Currie moved the third motion, again seconded by Mr Cree, that the maintenance plan be tabled and accepted. Under "General Business", Ron Currie expressed concern over painting that had occurred being signed off before it was completed. He further expressed concern that he had been turned down for a garden shed but had seen others going up in the Village.

(c) In a letter dated 26 September 2017 Mr Cree referred to the Applicants' concern about maintenance and advised that a review of the maintenance obligations for all categories of ownership was currently being undertaken and he would be in touch once this was completed. He further thanked the applicants for their contribution at the AGM.

(d) In a letter dated 9 October 2018 from Meg Baillie, the Interim Facilities Manager for the Respondent, the Applicants were advised of a new key safe in the upstairs office, maintenance request forms at the front desk, and her hours of attendance until a new facilities manager was appointed.

(e) In a document entitled "Radius ORA Schedule for Windsor", which appears to have been promulgated in 2017-18, Claudia Marie Currie is recorded as the current occupier of Unit 4. Under the heading "Owner of Unit Title" there is the word "Resident" for Unit 4. Under the heading "Type of Occupation Right" there are the words "Management Agreement" for Unit 4.

(f) In letters dated 30 April 2018, 12 March 2019 and 12 March 2020 from Michelle Slabber, the Finance Director for the Respondent, Claudia Currie was advised of increases in the Body Corporate Levy and Annual Administration Fee payments, with a direct debit form attached. Similar letters were sent on 5 May 2021 and 30 March 2022, but these were addressed to "Mr O'Connor(Mrs C Currie)" and commenced "Dear Mrs Currie".

(g) The Applicants have received and paid annual Invoices for Unit 4's share of the Body Corporate insurance premium. It is an obligation of operators, and a legal requirement for Body Corporates, to arrange insurance over the buildings in the Village, including all of the Units, and levies each unit for their share of the premium.

36. It is apparent that at least from 2017 to 2020, and possibly from an earlier date in 2014 when Francis Patrick O'Connor died, the Applicants were regarded and treated as residents by the Respondent. As a result of a review of unit ownerships in or about January 2019, the attitude of the Respondent in regarding the Applicants as "residents" suddenly changed. Because they did not have a LTO or an ORA, they were no longer considered to be "residents" and were no longer allowed to participate in or vote at meetings of residents. Whether that change in status was justified or appropriate is the question which is at the nub of this dispute. It involves many other issues and I do not intend to deal with it now. The Applicants certainly regarded themselves as residents at all material times.

37. At this stage, I am satisfied that the documents set out in paragraph 35, with or without the further documents referred to in paragraphs 30 and 34, are a sufficient "combination of documents" in writing to constitute, at least prima facie, an occupation right agreement. In this regard, there is no indication as to what the documents need to be, nor how they need to be combined or connected. Cumulatively, they may be regarded as sufficient to constitute an occupation right agreement.

38. Apart from the statutory authority in the definition of "occupation right agreement" contained in section 5 of the Act to construct an occupation right agreement from a document or combination of documents, I consider that the ability in the law of contract to imply or construct a contract could apply. Such contracts arise from the actions, conduct and circumstances of the people involved. An implied-in-fact contract arises when parties perform duties as if they have a contract in place. The obligation is created between the parties on the basis of the circumstances. The parties understand the terms of the agreement and what actions must be taken. They require an offer and acceptance

(usually expressed non-verbally, that is, by other means), mutual agreement and consideration (the giving of a benefit). Implied-in-law contracts do not require any offer and acceptance nor any intention to create them. The parties have no intention to enter into the contract. However, the law imposes an obligation to perform the contract, irrespective of the consent of the parties. There cannot be an imbalance of benefit between the parties, meaning the receiver cannot be unfairly enriched. On this basis, an occupation right agreement could be implied.

39. The creation of an implied right to occupy is not without precedent. In the early 1980's, while I was employed as a District Solicitor at Housing New Zealand, two cases were decided in New Zealand in which the Court implied/constructed a tenancy agreement based merely on a signed receipt for rent. These decisions do not appear to have been reported, and I have been unable to locate them, though I recall them because they obviously caused considerable disquiet at Housing New Zealand, which was then the largest rental provider in the country. These cases formed the basis for including implied tenancies in the definition of "tenancy" contained in section 2(1) of the Residential Tenancies Act 1986. Further, section 13C of that Act made it clear that such tenancies were enforceable even though they were not in writing. I am not indicating that the occupation of Unit 4 by the Applicants is a tenancy, though it would be open to the Trust and the Applicants to construe it as such, but merely that a document or combination of documents can give rise to an occupation right.

40. It follows that if the Applicants have, prima facie, an occupation right agreement, then they satisfy the definition of "resident" in section 5 of the Act. I therefore find that, for the purposes of this dispute, they may be regarded as residents. I am therefore satisfied that the Respondent is an "operator" and the Applicants are "residents" within the definitions in the Act, and the dispute may proceed to resolution accordingly.

Jurisdiction

41. The issue identified in the Dispute Notice is described as ""ORA in relation to the covenant attached to the title". The "covenant" refers to the Encumbrance and Management Agreement, which is a covenant in gross. In other words, can the Applicants be regarded as residents with an occupation right agreement by virtue of the "covenant", or, as the Respondent alleges, can they not be regarded as residents because they have not entered into a LTO or ORA?. The status of the Applicants as residents and the basis of their occupation right is the central issue.

42. Section 53 of the Act specifies the types of dispute that may be raised by a resident. Section 53(1)(a) indicates that a qualifying dispute is one "concerning any of the operator's decisions – (a) affecting the resident's occupation right or right to access services or facilities". Since the operator (=Respondent) has formed the view that the Applicants have no such right, this is clearly a dispute that falls within section 53(1)(a). I am therefore satisfied that I have jurisdiction to determine the dispute.

Preliminary Decision

43. This is a Preliminary Decision which is obviously necessary before the dispute can proceed further. Unless I am satisfied that the parties fall within the definitions contained in the Act under which the Dispute Notice has been issued, and unless I am satisfied that the subject matter of the dispute is within the parameters of section 53, the dispute cannot proceed. As indicated above, I am satisfied, at this stage, on both aspects.

44. I have stated that my decision as to the Applicants qualifying as "residents" is a prima facie one. That is because it is based on a preliminary look at that issue, and, like any prima facie decision, is regarded as correct until proved or established otherwise by subsequent considerations. The Preliminary Decision will form part of any later decision which may be made, and any changes that may be made as a result of subsequent considerations will be referenced accordingly. Any

Notes to Parties in respect of appeal rights and costs will therefore be stated in the final decision.

R Donnell

Roger Donnell

Single Member Panelist

20 SEPTEMBER 2023

Date of Preliminary Decision