UNDER the Retirement Villages Act 2003

In the Matter of disputes

BETWEEN **DOUGLAS IAN DAVIES** and Others

Applicants

AND **BETHLEHEM COUNTRY CLUB VILLAGE LIMITED**

Village Operator /Respondent

REASONS OF DISPUTES PANEL FOR DISPUTE DECISION
6 AUGUST 2025

David M. Carden, LL M,
Auckland

Introduction

1. Bethlehem Country Club Retirement Village is one of several in the Bay of Plenty area. In the part of the village in question in this dispute there are no footpaths but just roading. Essentially pedestrians need to share the roading with vehicles.
2. Residents have the right to occupy individual villas which are surrounded by gardening and landscaping and which have grassed areas meandering between them.
3. Over the years there has been paving laid and footpath formed in parts of those grassed areas, the work being done either by residents or by, or with the assistance of, the Village Operator.
4. For its own reasons the Village Operator decided to erect a fence across the paving area to prevent access down a portion of it. That was objected to by residents, including the Applicants, and procedures were followed but to no avail. Those procedures included, the Village Operator says, adequate consultation with residents before decisions were made.
5. The dispute notice under the Retirement Villages Act 2003 ("**the RV Act"**) was initiated by one affected resident in his name but supported by 22 others who have been treated as joint Applicants.
6. The Applicants claim that the erection of the fence is a breach of their respective rights under the Occupation Rights Agreements ("**ORA**") that they each have. They also claimed that there has not been adequate compliance with various obligations for consultation so as to invalidate the decisions are made by the Village Operator. They seek an order for removal of the fence.
7. After appropriate procedures including a hearing and an inspection of the site, this is the disputes panel's decision on that dispute notice.

Dispute notice procedure

8. The disputes panel was appropriately appointed by the Village Operator; a response by the Village Operator to the dispute notice was provided; and there have been several pre-hearing conferences conducted by electronic communication. The Applicants sought a hearing of the dispute and

timetabling has been complied with by the parties. This included the provision of an Agreed Bundle of Documents and an Agreed Statement of Facts. The Applicants (or at least many of them) were present at the hearing and all were represented by two of the residents, the first being Mr Ian Davies in whose name the dispute notice had been given and the second being Mr Paul Whitehead, another resident Applicant. The Village Operator was represented by counsel, Ms Lynne Van and on behalf of the Village Operator, General Counsel Ms Briar Malpas. Various witnesses attended the hearing and gave evidence. There was also one person who was requested by the Applicants to attend to give evidence and served with the appropriate notice under Regulation 16 of the Retirement Villages (Disputes Panel) Regulations 2006 ("**the RV Regulations**"). She gave evidence in answer to questions from all concerned.

9. Before the hearing, in the company of Mr Davies and Mr Whitehead as representatives of the Applicants and of counsel for, and the representative of, the Village Operator, I conducted a viewing of the footpath in question and its location in the village.

Background

10. The village in question, Bethlehem Country Club Retirement Village, was constructed between 2004 and 2010. The Village Operator acquired the village in 2019 (and there was annexed to Mr Davies' statement and produced in the agreed bundle to the hearing a Variation to Occupation Right Agreement dated 31 July 2022 apparently following the change of Village Operator ownership but not varying the ORA for Mr and Mrs Davies in any way pertinent to the issues raised by the dispute notice).

11. Access across the village is by way of dual vehicle and pedestrian access "*on the roads*"[1]; and separate pedestrian access was not a part of the design plan.

12. The pathway the subject of the dispute notice ('**subject pathway**") is part of a longer pathway ("**longer pathway**") which runs from Bannockburn Lane to Te Anau Avenue near the clubhouse. The subject pathway is the

[1] Expression used in the Agreed Statement of Facts

part of that path that runs from Glenorchy Lane to Gibbstone Lane and lies between Villas 107 and 108. The fence constructed prevents direct access from Glenorchy Lane and Gibbstone Lane and return but does not prevent individual access from either end to the fence in question.

13. Various construction and improvement works have been conducted to the longer pathway during its existence. This has partly comprised pavers, grass and bark, and concrete. The subject pathway was concreted by the Village Operator's relieving manager in 2022. The parties have agreed that "*[t]here is no evidence of the [Village Operator's] consenting to the pathways and the timing of construction is in dispute*".

14. The Agreed Statement of Facts also records:

> "*Residents from Gibbstone, Glenorchy, Bannockburn Lane, use the [longer pathway] as a shortcut access to the clubhouse*";

and that the Village Operator accepts that

> "*the [longer pathway has] been used by various residents in [those] areas for an extended period [and] … may also have been used by contractors/staff and/or other residents over a period of time due to its presence…*".

15. Other matters agreed are:

- That the clubhouse is also accessible by residents of those Lanes via Charles Lever Drive.
- That the original occupants of the villas affected by [the subject pathway] did not object to other residents passing through using the pathway.

16. A new resident moved into Villa 107 in 2023 and raised concerns about the use of the subject pathway by other residents (specifically in relation to disruption and privacy). That resident has since moved out "*for reasons including the concerns about disruption and privacy*[2]".

17. There were interactions between the then village manager and the principal Applicant, Mr Ian Davies, about the subject pathway on 8 and 9 April 2024 during which the then village manager indicated that the Village Operator was considering the closure of the pathway.

[2] Again using the words in the Agreed Statement of Facts

18. Further interactions occurred including emails exchanged and a petition completed with feedback, the detail of which is set out below.

19. On 2 May 2024 the then village manager wrote an email (and I am not sure to whom this was sent but the then village manager said it was "*to the residents*" and had sent an earlier email to "*all residents*", but certainly included the residents who are Applicants) referring to the "*consultation process regarding the proposal to remove a pathway located in between 6 and 8 Gibbston Lane*" and feedback that had been received. She said that she had a "*fully reviewed and considered all the feedback provided and… [f]ollowing this [she had] decided that the use of pathway will be discontinued*". She said that she had "*considered the needs of all residents, and what is the best longer-term option for the village for both present and future residents*". She said that she had

> " … *come to the view that the pathway creates an unreasonable disturbance to the residents of 6 and 8 Gibbston Lane and compromises their privacy [; that coming] into a village environment, everyone accepts this is a community setting and there is a compromise regarding levels of privacy. However, the lack of privacy afforded by this pathway to the two adjoining villas is beyond an acceptable level*".

She referred to the shared access that the village had via the roads for both vehicles and pedestrians and the fact that "*there isn't space to have a road and a footpath*". She referred to investigating new practices such as

- a "*buddy walking system*" with others to the clubhouse and activities
- the use of volunteer drivers to transport those who require it and/or
- the erection of more "*Shared Access signs*" if supported by the residents.

The then village manager referred to the work to decrease the height of the hedge at the roundabout to ensure more visibility for traffic and concluded:

> *"The pathway will be cut at the end of the service area at 6 Gibbston Lane. A hedge will be planted which will prevent access to this pathway.*"

She gave an estimated completion time.

20. There have been further processes between the parties to try to resolve this dispute without needing to have recourse to the disputes notice procedure but to no avail. No evidence was given to me about the fact that there has been a fence constructed where it is rather than the hedge that was referred to in the then village manager's email of 2 May 2024.

The Applicants' Claims

21. In the dispute notice there are two disputes raised:
    - The closure of the subject footpath alleging breach of the rights to services and other benefits in their respective ORAs and Right 1 of the Code of Residents' Rights (**CRR**).
    - The lack of consultation by the Village Operator with the residents concerned in respect of that decision said to be in breach of Right 3 of the CRR and Section 28 of the Code of Practice ("**COP**").

22. The grounds for that dispute are said to be:
    - That the walkway is a "*Common Area*" or "*Community Facility*" in terms of relevant ORAs because of the following factors:
        - It has been used by residents, friends, and staff for 14 years as a walkway.
        - The walkway is an integral part of a walkway between Te Anau Avenue and Bannockburn Lane.
        - The Village Operator has acknowledged the walkway as a Common Area/Community Facility by installing pavers and then concreting it.
        - Closure breached the Village Operator's safety obligations under S16 and S17 of the COP as it requires residents (several with mobility limitations) to walk on the roadways.
        - A recent Commerce Commission report concluding that clause 48 in one of the relevant ORAs may be an unfair contract term.
    - That there has been inadequate or no meaningful consultation with residents affected.

23. As to the breach of safety obligations and clauses 16 and 17 of the COP in the dispute notice, this was not pursued meaningfully by the Applicants; and in any event the Village Operator argued that there was not sufficient particularisation; which I accept.

24. I also except the Village Operator's submission as to my jurisdiction to consider whether there was an unfair contract term by reference to a recent Commerce Commission decision concerning the equivalent to clause 48 mentioned below, that is that I do not have jurisdiction to deal with that matter.

The Village Operator's response

25. The Village Operator raised these issues in response:

- That the subject pathway is not a common area (or common facility) as defined in the relevant ORAs.
- That even if it were such, it has not breached the CRR or COP or relevant clauses in applicable ORAs in making its decision to close the subject pathway.
- That if it had any obligations for consultation in making that decision, it has fully discharged those obligations.

The Hearing

26. At the hearing which I conducted eight witnesses who are also residents gave evidence. This was by way of written statement which was taken as read with the witnesses being available for cross-examination and questions were asked of them from time to time. These witnesses were residents of Villas 82, 107, 113, 116, 121, and 124, and Apartment D at the clubhouse area. They spoke of the development of the longer footpath and particularly the subject footpath and also alluded to traffic and other issues relevant. Much of what they said had complemented the Agreed Statement of Facts.

27. The Applicants also relied on the evidence of one of the occupants of Villa 108 alongside the subject footpath in the closed off fence area. She attended in response to a request issued on behalf of the Applicants under

Regulation 16 of the RV Regulations; and produced her form of ORA which is a so-called "Arvida ORA" (**AORA**). This is because The Arvida Group has a proprietary interest in the Village Operator which has owned and operated the village since 2019.

28. The village operator called two witnesses, the first being one of the village managers at relevant times and the second being the current sales manager for the village who was also sales manager at relevant times..

Property ownership and rights

29. The site on which the village is located must be owned by the Village Operator named above, Bethlehem Country Club Village Limited. ("**BCCVL**") No direct evidence was given about that. Another company was named as the "*Operator*" in paragraph 3.2 in the ORA produced by Mr Ian Davies for his and his wife's Villa 113 (referred to as the Sanderson ORA ("**SORA**")). Paragraph 1.1 in the Introduction section begins: "*We own a retirement village known as Bethlehem Country Club at 111 Carmichael Road, Bethlehem, Tauranga*" (although there appears no specific definition of the term "*We*"). Similarly in the AORA produced for Villa 108 by the current occupant the introduction commences: "*We own the retirement village*…" and there is a specific reference to the term "*We*" as being "*Bethlehem Country Club Village Limited*".

30. Any rights and obligations that the individual villa occupants have arise solely from their own respective ORAs. I have only been able to assess those from the two forms of ORA produced to me being respectively for Villa 113 occupied by Mr Ian Davies and his wife and Villa 108 occupied by another couple. There was no suggestion in the evidence that individual ORAs for other occupants including other Applicants were in different terms or form from those, although that would have been contractually possible at the time they entered into them, had this been necessary by negotiation then. Additionally, there was no evidence before me as to the form of ORA respectively for each of the other Applicants and I have been unable to ascertain the individual rights of other Applicants than Mr Ian Davies and his wife.

31. For Mr Ian Davies and his wife their occupation right is conveyed by clause 6.1:

> *"We grant to you, and you accept, the Occupation Right for your Residential Home on the terms set out in this Occupation Right Agreement*".

The expression "*Occupation Right*" is defined in clause 5.17 as meaning "*your personal non-transferable right to occupy the Residential Home under this Occupation Right Agreement*"
and "*Residential home*" defined by clause 5.21 to mean "*the dwelling described in clause 3.3 of this Occupation Right Agreement*" defined there as "*Dwelling: Lot 113, Bethlehem Country Club*".

Is the Pathway "Common Area"?

32. As to common areas the entitlement for the Applicants is given by clause 10.1:

> "*You are entitled to enjoy the Common Areas. Your rights to enjoy the Common Areas are not exclusive and must be exercised in common with all other residents of the Village and their guests from time to time and any other persons to whom we may, in our discretion, grant similar rights at any time*."

[Strangely clause 10.2 includes: "*We reserve the right for ourselves, including our family and friends … to use the common areas*" – this suggests to me that individuals were originally part of beneficial ownership of the land].

33. The term "*Common Areas*" is defined in clause 5.7 to mean

> *" … those parts of the Village provided by the operator from time to time for common use by all residents of the Village, including the entrances, driveways, visitors' car parking areas, gardens, grounds and all other common facilities within the Village*".

34. Different villages may have different ways of designating areas as common areas, but generally this might not need a specific survey plan such as might be required for unit title or "cross-lease" issue. What constitutes areas as common areas as defined above may simply be layout of the individual villas and surrounding land.

35. During my site visit at the commencement of the hearing, I saw the villas adjoining the longer pathway and the subject pathway. It was clear to me that in the main villas had been designed to have their own individual garden areas for the exclusive use of the villa occupant(s) and that there were areas of land surrounding the villas and these garden areas that were grassed and available for use by other residents. The individual garden areas were not provided by the Village Operator for common use by all residents, but the grassed passages were. That may be subject to change in the future provided that is properly done.

36. I accept the submission for the Village Operator that once issues are raised about the use of an area such as this grassed, or later formed, pathway, the Village Operator may re-evaluate the use of the area to ensure its continued use is in the best interests of all residents.

37. That this was so is confirmed by the involvement of the Village Operator in the paving and concreting of the longer pathway to the extent canvassed in the evidence. That involvement underlined the common use availability of those areas.

38. Accordingly, I am satisfied that the area occupied by the longer pathway which includes the area occupied by the subject pathway was provided by the Village Operator for common use by all residents of the village in terms of clause 5.7. My finding is therefore is that those parts of the land (the subject pathway and the longer pathway) are common areas.

39. The Applicants and each and all of them are accordingly entitled to enjoy those parts of the site which comprised the longer pathway and the subject pathway. This they had been doing by use of the pathway as an access to and from the clubhouse.

40. It was submitted by Mr Davies in separate submissions that any land not comprising a dwelling lot for which there was an independent right of occupation by the Village Operator for its own some specific purpose was common area. I do not need to go that far because this decision only affects that part of the village land comprising the total pathway.

41. The Village Operator in its evidence and submissions sought to distance itself from formation of the total pathway during the phases of it. It sought

to downplay the role that the respective village managers had played in this work. My assessment is that the individual residents affected and management from time to time accepted that the areas of land in question, initially grassed but later formed into a pathway, were a common area shared as access to the clubhouse by various residents and other personnel.

42. In case there be any Applicant who has a standard form of Arvida Occupation Right Agreement I will comment now on the issues raised, although the submissions for the Applicants included that;

> *"(The Applicants concede that whilst there is a variation in the wording between the Sanderson and Arvida ORAs, their meanings are substantially the same and reference [in the submissions] will therefore be largely to the SORA [Sanderson version])".*

43. The form of Arvida ORA for the resident at Villa 108 who gave evidence included:

- "*From the Commencement Date we grant to you and you accept a licence to occupy your unit, on the terms of this Agreement*" (clause 3.1).
- The unit is defined as Villa 108 at the Bethlehem Country Club Village with the address given.
- "*You are entitled to take occupation of your unit and move in on the Commencement Date …* (clause 3.3).
- "*You are entitled to use the Common Facilities. Other residents and residents of any other Arvida Village or Care Centre also have the same rights, so your rights need to be exercised in common with all other residents and any other persons we grant similar rights to*". (Clause 3.7)
- *"For villages that have a Clubhouse … residents will have access to it…*" (Clause 3.8)
- "*Common Facilities" means the common areas and community facilities of the Village provided by us* ***from time to time***" Schedule One - Definitions (emphasis added)

44. The concession made by the Applicants' submissions appears correct although there are two aspects to mention:

- The first is that the Sanderson form refers to Common Area whereas the Arvida form refers to Common Facilities and it might be said that the latter expression is more restricted than the former (and the Sanderson form does also include the word "*facilities*").
- Secondly the equivalent in the Arvida form to clause 48 in the Sanderson form referred to below at paragraph 40 which empowers of the Village Operator to remove the amenities from the common areas permanently or temporarily is clause 16.6 which reads:

> "*We are entitled to add, remove or substituted buildings, areas or facilities from the Community Facilities permanently or temporarily*".

This is consistent with the use of the words "*from time to time*" in the definition of the term "Common Facilities" as are highlighted above[3]. .

45. The parties did not canvas any differences to any extent and I am treating it that it is common ground that the rights and obligations arise by virtue of the Sanderson form of ORA either because all of the Applicants' ORAs are in that form or because there are no substantive relevant differences in the Arvida form.

Closure of subject pathway

46. There is in the relevant form of ORA (Sanderson form) a clause 48 which reads:

> *"We are entitled periodically to provide additional buildings, areas or amenities as part of the Common Areas, or to remove buildings, areas or amenities from the Common Areas permanently or temporarily".*

47. Although in its written opening submissions counsel for the Village Operator said that "*the operator did not invoke clause 48 to remove that*

[3] at paragraph 43

disputed pathway",[4] a different position was taken in its Closing submissions where it is said

> "*The operator says that clause 48 entitles it to remove the disputed pathway and the powers properly exercised in the circumstances*"[5].

48. It is important in the management of any retirement village that the Village Operator in question must manage all its resources for the benefit of the residents as a whole. There will inevitably be competing interests for the individual residents; and the Village Operator in question must manage the diversities of interest and how they are handled.

49. My finding is that it was open to the Village Operator to remove or restrict the amenity of the longer pathway or part of it at any time during the respective occupancy by the Applicants of their villas. As I understood the submissions for the Applicants, they did not dispute this[6].

50. That effectively deals with the first of the two dispute issues referred to above[7]:

> The closure of the subject footpath alleging breach of the rights to services and other benefits in their respective ORAs and Right One of the Code of Residents' Rights (**CRR**).

51. The relevant "*services and other benefits in their respective ORAs*" mentioned in that paragraph are the right not to have the relevant footpath closed as has happened. Given that I have found and the Applicants have conceded that the Village Operator has the right to remove or restrict the amenity of the longer pathway or part of it at any time, that is not a breach of any rights under the Applicants' respective ORAs.

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[4] Opening submissions for the operator - clause 9.2
[5] Closing submissions for the operator - paragraph 4.2(a)
[6] Submissions for the Applicant page 14 – Legal Issues Item 3: "This however is not an unrestricted discretion to remove common areas or parts thereof as … there are pre-requisites to the exercise of such a discretion. These are that such a discretion must be exercise reasonably, honestly and in good faith and there must firstly be consultation with the residents. Neither of these pre-requisites are satisfied…"
And at page 15: "it is accepted under paragraph 10.1 SORA that the occupiers have a right to enjoy the common areas but that right is not exclusive and "must be exercised in common with all of the residents of the village and their guests from time to time and any other persons to whom the operator may in its discretion grant similar rights at any time"
[7] at paragraph 21

52. The Code of Residents Rights, Right 1, does not help either because it reads: "*You have the right to services and other benefits promised to you in your occupation right agreement*".

53. That fairly and squarely places the same issue for consideration and I have nothing further to add than to say that that Right has not been breached by the Village Operator in respect of any of the Applicants.

54. Before I move to the second dispute raised in the dispute notice, lack of consultation in respect of that decision in breach of certain alleged requirements, I need to comment on a number of issues raised in the documents and at the hearing concerning the merits of the decision to close. Without intending any disrespect to the issues raised and the time spent on them, I now try to summarise some of those issues:

- That the Applicants or some of them had invested significant time and perhaps cost in the formation of the pathway or parts of it which is now no longer or value if the pathway is closed.
- The extent to which the use of the subject pathway by the residents who used it unreasonably interfered with enjoyment of their Villas by any of the occupants of Villas 107 and 108 respectively under their respective ORAs.
- The deterrent effect that the presence of the subject pathway may have had on prospective sales by the Village Operator of either of those Villas 107 or 108.
- Any aspects of danger in use of the subject pathway from inadequate lighting and how this could be addressed, with evidence from one of the residents with significant knowledge and experience of lighting as to how this might be improved or remedied, where necessary.
- Whether any concerns for any of the occupants of Villas 107 or 108 as to privacy could be allayed by further fencing or hedging.

55. Quite a significant volume of paperwork and time at the hearing was spent on these issues. As I see them, however, they are not matters on which I can give any meaningful ruling. They relate to management of the village by the Village Operator and are questions which it must address in that context. I can understand that those issues may come up in the

consultation process but they are not issues that I can myself rule on the merits of. Furthermore they are not matters on which I have jurisdiction under the RV Act to any give any ruling. Mine is not a jurisdiction of appeal on the merits of the issue; but rather a question of whether any procedure followed or action taken by the Village Operator is breach of rights under an ORA. I turn therefore to the second dispute which relates to consultation.

Lack of Consultation

56. As noted above this dispute is introduced in the dispute notice as follows:

> The lack of consultation by the Village Operator with the residents concerned in respect of that decision said to be in breach of Right Three of the CRR and Section 28 of the Code of Practice ("**COP**")

57. Section of 32 of the RV Act includes:

> *"**Retirement villages to have code of residents' rights***
>
> (1) *The code of residents' rights set out in Schedule 4 is a summary of the **minimum** rights conferred on a resident of a retirement village by this Act*". (emphasis added)".

58. There was no evidence that this retirement village had its own Code of Residents' Rights containing rights other than those minimum rights and I therefore assume that it is accepted that the rights referred to in Schedule 4 continue to apply to this village.

59. Right 3 of the Code of Residents' Rights (**CRR**) in the Schedule reads:

> *"Consultation You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your:*
> *a. occupancy or*
> b. *ability to pay for the services and benefits provided*".

60. The Code of Practice 2008 (**COP**) has been established following the consultation process provided for in section 89 of the RV Act. Clause 2.4 of the Sanderson ORA form includes reference to the code of practice but says it is "*not yet in force*" and that the Village Operator would adopt the

code of practice no later than when it came into force. It appears to be common ground that that COP applies in this case.

61. Paragraph 28 of the COP reads as follows:

> "***Residents' participation in decision-making***
>
> ***Operator must consult residents***
>
> *1 Residents have the right to be consulted by the operator. Subgroups of residents, or individual residents, are also entitled to be consulted.* Right 3, Code of Residents' Rights
>
> *2. The operator must consult residents:*
>
> *a as required in the Code of Residents' Rights and the occupation right agreement.* Right 3, Code of Residents' Rights
>
> *b about the content of any proposed rules if not already established by the operator, or any proposed amendment or addition to the existing rules by the operator.*
>
> ***Consultation process***
>
> *3 When consulting residents the operator must:*
>
> *a give them all the relevant information so they are able to provide informed comment and advice about the matter*
>
> *b allow enough time for residents being consulted to consider and draw up their comments or advice*
>
> *c fully consider any comment or advice before reaching a decision.*
>
> *4 Residents may, individually or as a group, appoint a person or people to represent their views in the consultation process.*
>
> *5 The operator must not decide a matter before consultation has been completed, but is not obliged to agree with every comment or to act on the advice provided. The operator must consider all responses received with an open mind. The outcome cannot have already been decided.*
>
> *6 Following consultation the operator must tell residents as soon as reasonably practicable the decision(s) made, with reasons.*
>
> *7 The consultation process must take into account the operator's need to operate and manage the retirement village effectively*

and to provide the facilities and services for the benefit of all residents".

62. There was no disagreement that the CRR and COP provisions imposed obligations on the parties to which this dispute refers.

63. It is the Applicants' position that, even if the Village Operator had the right to vary or amend any rights of use of the subject footpath in the common area, it had obligations under those authorities to consult with the residents including the Applicants, which it has failed properly to do.

64. The proposed closure of the subject pathway by the Village Operator was a proposed change in the services and benefits of the residents, it was said, and required in the Village Operator to undertake full consultation in accordance with those principles.

65. The position for the Village Operator is that it did not have any obligation to consult because this was not a common area but, even if it did, it did consult adequately and in compliance with its obligations. Furthermore, submissions on its behalf refer to clause 21 of the ORA which applied to Mr and Mrs Davies' Villa ("**Sanderson ORA**"). Clause 21.1 reads:

"21. WE WILL CONSULT WITH YOU

"21.1 We will consult with you about any proposed changes in:

(a) the services and benefits we provide pursuant to this Occupation Right Agreement

(b) …

that will or might have a material impact on your Occupation Right or your ability to pay for the services and benefits we provide".

66. There is then further provision for consultation in specific circumstances including sale or disposal of the Village Operator's interest, appointment of a new village manager, changes to the rules, and marketing of the residential Home.

67. The Village Operator argues that the consultation provisions of clause 21 are more restrictive in their reference to material impact on the occupancy right of the Applicant. The expression "*occupancy right*" is defined in clause 5.17 to mean the "*personal non-transferable right to occupy the residential home under the [ORA]*." Any closure of the subject pathway

does not, it is said, affect the occupancy of the Applicants in their respective villas.

68. I accept that a proper application of clause 28 of the COP requires consideration of the obligations under it and those under the respective ORAs. Clause 28(2) includes:

> *"The operator must consult residents:*
>
> *a as required in the Code of Residents' Rights and the occupation right agreement.*

69. The right to consultation is therefore the same under both, namely that the proposed change "*will or might have a material impact on your occupancy…*"

70. The expression "*Occupation Right*" is defined in clause 5.7 to read: "… *means your personal non-transferable right to occupy the Residential Home under the Occupation Right Agreement*". . My view is that the obligation is the same under both documents despite the slightly different wording. This is affirmed by clause 28(2)a of the COP.

71. It is the position of the Village Operator that the right of any individual residents, including the Applicants, to be consulted on the subject of closure of subject footpath is limited by the words " … *will or might you have a material impact on your occupancy*…" as contained in Right 3 of the Code of Residents' Rights or the words " … *will or might have a material impact on your Occupation Right* …" as contained in clause 21 of the Sanderson ORA.

72. The right to consultation, the Village Operator argues, is limited to any proposed change that would or might have a material impact on occupation rights; that a right that each of the Applicants have is to have access to the clubhouse; and that that right is not affected by closure of the subject pathway because residents still have access to the clubhouse via Charles Lever Drive.

73. It is my view that the occupation right for Mr and Mrs Davies is the non-transferable right to occupy the residential home in the dwelling on Lot 133 Bethlehem Country Club. That includes all the rights that accompany the

right of occupation which are set out in their ORA. They include the right to use the common areas which are there and that includes the areas surrounding their dwelling, part of which may be defined by garden or landscaping but part of which also comprise the meandering grassed areas of between villas. I do not consider that something more formal by way of a pathway adds to of those rights.

Who was entitled to be consulted?

74. My view is that, in the context of the **right** to be consulted (as against the question of the **process** of consultation), the right to use the common area that compromises the subject footpath will be a question of degree depending on the various factors concerning the individual occupants' circumstances. Proposed closure of the subject pathway may have no, or at least no material, impact on the occupancy by a resident who is not living anywhere near the subject footpath., Another resident, including some, if not all, of the Applicants may have a significantly greater interest in the use of the common area which is the subject footpath such that closure would have a material impact on their respective occupancy.

75. Or put another way. Every resident in the village will have sufficient interest in major proposals such as concerning the clubhouse or closure of roads for them to have a right to be consulted. It impacts on the occupancy of every resident. By contrast, proposals concerning parts of the common areas such as the subject footpath, will only affect a relatively limited number of residents who might claim that this has a material impact on their occupation rights.

76. The dispute notice was primarily in the name of Mr Ian Davies (but with the added words "*One of 23 signatories as attached, who have authorised this Notice of Dispute*"). He and his wife are the occupants of Villa 113 and both gave evidence. There was annexed to the dispute notice a document signed by 23 other persons reading: "*We certify that we have read and join in support of, the dispute notice described on page 1*". That does not make clear whether they were supporting Mr Davies in his dispute notice concerning his ORA or whether they were alleging breaches of their own

respective ORAs. The dispute proceeded on the basis, and I am taking it, that the latter applies, that is they are alleging their own rights are breached.

77. There were only 8 residents who provided a witness statement for the hearing summarised as:

- Mr Ian Davies concerning the total pathway timeline, changes in village management, use of the total pathway, and events subsequent to the proposed closure).
- A resident of Villa 82 concerning an accident she had had on the nearby street; but no mention of use of the subject pathway.
- One of the residents of Villa 124 confirming their use of the pathway and aspect of its formation. She said that about 2 May 2024 the then village manager came to see her and said "*Well, I have made up my mind and I'm not going to change it*". She also spoke of the consequences of the closure for her and her husband because of the requirement that they would now need to use roading to reach the clubhouse.
- A resident of Villa 116 detailing what she was shown and told by the sales manager concerning the pathway when she and her husband purchased their ORA in August 2012. This referred to the "*easy access to the clubhouse via the walkway* …". She referred to some aspects of its formation, and produced the copy of an email she had sent to the then village manager. She spoke of her concern for the safety of her husband and another resident in having to use roadways to access the clubhouse.
- The resident of an apartment at the clubhouse area, Apartment D, addressing safety issues but not referring to any personal effect from the closure of the subject pathway.
- Mrs Merlyn Davies of Villa 113 confirming her husband's evidence and detail of use of the total pathway, and expressing concern for safety issues in having to use the road. She spoke of exchanges she had had with personnel concerning closure of the walkway. She referred to

safety issues and suggestions that had been made concerning traffic risk.

- A resident of Villa 121 concerning the purchase by him and his wife of the occupation rights to that Villa and what they were told by the salesperson concerning the use of the total pathway and the importance to him and his wider family of continued use of that pathway. He also spoke of traffic concerns and safety issues.
- One of the occupiers of Villa 107 who said first that he and his wife were never asked if they wanted the pathway to remain or have it closed "*but to [them] it didn't particularly matter*". He expressed preference for a screen and gave evidence of other suggestions.

78. None of the other persons who had signed the page annexed to the dispute notice gave evidence.

79. That raises several questions in the context of those persons being Applicants. First, their understanding of what their involvement in the dispute notice is. Secondly, the extent, if any, of their use of the subject pathway. Thirdly, whether they are saying there has been some breach of their own individual ORA (in whatever form that may be) by the closure of the subject pathway. Fourthly, whether they say they were or were not involved in any consultation and whether they had the right to be.

80. It appears that it is understood, either expressly or by implication, by Mr Davies and the representative of all Applicants, Mr Whitehead, that the rights of those other Applicants on critical issues are identical with those of Mr Davies, the principal Applicant. I do not accept that. As I read it the position of each named Applicant could be different for the reasons mentioned above and each must be considered separately.

81. In some respects this may be a theoretical exercise only. If, for example, I find in favour of Mr Davies' (and his wife's) position, and I make any orders as sought by him, then all other residents are going to get the benefit of that.

82. My conclusion on the question of the **right to be consulted** is that this is a question of degree depending on the location of, or evidence of use by, occupants of respective villas.

83. The subject pathway has been formed with some effort and expense and certainly with the approval of, if not by, the then Village Operator. It is located on an area of land which had been a part of the generally meandering grassed area around various villas in the vicinity. That land provided free access for any resident who wished to use it directly from Glenorchy Lane to Gibbstone Lane to the clubhouse.

84. Primarily, I am satisfied that Mr and Mrs Davies in Villa 113 were affected by any proposal to close the subject pathway, their villa bounding directly on to the pathway area in question and the use of it as access to the clubhouse having been established by the evidence. That change might have had a material impact on their occupancy of that villa under the ORA and they were entitled to be consulted.

85. Likewise the evidence of the occupant of Villa 124 satisfies me that she and her husband are sufficiently affected in the enjoyment and use of their Villa by the closure of the subject pathway and they were entitled to be consulted on this potential change that might have had a material impact on their occupancy of that villa. They used these common areas for access between different villas including to the clubhouse and with family, friends, staff and contractors from November 2010 until the events referred to in this dispute. They were significantly involved in the formation of the pathway in its various form over the years.

86. The occupants of Villa 116 had a convenient access from their villa in Glenorchy Lane to the clubhouse down the total pathway since they moved in in August 2012 and I am satisfied that any proposal to close that pathway might have had a material impact on their occupancy of that villa.

87. While I appreciate the concerns for safety expressed by the occupant of Apartment D, I am not satisfied that his position as described in his evidence is sufficient to qualify him to be consulted on any proposal to close the subject pathway. Similarly with the occupants of Villa 82 one of whom gave evidence but who live some distance away from the subject pathway.

88. The occupants of Villa 121 had used the subject pathway from time to time since 2013 including access in a safe manner for their grandchildren (when

they are there to stay) to the clubhouse and I am satisfied that their position also qualifies them to be consulted on any proposal to close the subject pathway.

89. Of the residents who gave evidence, one of the residents of Villa 107 and the resident from Villa 108 who attended as a witness on request are both affected by any proposal to close the subject pathway and were entitled to be consulted about this.

90. Finally, any resident who has put money, time or effort into the formation of the subject pathway would have a right to be consulted.

91. I conclude that at least those persons had or might have had a material impact on their rights under their respective ORAs for enjoyment of their respective villas by the proposed closure of subject pathway entitling them to be consulted about that topic.

92. That is the best I am able to do on what has been presented to me in assessing who had right to be consulted about the proposed closure of subject pathway. There may have been other of the residents in the streets named Gibbston Lane, Glenorchy Lane and Bannockburn Lane (many of those who signed the document annexed to the dispute notice as being "*in support*" have addresses in those streets), (except perhaps those fronting Charles Lever Drive (that is apparently Villas 100, 105, 110, 114 and 119) who could be said to be less likely to use the total pathway), who were sufficiently affected that they could also have been consulted but I am not going to speculate on that.

93. All this may be academic because the reality is that the then village manager did go through a process of consultation.

Process of Consultation

94. The Agreed Statement of Facts on this records:

> "11. A new resident moved into Villa 107 in 2023 and raised concerns about use of the pathway by other residents (specifically in relation to disruption and privacy).
> 12. There were interactions between [the then village manager] and the Davies [the principal Applicant] about the pathway marked "B" [the subject pathway] on 8 April and 9 April 2024 during

which [the then village manager] indicated that the [Village Operator] was considering the closure of the pathway.

13. [The then village manager] circulated an email on 10 April 2024 which amongst other matters, advised residents that the [Village Operator] was "looking at removing access to the pathway located in between 6 and 8 Gibbston Lane, and which also extends between 5 and 7 Glenorchy Lane" [the subject pathway], noted that the concern was around the impact on privacy for those in the adjoining villas and that prospective residents had commented on the lack of privacy and also that the [Village Operator] had received feedback that the pathway was not well lit which affected safety at night. The email concluded by stating that " … *if you would like to provide any thoughts as to our proposal to remove access, it would be greatly appreciated. Please provide any feedback by next Wednesday 17th at 12:00pm*".

14. A petition dated 11 April 2024 was prepared by residents and provided to [the then village manager] on 15 April 2024. The petition contains signatures from residents objecting to the removal of the pathway. [I further note that the petition "*reserved the option of submitting a formal complaint*".]

15. Various written feedback was provided by residents, including by Ian Davies on 14 April 2024.

16. Feedback formally closed on 17 April 2024.

17. Notice of a decision by the operator to remove the pathway, was on 2 May 2024.

18. A formal complaint was made by residents in relation to the decision, on 5 May 2024. The formal complaint sought a reversal of the decision to close the pathway in dispute.

19. [The then village manager] responded to the formal complaint on 9 May 2024.

20. In response to the formal complaint, the statutory supervisor provided a recommendation on a way forward, by letter dated 21 May 2024. The recommendation was not accepted by the [Village Operator]. This was communicated by letter to Mr Davies dated 13 May 2024.

21. The parties have attempted to resolve issues through mediation. This was unsuccessful."

95. Because this was an Agreed Statement of Facts, I need not inquire into the veracity of it at all. Much of what was agreed was, however, confirmed in

exhibits to statements from the witnesses. I have also taken into account the content of those documents.

96. There is also evidence from the statements signed by the respective witnesses which they affirmed; and there is a timeline produced by the corporate counsel for the Village Operator's owner, Arvida, in the course of preliminaries for the hearing. The sequence as I have been able to distill it from these sources is:

- Commencing about mid 2023 the then village manager and the then sales manager addressed what they saw as issues concerning the subject pathway. The then village manager unsuccessfully sought to address the concerns of the then resident of Villa 107 and said she "*undertook an investigative process*" of which she gave evidence in detail.
- Around September 2023 issues were raised concerning lighting of the pathway which were attempted to be addressed.
- In early March 2024 the persons who later became residents inspected Villa 108 and on 27 March 2024 signed an application for ORA of that villa[8].
- On 8 and 9 April 2024 there were the interactions between the then village manager and Mr and Mrs Davies referred to paragraph 12 of the Agreed Statement of Facts and the then village manager said in her statement that she knew Mr and Mrs Davies used the pathway frequently. This was on the subject of possible closure of the subject pathway, with the then village manager saying she reassured Mr and Mrs Davies that she would follow a consultation process to enable feedback to be provided from residents who would be given a week to provide written feedback.
- On 10 April 2024 the then village manager wrote the email referred to in the Agreed Statement of Facts (which she said in her statement was to "*all residents*") which sought feedback by Wednesday, 17 April 2024.

[8] Consultation timeline and Summary of Conversations prepared by corporate counsel for Arvida – Exhibit 20

- On 11 April 2024 the residents of Villa 116 wrote an email to the then village manager referring to the upset and disturbance that the proposal was causing; aspects of privacy promotion; lighting issues; and the inconvenience and danger there would be to them if the closure proceeded.
- On 13 April 2024 the residents of Villa 124 sent an email to the then village manager objecting to the suggested closure; referring to their use of the accessway for 14 years as a shortcut and safe way to get to and from the clubhouse, referring to privacy and lighting issues, and inviting "*sensible discussion on site*".
- On 14 April 2024 Mr Davies wrote an email to the then village manager concerning the privacy concerns of potential new residents and the relative unfairness to existing residents who had enjoyed the subject footpath for a period. The Agreed Statement of Facts refers to written feedback provided by other residents and I am assuming that refers to the other emails I have noted.
- On 15 April 2024 the petition signed by 52 residents referred to in the Agreed Statement of Facts was presented to the then village manager. In his statement Mr Davies said that he was asked by the residents of Villa 124 to prepare a petition which "*garnered 52 signatures over the weekend*". In her statement the then village manager said that the statement was signed "*by a number of residents stating that they did not approve of the way the petition was done and some felt obliged to sign it*" – although objection was taken to the hearsay nature of that evidence and I must give it only the weight that I can.
- On 16 April 2024 the then village manager provided her Village Manager Report to the residents committee which included reference to the feedback she had had concerning the subject footpath including removal or retention and said she would "*take time to consider and then provide a final response*". She summarised briefly the content of some of the emails. She concluded:

> "*I will be involving our Regional Manager prior to a decision [being] made but I will not feel pressured by the content of the emails, but rather a decision will be made on what we feel is*

> *the best longer term option for the village which provides a sense of privacy to all*."

I was not given detail of the personnel on the residents committee or whether these included any of the Applicants.

- On 17 April 2024 the (now) residents of Villa 107 came to the village to view villas for their retirement accommodation.
- On 19 April 2024 those persons signed an application form for an ORA of Villa 107 and paid a deposit.
- On 26 April 2024 Mr Davies wrote again to the then village manager with some legal questions of interpretation of the ORA and questioning how long it would be before the closure took effect.
- Between 17 April 2024 and 1 May 2024 the then village manager considered the material that she had received and said she had taken into account.
- On 2 May 2024 the then village manager separately visited the residents of villas 124, 116 and 113. According to Mr Davies' statement, this was to give prior notice that her decision had been made and the access to the walkway would be closed.
- On 2 May 2024 the then village manager gave the formal communication referred to above and in the Agreed Statement of Facts. This was by email but no evidence was given as to whom this email was sent (although the then village manager's statement says that on "*5 May 2025*" she communicated to "the *residents*" that she had made the decision that the pathway would be removed – (which must refer to 2024)). It did contain these paragraphs:

> "*Recently … I embarked on a consultation process regarding the proposal to remove a pathway located in between 6 and 8 Gibbston Lane. …*
>
> *Thank you to those who took time to comment. I had feedback both for and against this proposal.*
>
> *I have fully reviewed and considered all the feedback provided in respect of this proposal. Following this, I have decided that the use of pathway will be discontinued. I know those that use this pathway to access that Clubhouse will be*

disappointed, however in making this decision I have considered the needs of all residents, and what is the best longer-term option for the village for both present and future residents.

From the feedback received, I have come to the view that the pathway creates an unreasonable disturbance to the residents of 6 and 8 Gibbston Lane and compromises their privacy. Coming to a village environment, everyone accepts this is a community setting and there is a compromise regarding levels of privacy. However, the lack of privacy afforded by this pathway to the two adjoining villas is beyond an acceptable level".

The village has shared access via the roads for both vehicles and pedestrians. While some residents favour footpaths over shared access roads, there isn't space to have a road and a footpath. Many residents utilise this shared space successfully, including those with walking aids coming along Charles Lever Drive.

I am happy to support those who have concerns utilising Charles Lever Drive by investigating new practices such as …

I am also working with the gardening team to decrease the height of the hedge at the roundabout at the end of Glenorchy Lane to ensure more visibility of traffic coming along Charles Lever Drive. We have already put an additional solar light on the corner of this roundabout.

The pathway will be cut at the end of the service area at 6 Gibbston Lane. A hedge will be planted which will prevent access to this pathway. Our estimated timing is…"

- On 15 May 2024 the ORA for the residents of Villa 107 became unconditional.
- On 11 June 2024 those residents moved into Villa 107.
- There have been further processes between the parties to try to resolve this dispute without needing to have recourse to the disputes notice procedure but to no avail.

97. The Applicants' position is that the exchanges mentioned above did not amount to adequate consultation as required by the CRR and the COP (or indeed their own respective ORAs).

98. The Village Operator argues that any exchanges or feedback that occurred up until the time the decision to close was communicated should be taken into account. I accept that submission and do not accept that it was only such feedback as there was until the time for feedback closed.

Arvida Group Complaints Policy

99. The Applicants also claim that the Village Operator did not comply fully and properly with the formal complaints procedures mentioned in the "*Arvida Group Complaints Policy*" document produced by a witness for the Village Operator under questioning by the Applicants' representative as an exhibit. Objection was taken to this by the Village Operator.

100. Submissions for the Applicants referred to the obligation in that Complaints Policy for the manager to convene a meeting as part of the consultation and resolution of the formal complaint; and that that had not been done in the context of the obligation on the Village Operator to consult with the parties.

101. There was little evidence concerning this, but I take it as common ground that the operator of the village has changed at some stage between when Mr and Mrs Davies concluded their ORA with the then operator and the current time and that the Arvida Group Limited has a role in the management of the village.

102. There are these difficulties with the argument concerning the Arvida Group Complaints Policy:

- First I accept the submission that this was not an issue raised in the dispute notice.
- Secondly it is hard to identify how that Complaints Policy could apply in this case. The scope of that Policy is to cover all complaints or concerns raised by resident and the outline of procedure includes various provisions from the CRR. Responding to a complaint is a very different matter from initiating a proposed change such as occurred in relation to what I have found to be common area. One involves listening to the complainant and any evidence and inquiring into the

complaint whereas the other involves communicating a proposal and seeking a consultation response.

103. In fact a formal complaint was made by certain residents on the subject of the pathway and the detail was in the bundle of documents but it is not my role to resolve that complaint as such.

104. I do not accept that the Applicants have any rights to rely on provisions of the Complaints Policy of the Arvida Group Limited in this current context of rights under their respective ORAs and entitlement to consultation for any variation of those rights.

Principles for consultation

105. The submissions for the Applicants referred to two authorities:

- *Resident A v Operator 2* (2022). In that case a disputes panel under the RV Act dealt with questions of restriction to access to a common area namely the clubhouse in a relevant village. This arose from the operator's decision to restrict access during the Covid-19 epidemic to vaccinated residents only. The disputes panel said:

> "*Consultation is more than notification and more than the provision of information. Consultation is an interactive, transparent, cooperative, collaborative, authentic, proactive and purposive exchange of information, ideas, viewpoints, and advice, to be embarked upon between two parties or amongst multiple parties as soon as possible and before any decision is made by the party having such authority*".

The disputes panel limited those remarks to the case in point, saying that other villages could have different consultation processes because of their different forms of ORA or otherwise. While I agree with generalised principles stated, each case must be decided on its own merits.

- *Refrigerant Recovery (NZ) Ltd v Trust for the Destruction of Synthetic Refrigerants* (2024) NZHC 3933: O'Gorman J citing these principles:
    a Consultation includes listening to what others have to say and considering the responses.
    b The consultation process must be genuine are not a sham.

c Sufficient time for consultation must be allowed.

d The party obliged to consult must provide enough information to enable the person consulted to be adequately informed, to be able to make intelligent and useful responses.

e The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind.

106. The submissions referred to other cases and principles concerning contractual discretion. Those submissions expressly acknowledged that they relate to "*explicitly commercial contract arrangements*."

107. Submissions for the Village Operator objected to reference to those authorities on the grounds that they dealt with judicial review and contractual discretion. By contrast a disputes panel under the RV Act has no power or jurisdiction to determine whether a decision was reasonable. I accept that submission but I can take into account the principles involved and stated that are relevant to this current case. Primarily, however, the issues concerning consultation are expressly provided for in the COP as I discuss below.

108. Specifically in breach of those principles, the Applicants submitted that:

- To send out an email to all residents on 10 April 2024 seeking a response within 7 days was a very limited time for the 270 residents to organise a meeting to respond.
- Failing to meet with objecting residents to hear what they had to say was a breach.
- There was no "*interactive, transparent, cooperative, collaborative, authentic proactive and purposive exchange of information, ideas, viewpoints and advice*" (to adopt the wording of the disputes panel decision referred to above).

Discussion

109. In considering whether there has been a breach of duty of consultation in this case, as disputes panel I must take into account primarily the provisions of the respective ORAs of each resident (as they have been

presented to me), the principles stated in the CRR although there is a significant overlap there, and the provisions of the COP, particularly clause 28 as noted above.

110. As with the question of the duty to consult mentioned above, I am also of the view that the application of those principles as to the extent of and manner of consultation with each individual concerned varies with the extent to which they are affected by the decision in question.

111. Those who are only involved in the periphery or not at all, but are nevertheless residents of the village to whom notice was given, have the rights to consultation afforded them by their respective ORAs, the CRR and with the COP, but taking into account individual circumstances where each are affected. The process for consultation under clause 28(3) would need to be considered in the context of their own individual situation. They would not have the same rights and entitlement to consultation as those who live within walking distance of the subject pathway or had expressed views concerning the use of it and its retention or had invested time or money into formation.

112. Referring to the residents mentioned above as having the right to consultation, Mr and Mrs Davies, the principal Applicants, would have a greater right and therefore would need to have closer consultation than others. Others have differing levels of that right depending on their different positions as summarised above

113. The then village manager said that she met with Mr and Mrs Davies on 8 and 9 April 2024. She said this was to let them know that she had received some negative feedback and was considering whether it should remain: with the response that they were against the removal of pathway for safety reasons. She explained in the second meeting that she would be following a consultation process.

114. There then followed her email to residents of 10 April 2024 referring to removal of access to the pathway and the concern for impacted privacy on adjoining villas, commented on by prospective residents. She referred to the fact that there were no other such pathways between houses in any other part of the village. She referred to concerns about lighting and health

and safety at night and difficulties in addressing this. She asked for "*any thoughts*" as to the proposal to remove access and gave until Wednesday, 17 April (1 week later) for that purpose. That seems to me to be a reasonable way to open the consultation process by describing the proposal and the current concerns about it, and seeking comment.

115. The one week period allowed for response was, the Applicants claim, too short a time to comply with the consultation obligation.

116. As I understand the Village Operator's position, there was no urgency about the proposal or its implementation. As indicated in the timeline above[9] the previous occupant of Villa 107 who had had issues concerning her dog or dogs barking and questions of privacy had vacated and the new (now current) occupant was in the process of finalising an ORA. The persons who were to become occupants of Villa 108 were in the process of finalising their ORA.

117. That being so, there was no need for any truncation of a consultation process with the remaining residents concerning the proposal for closure.

118. The question of closure of the subject pathway which had by then become clearly formed was not in my view the most important part of enjoyment of occupation of the respective villas for any of the Applicants. They had chosen to go into a village which had only roads and no footpaths. Formation of the total pathway had occurred incrementally. Initially the first residents involved in its formation had had an added bonus from when they had signed their respective ORAs. Whereas before there had been lawn meandering around the villas for them to walk on, there was now a formed footpath. Any resident who came later after there had been a measure of formation may have been able to enjoy the use of the formed footpath but must not have understood this to be a footpath of any formality. The Applicants themselves acknowledge that the pathway was used only about six times per day.

119. The time given for response was enough time for Mr Davies to send his own email on Sunday 14 April 2024 and further to prepare a petition and arrange for the signature of it by 52 residents. No one of those persons

[9] at paragraph 96

asked for further time for more detailed response. The submission refers to time for consultation with some 270 residents; whereas the view I have expressed is that most of those would not have been materially affected by the closure of the footpath or indeed entitled to consultation. Any resident could have claimed to be affected and made some response individually; and there was no need necessarily for any collaborated joint response.

120. In the petition there was first reference to removal of the concrete walkway and replacement with lawn "*to prevent south-eastern residents from using the walkway [en] route to the clubhouse*". The signatories expressed the wish that management abandon the proposal. There was brief mention of what was understood to be the management reasons, safety, complaints, no other walkways and sales issues; and the signatories' responses on those issues (briefly). There was also mention of other factors concerning facility of use of the footpath by residents, greater safety for those with mobility issues, and the availability of space for screen erection.

121. The then village manager's statement said that she received email feedback from a number of residents both supporting the removal of the pathway and retaining it; but gave the reasons for the nondisclosure at that stage as her "*genuine concerns*" that the groups of residents may be "*subjected to mistreatment*" by the group wishing to support retention. She referred to the concerns of those supporting closure as including privacy as a real concern, security of the area, and lighting. There was no evidence from any other person directly to the dispute panel concerning any of these issues and objection was taken on behalf of the Applicants to the hearsay nature of it.

122. I can take into account that the then village manager said she received feedback from other residents and I do not think that there was any obligation on her part to share this with the Applicants or other persons affect by the proposed decision. There is nothing in clause 28 of the COP which requires that feedback from some residents be referred to other residents for comment. All that is required by that clause is that the relevant information is given by the Village Operator with time for comment

or advice from affected residents. This is different from a normal judicial process where "natural justice" might have required that.

123. For present purposes of this dispute notice, I am prepared to accept that there was communication from other persons to the then village manager which may have addressed those issues but I am not prepared to give weight to the content of the concerns expressed by them. Indeed, it is not my function to determine the merits of the proposed closure but rather the process which was followed.

124. On Friday 26 April 2024 Mr Davies wrote his further email to the then village manager.

125. Another manager may have handled the situation differently such as to have convened a meeting of affected residents to give a further opportunity for feedback. My assessment from the statement of the then village manager and her evidence was that she handled the question in a way that was sufficiently adequate in the circumstances.

126. Having been confronted with these different issues concerning Villa 107, when it was time to market Villa 108 reassurances concerning privacy issues affected by the presence of the subject pathway were apparently front of mind for village personnel and I am satisfied that assurances were given to the potential purchasers, including the residents who finally entered into an ORA for that villa, that the subject of privacy arising from the presence of the subject pathway in close proximity to Villa 108 was being addressed. This did not need to include a detailed disclaimer or condition about consultation with other residents.

127. Although it is part of the case for the Village Operator that there was no duty of consultation, I am satisfied that the then village manager did consider herself to be under an obligation to consult with other residents materially affected and her evidence refers to the process she followed.

128. By the same token, what she said to them in writing or orally by way of consultation should fairly have included the issues that were being addressed in the proposed closure (clause 28 of the COP refers to "*all the relevant information"*). This would have included privacy for villas 107 and 108, lighting and safety issues and other matters that were motivating the

proposal for closure. It may have, but need not have, included concerns about resale of the villas which was a commercial consideration but not affecting the enjoyment of the individual villas by the residents. The closure proposal could not have been made "*out of the blue*" because that would inevitably have raised the reply question "*why*?".

129. Giving that sort of detail does not, in my view, indicate predetermination. It simply puts a framework or context for the proposal being made for closure of the subject pathway. Certainly the language used can be a pointer to whether there has been predetermination but I do not think that the language used in the 10 April 2024 email amounts to that. The words are used: "*We are looking at removing access…" "Our concern is the impact that privacy…" "In addition, I have received multiple feedback that this pathway isn't well-lit and a health and safety issue…" "We understand that some of you do use this pathway and if you would like to provide any thoughts as to our proposal to remove access it would be greatly appreciated".* Issues are raised but there is no indication of predetermination.

130. The Code of Practice requires that the operator allow enough time for residents being consulted to consider and draw up their comments or advice. In the context of the materiality of the impact of closure of the subject pathway on their occupancy (which would have varied from resident to resident in this case) I believe that that obligation has been met by the Village Operator. There is then the obligation to fully consider any comment or advice before reaching a decision and in my view that was done by the then village manager on behalf of the Village Operator in the steps that she took to which her evidence refers.

131. The petition which was signed by 52 of the residents dealt with the issues as they understood them and these were taken into account by the then village manager.

132. I do not think that she had predetermined the matter until those steps had been taken as required by the obligation in clause 28(5). That clause makes it clear that she was not obliged to agree with every comment or any opposition as long as she considered this with an open mind.

133. I am also mindful of clause 28(7) requiring ("must") that the consultation process take into account the Village Operator's need to operate and manage the retirement village effectively and to provide facilities and services for the benefit of all residents. That has been done in this case. The submissions on behalf of Village Operator listed eight operational needs that the Village Operator had:

- minimising friction and issue between residents,
- ensuring all residents are free from harassment and having quite enjoyment,
- the saleability of villas going forward,
- safe access across the subject pathway and lighting concerns,
- the impact on the adjoining villas 107 and 108 in terms of potential solutions,
- the fact that there are no other pathways in the village (although that was disputed by the Applicants),
- obligations to staff, and
- cost and efficiencies of solutions.

Apart perhaps from the other pathways issue, those are in my opinion all valid and appropriate considerations for the Village Operator and the manager to take into account.

134. I do not accept the submission that closure was in any event unreasonable. As I have said, it is not my function to determine reasonableness other than in the context of any breach of obligations under the ORAs.

135. As to the submission that there was a failure to meet with residents affected, I do not think there was an obligation to do this and, as noted above, any procedure proscribing that in the context of complaints does not apply.

136. This was, however, all in the context of the final issue raised by the Applicants concerning consultation which is that the Village Operator was under an obligation to approach the consultation with an open mind and to listen carefully to the different matters put before it on the subject before making a decision. That submission is consistent with clause 28(5) of the COP:

> "*The operator must not decide a matter before consultation has been completed, but is not obliged to agree with every comment or to act on the advice provided. The operator must consider all responses received with an open mind. The outcome cannot have already been decided.*"

137. It is the Applicants' case that that was not the position here and that the determination had already been made to close the subject footpath before that consultation process began (or at least before it concluded) as evidenced by the exchanges with the residents or potential residents of Villas 107 and 108.

138. The Applicants refer to the detail of the exchanges with those persons during their introduction to the village and the two villas and their negotiations for their respective ORAs. They say that those facts indicated that the Village Operator had already determined to close the subject footpath before those negotiations took place and gave assurances to the prospective residents accordingly.

139. The Village Operator's position is that the issue was not pre-determined and this was supported by the evidence:

- The subject pathway was retained for use during 2023 and concerns around lighting were in fact addressed.
- The sales agent had looked for a resident without pets.
- The sales agent's evidence was that she did not advise residents of Villas 107 and 108 of the decision to close as she did not know about it at that time.

140. My assessment is that there had been some history of difficulties with the then occupant of Villa 107. This arose partly because of the fact that she had a dog which barked (and apparently by a dog belonging to a visitor which also barked) which irritated other residents. There had apparently been some expression of concern by that resident about privacy issues, although there was no direct evidence about that and my inspection of the site indicated to me that that could not have been a significant issue because part of the wall of that Villa 107 is the side of a garage and another part is a window to the lounge. The current occupant of that villa did not express significant concerns on that subject.

141. When the then occupant of Villa 107 left that villa, it could have been because of those or other reasons but there was no direct evidence from that former resident about that. It was sufficient, in my assessment, to alert the Village Operator to the fact that there could be issues with the proximity of the area of the footpath on what I have found to be common area to that Villa 107.

142. The then village manager also gave detail of other issues that had been raised from March 2024 onwards concerning poor lighting of the footpath creating dangers and privacy issues for the adjoining villas.

143. The obligation imposed by clause 28(3)(a) of the COP is to give all relevant information on any issue requiring consultation so that the resident(s) are able to provide informed comment and advice about the matter.

144. There is then the obligation (having allowed "*enough time*" which I have dealt with above) to *"fully consider any comment or advice before reaching a decision*".

145. There is certainly a fine balance between having a proposal and articulating it and the reasons for it on the one hand and giving the appearance of having reached a decision already on the other.

146. It was quite open to the Village Operator to consider closing of the subject footpath for the variety of reasons that were mentioned, particularly in the 10 April 2024 email from the then village manager. This was certainly in compliance with the obligation of providing all relevant information.

147. That of itself did not indicate that the outcome had already been decided. To use the words of O'Gorman J in the *Refrigerant Recovery NZ Ltd* case above:

> "*The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind*".

148. What the Applicants rely on is the commitment that the Village Operator had made to the prospective purchasers of the ORAs for Villas 107 and 108 indicated that there had been a decision for closure already made.

149. In reply the Village Operator relies on the evidence of the sales manager which included:

- That she did not advise the potential residents about any decision to close as she did not know about any such decision at the time of the applications or agreements.
- That specifically she did not have any discussions with the potential purchaser of Villa 108 when the application was signed; and that potential purchaser, who gave evidence, could not recall any such confirmation.
- That she did tell the Applicant for purchase of the ORA for Villa 107 that there was discussion about whether the subject pathway should be retained not that it would be closed; and that the subject pathway was not addressed after that and not covered in the signed ORA for that villa.

150. I accept those submissions and points made in the context that I accept there was no commitment on behalf of the Village Operator to remove the subject footpath before the new residents of those two villas occupied the same.

151. It is not for me as disputes panel to decide or comment on the merits of the proposal for closure. What I must consider is the process that was followed by the Village Operator through its then manager and subsequently. The merits only come into account as "*all the relevant information*" which is to be provided in consultation with residents and on which comments or advice are to be fully considered before reaching a decision.

152. Another consideration for the Village Operator and therefore the then village manager was the ability for resale and resale value of the villa. That is a commercial concern for any Village Operator and no less so in this case. It is not something with other village residents can have a say in unless it materially affects their enjoyment of their own villas under their ORAs.

153. I conclude that there has been adequate compliance with its obligations under clause 28 of the COP and generally by the Village Operator. Residents were given relevant information and enough time as required

and the Village Operator's then manager fully considered comments and advice before reaching a decision. The matter was not decided before the consultation had been completed and I am satisfied that the Village Operator's manager considered the responses with an open mind.

Remedies under section 69 of the RV Act

154. What I have also taken account of are the limited powers that I have as disputes panel under section 69 of the RV Act.

155. That section expressly provides that a disputes panel may:

> "(b) order any party to comply with its obligations under an occupation right agreement or the code of practice, or to give effect to a right referred to in the code of residents' rights .
> .....
> (e) not impose any other obligation other than in relation to the payment of costs on any party".

156. In final submissions for the Applicants their representative repeated what had been said in response to a question from me from the outset of the hearing namely that what was sought was "*reinstatement of the walkway*".

157. It is clear from section 69(1)(e) above that I would not have had power to order that even if I had found a breach of obligations for consultation arising under the COP. There was a similar problem raised in *the Resident A v Operator 2* case referred to above where the resident sought an order that the village operator in that case apologise to that person. Although the disputes panel found there had been a lack of consultation, it also found that there was no jurisdiction to order that relief.

158. Had I otherwise found in favour of the Applicants in dispute, what I could have done would be to order the Village Operator to comply properly with its obligations of consultation in relation to closure of the walkway. That would have required the Village Operator to go through the process again of consultation with residents affected in the way that I have referred to above with whatever corrections of process were required and come to a conclusion. It is extremely hard to see how that could be done now with an open mind on the part of the Village Operator, given what has occurred

already, and what has already been said in the course of this dispute notice process, not to mention the earlier mediation and other indications and the passage of time. That is not for me to speculate about because I have found that there was adequate consultation.

Conclusion

159. This has been a difficult conclusion decision to reach. The case for the applicants has been presented succinctly and with articulation by Mr Davies and Mr Whitehead; and the witnesses have presented their statements and position clearly. The subject pathway has been used by residents over a long period time and they have participated in its sealing and formation. The village managers from time to time have had to weigh up the respective issues concerning all residents in the village as a whole. Changes can be inevitable. These require proper process and it has been a fine line for me to decide in favour of the Village Operator as I have done to a degree in this case. Residents have banded together with their endorsement of the petition in response to the proposal and of the dispute notice and the complaints procedure they have followed. Those who have enjoyed the facility of walking on the subject footpath will have now lost that facility. It may well be that the total process has been divisive in the village and that is to be regretted. I have reached these conclusions.

160. The subject pathway lies on land which formed part of the common areas surrounding various villas in the vicinity. It was provided with other grassed areas by the Village Operator for common use by all residents in the village. That use included walking on to the extent this was possible in the conditions.

161. All of the Applicants were entitled to use the subject pathway, it being common area.

162. The Village Operator had the right to remove the amenity of access to those common areas from time to time permanently or temporarily. That included closure of access to that common area.

163. The Village Operator had obligations of consultation with residents about any proposals for closure of this amenity of access under clause 21 of the

ORA, Right 3 of the Code of Residents' Rights and clause 28 of the Code of Practice.

164. There is a fine balance as to whether the Village Operator had complied with those obligations of consultation; but on balance it is found that there has been compliance. There was no binding predetermination or commitment by the Village Operator in the dealings with the prospective occupants of Villas 107 and 108 such that it could be said that the outcome had already been decided.

165. In any event, there is no jurisdiction under the RV Act for the disputes panel to order removal of the fence from the pathway as sought.

166. The proper response to the two disputes in the dispute notice is:

- There was closure of the common area/common facility walkway but no breach of the Applicants' rights because there had been an entitlement for the Village Operator to do this and on balance there had been adequate consultation prior to closure.
- On balance there was no lack of consultation with qualifying residents concerned with the decision for closure of access to the walkway.

Costs

167. The Applicants have not sought costs but wish to be heard on any application for costs by the Village Operator. To date the Village Operator has not sought costs but asked that costs be reserved. In the normal way, there may be an issue arising from the outcome and, given the broad nature of the jurisdiction to order costs under section 74 of the RV Act, I reserve costs.

168. I will consider any application for costs by the Village Operator if that is made and opposed by the Applicants, but I do repeat at this stage that there was a fine balance between upholding the dispute notice issues in favour of the Applicants and not. I also comment that during preliminary exchanges and directions prior to the hearing in this matter there seemed to be difficulty on the part of the Village Operator in supplying information reasonably sought by the Applicants which necessitated further process and time.

169. If the Village Operator/respondent wishes to make an application for costs this must be made in writing with full details **within 5 working days of the date of this decision**. Any response to that application must be made in writing with full details **within 5 working days thereafter**. Either party may seek an extension of those times.

170. This will not be a final order therefore until I have dealt with any application referred to or time limits have lapsed.

Result

171. I decline to order the relief sought in the dispute notice and I reserve the question of costs.

172. This order will be final if no application for costs is made in accordance with the timetabling above, or, if there is an application, when that is finally disposed of.

Dated at Auckland this 6th day of August 2025

_____

David M Carden
Disputes Panellist