IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-2139

UNDER	The Judicature Amendment Act 1972 and the Declaratory Judgments Act 1908
IN THE MATTER OF	The Retirement Villages Act 2003
BETWEEN	THE RETIREMENT VILLAGES ASSOCIATION OF NEW ZEALAND INCORPORATED Plaintiff
AND	THE MINISTER FOR BUILDING AND CONSTRUCTION Defendant

Hearing: 29 November 2007

Counsel: M Heron, P Joseph and D C E Smith for Plaintiff
J Oliver and J Reynolds for Defendant

Judgment: 19 December 2007

JUDGMENT OF SIMON FRANCE J

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1. Introduction

[1] The Retirement Villages Act 2003 provided for the establishment of a Code of Practice to regulate the relationship between operators of retirement villages, and the residents. The Retirement Villages Code of Practice 2006 was gazetted on 26 September 2006, the effect being that it would come into force 12 months later on 25 September 2007. It is the subject of these proceedings.

[2] Residents of retirement village will typically live in a unit pursuant to an "Occupation Right Agreement" which, amongst other things, sets out arrangements for refurbishment of the units, and the process to be followed upon termination of the

occupation. Contracts vary, but normally a resident will have paid a lump sum at the outset for a right to live in the unit, to access common property and to receive services.

[3] The Occupation Right Agreement will usually then contain provisions that set out what part of the original entry fee is to be repaid by the operator to the resident upon termination of the residency. There may be provisions for capital gains to be apportioned, and for deductions to be made.

[4] The new Code contains rules that affect such provisions. A common example of such a provision is the obligation on a resident to refurbish when the occupation of the unit ceases. The Code now provides that all contracts must have such a refurbishment provision and that, inter alia, it must:

> state that the residential unit is to be refurbished to no more than the condition of the unit when the resident entered it, less fair wear and tear.

[5] The Code therefore imposes both the standard or level of refurbishment that can be required, and also provides that the fair wear and tear impact of the residency on the unit is not to be deducted as a refurbishment cost. The exclusion of fair wear and tear from refurbishment costs will represent a change in the current contractual arrangements under most existing occupancy agreements.

[6] The plaintiff seeks a declaration that this provision, and 4 other similar changes to the termination rules, do not apply to any occupation right agreements that were entered into prior to the coming into force of the Code. It argues that the statute, and the Code made under it, are unclear as to whether the Code applies to existing contracts. Officials plainly believe that it does, and the plaintiff disputes this. It says that given the statutory silence about this point, the common law presumption about interference with existing property and contractual rights applies. Accordingly the Code should be seen as applying only to new contracts.

[7] If successful in its argument the plaintiff would not pursue relief in relation to its other challenges to the Code. However, if unsuccessful, it submits that the Court

should declare the Code to be invalid because the process followed in making it did not comply with the statutory scheme to an extent that makes it right for the Court to in effect set it aside.

[8] This judgment addresses these two issues in the order just described.

2. Issue one : Does the Code apply to existing contracts?

[9] The parties were in dispute as to whether the common law presumptions relied on by the plaintiff applied at all. There is no suggestion that the Code applies so as to undo or alter what has already happened in relation to agreements that terminated prior to the coming into force of the Code. It applies only to future terminations, and because of this the defendant submits that the Code is only forward looking in its impact and does not engage the retrospectivity presumptions on which the plaintiff relies.

[10] The plaintiff submits that it is the substance that must be considered. The issue is not, for example, as the defendant would have it about whether the obligations entered into under existing contracts are properly to be called "property rights". What is important is that there is an existing contract that apportions obligations, duties and costs between the operator and the resident. The Code, if applied to these existing contracts, will significantly alter the balance struck in those contracts in circumstances where the operator realistically has no opportunity to renegotiate the terms. The plaintiff has estimated, for example, that the fair wear and tear change imposed by the Code, on its own, will cost its members $80 million. The common law presumptions apply to require that such an impact may only occur if Parliament has used clear words to authorise such interference in existing arrangements.

(i) An analysis of the Retirement Villages Act 2003

[11] Section 3 provides that the purposes of the Act are:

a) to protect the interests of residents and intending residents of retirement villages;

b) to enable the development of retirement villages under a legal framework readily understandable by residents, intending residents and operators.

[12] The Crown points to the contrast in these provisions between residents and intending residents as a specific example of the intended scope of the Act. It emphasises the central purpose of the Act which has consumer protection as its focus; the Act's intent must be to protect all residents, be they existing or future.

[13] The specific provision authorising, and indeed mandating, the making of a Code of Practice is s89. It will be considered in more detail under the next challenge to process. Section 92 is the provision that sets out the status and applicability of such a Code. Section 92 provides:

> **92 Status of code of practice**
> (1) A code of practice is a regulation for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989.
> (2) While a code of practice is in force, it –
> (a) must be complied with by -
> (i) every operator of a retirement village:
> (ii) every receiver or liquidator or statutory manager of an operator or the property of the operator; and
> (b) is enforceable as a contract by a resident and prevails over any less favourable provision in his or her occupation right agreement; and
> (c) must be given effect to in any occupation right agreement offered to a resident.
> (3) Nothing in the code of practice applies to any health services or disability services or facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.
> (4) The operator of a retirement village must make a copy of the code of practice available to every resident and intending resident on request.
> (5) Subsection (2) is subject to section 93 [which allows for exemptions].

[14] The plaintiff maintains that this section is ambiguous because it does not expressly say that the Code applies to existing contracts. No ambiguity is identified other than this silence on the point. The Crown submits that the plain meaning is

that it applies, once in force, to all occupation right agreements. The absence of any qualification to the application of the Act reflects its all embracing intent.

[15] The Crown relies on two other contextual points within s92:

a) the use of resident and intending resident in subsection (4);

b) the contrast between paragraphs (b) and (c) of subsection (2). It is submitted these can only be sensibly read together if (b) is read as applying to existing residents and their contracts.

[16] The plaintiff accepts 2(b) and 2(c) are susceptible to such a reading, but contends the section lacks the express wording required to support interference with existing rights.

[17] I note in passing that leaving aside the reference to intending residents, subsection (4)'s requirements in itself could be argued to be significant. A copy of the Code is to be given to all residents. One must ask why, if it is not intended to apply to them.

[18] The parties did not otherwise analyse the Act. What follows are some provisions which appear to the Court to be of potential relevance to the issue. Section 93 provides that the Registrar may exempt an operator from any provision of the Code if satisfied the application meets the criteria set out in s105 of the Act. Section 105 provides:

> **105 Regulations prescribing criteria for exemptions under section 93**
> (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations prescribing criteria for the grant of exemptions under section 93 (which relates to the grant of exemptions from the requirement to comply with a provision or provisions of the code of practice).
> (2) The Minister must not recommend the making of an Order in Council under subsection (1) unless, in the opinion of the Minister, the regulations will enable the grant of an exemption from the requirement to comply with a provision or provisions of the code of practice only in circumstances where compliance with the provision or provisions that are the subject of the exemption is unnecessary for the protection of residents' interests or undesirable.

[19] The limited scope of s105 is apparent; exemption is to be contemplated and provided for only when compliance with that provision "is unnecessary for the protection of residents' interests or undesirable". The existence of a power to exempt would seem consistent with the idea that the Code applies to existing contracts.

[20] Turning to the interpretation provision of the Act (s4), the manner in which words and concepts are defined is largely neutral in terms of the present debate. There is nothing that appears to suggest that the Act might not apply to existing arrangements. Further, on each occasion one generally has the sense that the natural reading of the words is that the Act and Code apply to all agreements; but, however, they could be read consistently with the plaintiff's case. As an example, operator is defined as including:

> "a person who is, or will be, liable to fulfil all or any of the obligations under occupation agreements to residents of the village."

[21] If one thinks of the point in time at which the Code first comes into force, then either operator means a person who "is liable" to fulfil a function under an existing contract, or there is no one for the time being who meets that aspect of the definition.

[22] The definition of operator just cited refers to one liable to fulfil obligations to residents. The definition of resident is (s4):

> **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".

[23] Arguably one sees in paragraphs (a) and (b) of this definition a similar split to that noted under s92 with (a) being forward looking to one who enters in the future, and (b) addressing one who already has entered. It could be that (a) and (b) instead contemplate a situation where the person entitled to occupy (b) is different from the one who enters the contract (a). I do not know if that is possible or likely, or indeed sufficiently common for the Act to provide for it. If not, then the definition of resident, itself linked to operator, seems to support the proposition that the Act applies to all contracts.

[24] As one would expect, s6 which defines retirement village can only be read as applying to existing retirement villages.

[25] Section 8 is a provision that specifically and expressly affects the terms of existing contracts. It provides:

> **8 Operator and director, trustee, or office holder of operator not to be exempt from liability**
>
> (1) This section applies to any provision in any agreement or other document that directly or indirectly has the effect of involving the residents of a retirement village in–
>
> (a) exempting any operator or any director, trustee, or office holder of an operator from any liability that, by virtue of any rule of law, would otherwise attach to him or her in respect of any negligence, default, breach of duty, or breach of trust of which he or she may be liable in relation to the retirement village; or
>
> (b) indemnifying any such operator or director, trustee, or office holder against any such liability.
>
> (2) Except as provided in subsection (3), any provision to which this section applies is void.
>
> (3) Nothing in subsection (2) deprives any operator or director, trustee, or office holder of an operator, of any exemption or right to be indemnified in respect of anything done or omitted to be done by him or her while any such provision was in force if the exemption or indemnity was in existence on or before the day on which this section comes into force.

[26] As is often the case, one can view these provisions both ways. The fact that a provision expressly alters an existing contract could be argued to mean that otherwise existing contracts are not affected. However, I was advised that the provisions of the Code and Schedules would not otherwise have any effect on the subject matter covered by s8. Therefore the alternative view of it, from a statutory interpretation viewpoint, is that it was an effect that Parliament determined was

better included in the Act. The provision should not be seen as otherwise indicating the scope and impact of the Act and Code.

[27] Section 27 sets out what must occur when an occupation right agreement is to be entered into. It carries obligations for the intending resident to have independent legal advice and for their signature to be witnessed by a lawyer. The section obviously applies to agreements to be entered in the future but interestingly in this context uses the term "intending residents", which is itself defined in s4 and is to be contrasted with "residents" (being those who have already entered into such an agreement).

[28] Section 28, which provides for a cooling off period following signature, then changes the term and describes such a person not as an intending resident, but as a "resident". They are such because they have entered into a contract, and are no longer intending. The consistent use of intending residents in this limited way, and the much more prevalent use of "residents" again suggests that generally the provisions are intended to apply to existing residents and therefore their contracts.

[29] Section 31 of the Act makes agreements that are entered into contrary to nominated sections of the Act voidable on the motion of the resident. This section is silent on its impact on existing contracts, and read naturally cannot apply to them since such contract cannot "have been entered into" in contravention of a statutory provision that was not then in force. The next provisions of the Act deal with the provision of information to residents and intending residents, and involve providing a Code of residents' rights. Again there is nothing determinative of the present issue, nor susceptible to a different analysis than that which has arisen under earlier sections.

[30] Indeed, generally the other provisions of the Act all yield similar outcomes. None suggest that the requirements of the Act, and any Code made under it, would not apply to existing contracts. Some point the other way. For example, the Act establishes a disputes mechanism which allows a resident, inter alia, to refer a dispute (s53(1)(d)):

> "relating to an alleged breach of a right referred to in the code of residents rights or of the code of practice."

[31] Nothing in this provision suggests that the disputes mechanism does not apply to existing contracts. Further, s53(3) says a dispute notice may be given concerning an alleged breach of an occupation right agreement, or the code of practice, in relation to the disposal of a residential unit formerly occupied by the resident. Section 57 says this dispute cannot be lodged until 9 months has elapsed since the operator had the unit for disposal:

> "in accordance with the residents occupation right agreement or the code of practice."

[32] A plain reading of this Part of the Act suggests the disputes process must be available to the termination of an existing residence arising after the Act comes in to force. The dispute can allege either a breach of the termination provisions of the agreement, or the code of practice. This suggests that the Code's provisions are applicable to existing contracts.

[33] Finally in relation to the Act, mention should be made of s90(1) which provides that:

> "the code of practice comes into force–
>
> in the case of the first code of practice, 1 year after it is approved under s89(1) or (4) …"

[34] This 1 year period of adjustment is plainly supportive of the idea that the Code will thereafter apply to all contracts, existing or otherwise. It is designed to allow the parties to rearrange their affairs. The plaintiff points out that as regards the provisions they are unhappy with, re-negotiation is not a viable option. Mr Heron eloquently put it as "12 months to do what?" However, the fact that some of the burdens of the new Code cannot be neutralised by re-negotiation during that period does not negate the obvious inference to be drawn from the establishment of the 12 month transitional period.

[35] In conclusion on the Act, in my view it can be said:

a) there is no provision that suggests the Act and Code were not to affect existing contracts;

b) s8 is the only provision that expressly says existing contracts are affected;

c) the natural reading of most provisions is at least consistent with them applying to existing contracts, and some positively suggest the Act, and the Code under it, do apply.

(ii) The Code

[36] It was common ground that there was likewise no specific provision in the Code that addresses the issue, or indeed comments on its applicability and scope. Presumably the Act was thought to determine these issues.

[37] The Code is divided into 4 parts:

a) Introduction;

b) General requirements;

c) Minimum requirements to be included in any occupation right agreement;

d) Useful information.

[38] The purpose of the Code is to set out the minimum requirements that the operator of the retirement village must carry out, or make sure are carried out, to meet their legal obligations under the Retirement Villages Act 2003. It would be surprising, in my view, if the provisions of the Code applied only in relation to residents who signed a contract later than 12 months after the Code was gazetted. There is no suggestion anywhere that the Code is so limited in its impact.

[39] Some of the provisions must apply to existing residents – indeed most of them, as is accepted by the Plaintiff. What it says is that all those provisions of the Code apply to existing contracts, but not the 5 provisions in issue because they are property rights, and the common law presumption operates to prevent the Code applying to those. Although any statutory ambiguity must logically apply to all the provisions of the Code and not just the 5 provisions the plaintiff does not like, the plaintiff says that since there is no common law presumption applicable to the other provisions, the Code can be regarded as applying to them. Asked for any example in the previous caselaw where an alleged ambiguity was applied differently to different parts of a contract, the plaintiff could not identify any. It did, however, cite an extract from Professor Joseph's text that it argued could apply by analogy (at 17.4.2, 3rd ed):

> The purpose of s27 is to erect a presumption against the Crown being bound against its will,[180] where to bind the Crown would prejudicially affect its rights or interests.[181] Thus the authorities have held that the Crown may take the benefit of a statutory provision, although it is not prejudicially "bound" by it.[182] In *Town Investments Ltd* v *Dept of the Environment*,[183] the Crown as a lessee could take advantage of anti-inflation legislation imposing a rent freeze, while the Crown as landlord was immune from the legislation and could not be prevented from raising rents. In Canada the courts have held that the Crown can bring proceedings outside a statutory limitation period but can invoke a limitation period to defeat a counterclaim.[184]

[40] Turning to the rest of the Code, there is little point in detailing its specific provisions. The plaintiff accepts that many of these provisions must apply to existing contracts – staffing, safety and personal security of residents, fire protection and emergency management, complaints facility and accounts are just some examples of the new minimum requirements accepted to apply to all contracts.

[41] Mr Heron explained that whilst there is a broad similarity in existing contracts, there is no uniform agreement across retirement villages. It is the case now, therefore, that residents live under different contractual arrangements from other residents and so the Court should not think it must be that the Code applies equally to all residency agreements. While I accept that it is correct what Mr Heron says about different existing contracts, it is still a large step to contend that the Code, or some of the most significant reform provisions within it, will not apply to all the existing residents but only incrementally as new residents join a retirement village.

[42] In my view the silence of the Code as to its applicability to existing contracts can be explained by two factors:

a) It is, in my view, obvious it applies;

b) S92(2)(b) says that the Code prevails over any less favourable conditions or provisions in any occupation right agreement. Accordingly the Code did not need to say more.

(iii) Conclusion on issue one

[43] It is not necessary to consider the more difficult issue of whether the interpretation principles on which the plaintiff relies are applicable to interference with existing contractual rights, where the only impact is on future events. The plaintiff accepts that these interpretation principles can be overridden by implication, albeit that it stresses it requires very clear implication.

[44] Accepting that, I consider that such very clear implication is present here. The provisions of the Act on which I particularly rely for this conclusion are:

a) S92(2)(b) which says the Code prevails over less favourable provisions in the contract, in circumstances where that paragraph of the Act realistically must refer to existing contracts. It is unlikely to refer to future contracts since 92(2)(c) says future contracts must comply with the Code. Further there is an obligation on an operator, when registering a village, to submit a copy of their occupation agreement to the authorities, who presumably will check it for compliance;

b) the consistent separation in the Act of residents and intending residents, and the use of the concept of “residents” in relation to the Code provisions;

c) the need for an operator to provide the Code to all residents, not just future ones;

d) the provision of an adjustment period of one year before the Code comes into force;

e) the dispute mechanism within the Act which seems inevitably to apply to existing residents, who may raise disputes based on the Code of Practice.

[45] Concerning the Code, I consider the fact that so many provisions inevitably apply to existing contracts reflects and strengthens the conclusion that the Act authorises and indeed contemplates a code of practice which applies, in whole, to existing occupation agreements.

[46] Accordingly I decline the declaration. In my view this Code applies to existing contracts, and the Act authorises that to occur.

3. Issue two : Was the statutory process followed?

[47] The method by which a Code is to be made and promulgated is set out in s89 of the Act, which provides:

> **89 Code of practice must be prepared and published**
> (1) The Minister may approve 1 of the draft codes of practice submitted to the Minister by any retirement village, group of retirement villages, or association of operators of a retirement village as the code of practice applicable to all retirement villages, after considering any recommendations of the Retirement Commissioner made in accordance with sub-section (2).
> (2) Before making a recommendation to the Minister for the purposes of subsection (1), the Retirement Commissioner must consider any recommendations by any groups of persons or bodies that, in the opinion of the Retirement Commissioner, represent the interests of –
> (a) operators of retirement villages; or
> (b) residents or intending residents; or
> (c) statutory supervisors; or
> (d) other persons.
> (3) The Minister is not obliged to approve a draft code of practice submitted under subsection (1) that the Minister considers is

incomplete or inappropriate or that fails to comply with the requirements of subsection (5) or Schedule 5.

(4) If no draft code of practice acceptable to the Minister has been submitted under subsection (1) before 1 January 2005, the Minister must prepare, approve, and publish a code of practice after considering any recommendations of –
  (a) the Retirement Commissioner; and
  (b) any groups of persons or bodies that, in the opinion of the Minister, represent the interests of operators of retirement villages, residents or intending residents, statutory supervisors, or other persons.

(5) A draft code of practice submitted under subsection (1) or a code of practice prepared under subsection (4) must –
  (a) specify rules of practice in relation to every matter that the code is required by Schedule 5 to address;
  (b) be consistent with the rights referred to in the code of residents' rights.

(6) The Minister must publish in the *Gazette* notice of –
  (a) the approval of any code of practice approved by the Minister under subsection (1) or subsection (4) and any variation under section 90(4); and
  (b) the place or places at which copies of the code and any variation can be obtained.

[48] The section establishes two routes to a Code; one initiated by a retirement village or association of villages, and one where the Minister prepared the Code.

(i) The facts

[49] In this case the plaintiff submitted a Code; the Department then handling it (Ministry of Social Development, and specifically the Office for Senior Citizens) prepared a report for the Minister recommending that the plaintiff's code be referred to the Retirement Commissioner to undertake the required public notification and consultation. The plaintiff refers to a much later statement by the Retirement Commissioner that the Department had sent it to her on the basis that it was "acceptable". The Report of the Officer for Senior Citizens does not use that word, but I have not been provided with the covering letter. The defendant's evidence begins after the time it was sent to the Retirement Commissioner, so I have no further detail from it on this point. I note, though, that the Statement of Defence does not accept it was assessed as "acceptable".

[50] Regardless of the exact basis on which the Plaintiff's code was sent on 6 December 2004, the Retirement Commissioner received it and undertook the statutory process of notification and consultation. The Commissioner ultimately reported back to the Minister (now the Minister for Building and Construction) on 25 August 2005.

[51] The next critical date is 19 June 2006. There are disputes as to the nature and scale of discussions between the Department and the plaintiff between the time of the Commissioner's report, and 19 June 2006. It is accepted by the Department that it did little or nothing on the Code till sometime in March 2006 when it began working through the Commissioner's recommendations. A new senior manager then assumed responsibilities and met with the Plaintiff on 21 March 2006.

[52] Three months later, on 19 June 2006, the Department sent the Plaintiff, and the Retirement Commissioner, a revised draft of the Plaintiff's code. Although there is dispute as to what extent the changes had been previously discussed, it is accepted that this was the first time the plaintiff saw the revised document in writing, or as a whole. The plaintiff was given till 23 June (i.e. 4 days) to comment. It attempted to meet this deadline. The new Code included, inter alia, the "fair wear and tear" addition to which the plaintiff objects.

[53] The Retirement Commissioner also commented. However, on 27 June 2006, she indicated that she did not support the Code being referred to the Minister as a final version on 30 June. Matters were therefore slowed down, but despite this the plaintiff was not invited to make further submissions or formally advised of the delay.

[54] Two more versions of the Code were produced within the Department. A dispute between deponents has led to the common ground that these versions were not given to the plaintiff. The extent to which they were discussed remains in dispute. Finally what can be called Version 5 emerged. It is in effect the gazetted Code, with only some very minor changes having been made to Version 5 subsequent to Gazetting.

[55] Version 5 was sent to the plaintiff on 15 September 2006. It was called an "embargoed" copy. The basis on which it was provided, and in particular whether it was provided for comment and consultation, is disputed. However, there was a subsequent meeting between the Department and the plaintiff. Again the tone, purpose, and usefulness of that meeting is subject to differing perceptions.

[56] The Minister approved Version 5, with 2 small changes that had been suggested by the plaintiff, on 25 September 2006.

(ii) The dispute

[57] The plaintiff says that the s89(1) route is for approval of an industry submitted Code. Any changes to it must be agreed to by the body submitting it. There is no power in the Minister to unilaterally amend it. If the Minister does not like it, or cannot get agreement to changes that he wants, then he has the power to initiate his own Code under s89(4).

[58] The defendant by contrast says that the Minister does have a power of unilaterally amending a s89(1) Code. It is accepted that the present Code was regarded, and gazetted, as one made under s89(1). The defendant's reading of s89 is that:

a) the operator submits a Code;

b) the minister views it as acceptable (or not) under s89(4);

c) if acceptable, it is sent to the Retirement Commissioner;

d) once it comes back, the Minister has to approve the final Code and that must involve a power of unilateral amendment;

e) s89(4) applies only if no acceptable Code is submitted by 1 January 2005.

4. Was the statutory process followed?

[59] The competing positions would seem to revolve around the extent to which the alternative sources of a Code – an operator's version or the Minister's version influence the entire process. The Crown's position is that the source only dictates which Code goes to the Retirement Commissioner. Thereafter it become's the Minister's. The plaintiff maintains separate processes apply right through.

[60] In my view the plaintiff is correct. It is important to read subsections (1) and (3) together, for they provide the actual approval mechanism:

> (1) The Minister may approve 1 of the draft codes … submitted by an association of operators … after consider recommendations of the Retirement Commissioner.
>
> (3) The Minister is not obliged to approve a draft code submitted under subsection (1) that the Minister considers is incomplete or inappropriate …

[61] The emphasis within these subsections is that it remains the association's draft Code. The Minister may approve it, but is not obliged to approve it. It is difficult to read into that process a power of unilateral amendment. One can readily envisage negotiated changes which put the Minister in a position where she or he then considers it complete and appropriate, but it very much remains the association's draft code that is approved.

[62] The question that arises, however, is what if negotiated changes cannot be achieved? The answer is not obvious, and no doubt this led in part to the Department's interpretation. If it is assumed that by referring the code to the Commissioner the Minister considered it "acceptable" in terms of subsection (4), what happens when the Code comes back and the Commissioner's recommendations demonstrate that the Minister should not approve it under s89(3)? Subsection (4) arguably does not authorise the Minister to do his or her own because there was a Code submitted by 1 January 2005 that was acceptable to the Minister. Thus one has an initially acceptable Code that is not suitable for approval under subs (3), no capacity to make the association agree to the changes that would make it acceptable,

and no apparent power for the Minister to do his own. Is there a stalemate that cannot be resolved?

[63] The Crown's interpretation avoids this by emphasising that subs (4), and the concept of acceptability, only represents the route by which Codes are put to the Retirement Commissioner. Either it is an acceptable industry Code submitted by 1 January 2005, or it is the Minister's. Either way once it goes to the Commissioner the Minister takes over.

[64] Whilst such an approach works, it seems wholly inconsistent with the concept of "approving a code submitted by the association". One can envisage, as here, fundamental changes that leave the code a quite different beast, at least from the association's viewpoint, from that which it was proposing. In the present case, apart from the specific disputed provisions earlier identified, generally there appears to be disagreement between the parties over the level of detail and prescription that the Code should contain.

[65] Two other difficulties arise with the Crown's approach. First, it could have been that several different "acceptable" Codes were submitted under s89(1). If so, all of these were to go to the Commissioner. Again the section seems to contemplate the Minister then, having considered what the Retirement Commissioner says, approving <u>one</u> of them rather than cobbling together a wholly new Code with bits taken from all or some of them. Again the wording is consistent with a submitted Code, probably amended but by agreement, being approved.

[66] The second difficulty is that the Crown's approach allows imposed significant changes to be made without any referral to the public notification process. This very much limits that aspect of the scheme, for the Code that the Commissioner put out for public discussion may be very different from the Code being approved. It is true that consultation may alleviate this – here the Retirement Commissioner and the Association were consulted – but it still denies the public aspect of the contemplated process.

[67] The history of s89 seems to be that it was contemplated there would be industry self-regulation. A voluntary code was already in place, and s89(1) envisaged a formalisation of that. As it happens the process did not yield an industry code which the Minister considered acceptable and so the Act prescribes that at that stage, there must be a Code, and the Minister must do it.

[68] To give effect to the plaintiff's contention, one has to read words into s89(4) but I consider that such an approach is most consistent with the statutory scheme. Accordingly I read s89(4) in this way, with the italicised words being read in by inference:

> "If no draft Code of Practice acceptable to the Minister has been submitted under subsection (1) before 1 January 2005, *or if no draft code is suitable for approval under subsection (3)*, the Minister must prepare, approve and publish …"

[69] It is interesting in this case that, even under the Department's interpretation, there is no certainty the correct process was followed. It is noted earlier that in its pleadings the defendant denies that it assessed the plaintiff's code as "acceptable" under s89(4). If that is so, then the Minister's obligation to prepare his own would seem to have arisen anyway.

[70] I accept Mr Oliver's submission that the section is not without difficulty, but in the end conclude that the scheme envisages two types of code; a Minister approved industry code, or the Minister's own code. Each code has its own statutory process that must be followed. It is common ground that if the Court reached this view, the process followed by the Minister did not meet the statutory obligations.

[71] Concerning relief, there is scope to argue that the ultimate outcome, if the Minister had to start again with his own code, would be the same as that which has already been gazetted. However, there are two responses to be made. First, the always cited principle, that the potential effects of proper notice and consultation should not be ignored. Second, for reasons to be briefly stated, I am far from satisfied that the consultation undertaken in this case was adequate.

[72] I also record that I do not consider the invalidity applies only to the added non-consensual provisions. Subsection (3) is clear the Minister has the power to approve, or not, a code depending on whether he assesses it as being complete or appropriate. It is to be inferred that a Code that does not contain the 5 disputed provisions would not be regarded by the Minister as complete or appropriate. It is for this reason that I reject the plaintiff's suggestion that the Court could sever out the particular disputed provisions, and leave the balance intact. In my view such a course would substantially alter the balance within the Code as approved by the Minister, and would significantly exceed the Court's proper role. It is for the Minister to approve a Code, and for the Minister to determine what is required to be dealt with in the Code in order for it to be complete and appropriate.

[73] In terms of the Statement of Claim, I uphold the first cause of action and declare that the process leading up to the gazetting of the Code did not comply with s89 of the Retirement Villages Act 2003. The Code is accordingly invalid and of no effect.

5. The consultation process

[74] The second cause of action alleges a failure to properly consult. The context is the statutory scheme previously discussed. This issue is relevant only if the Court's interpretation of s89 is flawed. That being so, I will assess this challenge from the defendant's viewpoint. On that basis the Minister has a power to amend the plaintiff's code following recommendations from the Retirement Commissioner. The goal of such changes is presumably to produce a Code that is complete and appropriate.

[75] Consultation obligations must be assessed in light of a process where to date the association has submitted a Code, the Minister has presumably said it was acceptable, it has been sent to the Retirement Commissioner who has held public consultation, and has then been reported back to the Minister who has power to fashion it into an appropriate document.

[76] The body claiming it has been inadequately consulted is the original "owner" or submitter of the Code, to which the Minister is now making changes. I take there to be no dispute that there was an obligation to consult with the plaintiff given its role up to that point. I see little profit in referring to authorities; the degree and nature of the consultation required is case specific and must reflect the role of the body being consulted, the process to date and the general imperatives governing the process, as well as the subject matter and context of the process.

[77] Here I consider that the plaintiff was entitled to a proper opportunity to consider and reflect upon the changes being made, especially any which also differed from the Retirement Commissioner's report. It needed to have an opportunity to respond and offer alternatives, or amendments, or suggestions. Such response would also include an opportunity to consider and make submissions upon the impact of the changes on the plaintiff. In this way the decision-maker becomes more fully informed, and can take decisions knowing the consequences of its decisions.

[78] Once that requirement is spelt out, it is apparent the defendant is in some difficulty. A brief chronology illustrates the point:

a) the plaintiff's Code was referred to the Commissioner on 6 December 2004;

b) the Commissioner reported back on 25 August 2005;

c) by its own admission the defendant Department did not consider the recommendations for 6 months.

[79] Then, from March to June 2006 the Department worked on the Code. There were discussions with the plaintiff. However, the plaintiff saw the revised Code in writing and in full for the first time on 19 June 2006. This date was 19 months after its Code was referred to the Commissioner, and 10 months after the Commissioner had reported.

[80] At that point the plaintiff was given four days to make comments. The inadequacy of that situation is so obvious that further comment seems pointless. One could refer to the Retirement Commissioner's observations. She wrote to the senior manager on 27 June, observing:

> "I have provided some initial comment to the Department on some areas the revised Code which I still consider to require more work. I was unable to provide a full analysis as the timeline allocated was way too short."

[81] The defendant finds support for its stance in *Air Nelson* v *Minister of Transport* [2007] NZAR 666 (HC). I take the relevant parts to be the emphasis therein on fairness, and the need to consider the whole process of discussion and consultation. In the defendant's summary, citing from *Air Nelson*, the Court must take:

> "A practical rather than a legalistic approach to determine whether practical justice, in the sense of overall fairness, has been afforded".

[82] The defendant continues on to observe that at a certain point a balance must be struck between continuing to consult and with getting on and making a decision. I take it this observation does not relate to the 6 months where the defendant did nothing, but to the three months where it had some discussions, and the four days where it sought detailed comment on a Code the plaintiff had not seen previously.

(i) March – June 2006

[83] I see nothing on the written evidence to support the appropriateness of a 4 day comment period based on the preceding 3 months of discussion. The parties dispute what that period involved but on the defendant's evidence it seems at best to have been it initiating comment on specific topics when and as it wished.

[84] The defendant's primary affidavit, from Ms Clark who was managing the process, identifies an initial meeting with the plaintiff on 21 March 2006. The purpose of the meeting was to explain her role, discuss the process and identify an intended timeframe of 30 June 2006.

[85] The next specific contact identified is 7 April when the plaintiff is told a contractor is being engaged. The defendant sought and received electronic copies of the plaintiff's original draft. The contractor began work on 1 May 2006. Ms Clark was away on leave between May 15 and June 12. She left instructions to the persons working on it to work with the plaintiff and the Retirement Commissioner. She understands a meeting took place on 18 May 2006.

[86] It is then noted that on 1 June 2006 the defendant emailed the plaintiff seeking information on two specific issues. A response was received on 6 June 2006. Ms Clark received a draft on 15 June on her return, and directed it to be sent on 19 June with the timeframe previously identified.

[87] The defendant seems to take comfort from the fact that the plaintiff provided written comments within the four days, and that it had been forewarned that 30 June was the deadline. Concerning that deadline no explanation has been provided other than that it was a self imposed deadline by the defendant. As events showed, it had no particular significance because the Retirement Commissioner was able to reject its appropriateness and matters slowed down. As noted, however, the plaintiff was never given an opportunity to make further comments on this draft, nor was it formally advised of the delay.

[88] Ms Clark expresses disappointment of the suggestion that consultation was inadequate because she says she met with representatives of the plaintiffs "on numerous occasions". However, the Court has only been provided with her evidence detailed earlier which does not support such a description. On that evidence, up to 19 June 2006, Ms Clark appears to have met only the once, other than a discussion at a function in June. There is then references to numerous emails between the persons working for her. The Court has not been put in a position to assess how comprehensive they were.

[89] Suffice to say the evidence of the plaintiff's officers is that they had a considerably different impression of the extent to which they had been consulted. It is not necessary to detail this as in my view it is clear that the consultation on Version 2, as it is known, was not adequate. That comparatively neutral label should

not be taken as implying the issue to that point is finely balanced. It is important to reflect on the overall process, and the reality that the 30 June deadline was in effect a matter of convenience and in that sense arbitrary. The defendant refers to complementary regulation drafting processes, but again they were all Department driven timetables. It cannot be ignored that nearly two years had gone by since the plaintiff submitted its Code. To be given 4 days was, in my view, ridiculous.

[90] The defendant advises that the 6 months hiatus following receipt of the Commissioner's report was because of other priorities. No criticism can be made of that; they are choices the defendant must, and is entitled to make, but that does not alter its consultation obligations once it comes to focus on the project.

(ii) June – October 2006

[91] Following the 19 June version, and the comments received, work continued. It seems as if there were two further internal drafts prepared, (Versions 3 and 4) and then a final version, Version 5.

[92] The defendant's evidence is that all three versions were discussed with the plaintiff, although it is now common ground that Versions 3 and 4 were not provided to it. Ms Clark identifies meeting on 7 August to discuss timeframes and practicalities.

[93] The defendant notes that the policy did not change substantively from June 2006, which goes to the extent of subsequent consultation required. It says the final version was sent in September 2006 to the plaintiff "for feedback". Changes thereafter suggested by the plaintiff are noted as reflecting this was the basis on which it was sent.

[94] Rather than giving all the detail of the plaintiff's evidence, a summary will suffice. At various points there are differences in recollection as to what was discussed at the meetings that occurred. The plaintiff's perception of the consultation that occurred up to 19 June, and the opportunity it had to comment is

very different from the defendant's. It is worth citing a paragraph from one of the plaintiff's officers, Ms Petrina Turner:

> Although the RVA were given advance notice of a tight timeframe to comment on the draft code, being given such advance notice did not alleviate the problems this caused. Until we had been provided with the DHB's revised version of the draft Code we could not start working on a response. It was simply impossible for a representative association such as the RVA to consult with its members, reach consensus and form a considered view within four days without have seen the draft amended Code. I recall being extremely disappointed and commenting to Norah Barlow that three years of work by the RVA had all come down to four days in which to comment on a draft Code that was substantially different from the one the RVA submitted for approval.

[95] Concerning Version 5, this was provided to the plaintiff as an "embargoed" document. It is clear that the plaintiff's perception of what that meant, and what opportunity for input there was, is again very different from the defendant's.

(iii) Decision

[96] I have already observed that the process surrounding Version 2 was inadequate. The subsequent events of July and August have not, in my view, changed matters. I prefer to address the topic by way of general observations:

a) first, the nature of consultation is undoubtedly always affected by the perception of those involved as to what their obligations are. The Department's approach seems very much to reflect its view that the process of producing the Code was its to control and determine;

b) although it is not always the case, on this occasion I consider the differing perceptions reflected in the affidavit evidence reflect the inadequacy of the type of consultation that occurred. It was very much on the defendant's terms, with the plaintiff invited to the party as suited the defendant;

c) timeframes must be sourced in sound reasons. It is not acceptable to unilaterally determine one, and then to consider that because everyone has been told about it, it is therefore somehow "OK";

d) the fact that a body such as the plaintiff seeks to do the best it can with the opportunities provided does not mean that the opportunities were sufficient. Nor do the plaintiff's efforts at trying to maximise the opportunities afforded somehow constitute an estoppel against it later complaining about the process.

[97] It is interesting to observe that the impact of the "fair wear and tear" change to the refurbishment rules (i.e. the 80 million cost to the industry) only came to light after the Code had been promulgated. As a consequence of learning about it, the defendant initiated a variation procedure, although ultimately no change eventuated. The point is that the consultation process had not brought this to light. Although an example such as this need not necessarily prove anything, in this case it is in my view again reflective of a process that has not achieved its desired outcomes because of significant deficiencies in that process.

[98] Had it been required, with no hesitation at all I would have held that the defendant had a duty to consult, and that it failed comprehensively to discharge that obligation as regards the plaintiff.

6. Conclusion

[99] Concerning the claims made by the plaintiff:

a) the Code is declared to be invalid because the process followed did not comply with s89 of the Retirement Villages Act 2003;

b) had the Minister had the power to unilaterally amend the plaintiff's Code, there was a duty to consult in relation to the revised Code which the defendant failed to discharge;

c) the Act authorises the Code to alter existing contractual arrangements.

[100] If the parties cannot agree the plaintiff is to file a costs memorandum by 31 January, and the defendant has 2 weeks to respond.

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Simon France J

In accordance with r540(4) I direct the Registrar to endorse this judgment with the delivery time of 4.00 p.m. on the 19th day of December 2007

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