IN THE SUPREME COURT OF NEW ZEALAND SC 99/2016

BETWEEN **LAKES INTERNATIONAL GOLF MANAGEMENT LIMITED**

THE LAKES INTERNATIONAL GOLF COURSE

Appellants

AND **HARTLEY CLENDON VINCENT**

Respondent

Hearing:	27 March 2017
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	D J Goddard QC and E M Gattey for the Appellants M J Fisher and K J Ng for the Respondent

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CIVIL APPEAL

MR GODDARD QC:

May it please the Court. I appear with my learned friend Ms Gattey for the appellants.

ELIAS CJ:

Thank you Mr Goddard, Ms Gattey.

MR FISHER:

May it please the Court. Counsel's name is Fisher and I appear with my learned friend Mr Ng for the respondent.

ELIAS CJ:

Thank you Mr Fisher, Mr Ng. Yes Mr Goddard.

MR GODDARD QC:

Your Honour. The Court should have a roadmap from me and one more authority, I apologise for adding.

ELIAS CJ:

I think there's two, aren't there? There's Lewis Carroll as well as Francis Barlow (ed) *Williams on Wills* (LexisNexis).

MR GODDARD QC:

Yes, attached to the – I wasn't quite sure that I should describe that as an authority, but it is –

ELIAS CJ:

Well what is it?

MR GODDARD QC:

It provides an interesting thought experiment that Lord Hoffmann has drawn on, and that I'll draw on. I refer to it in my footnotes and I'll come to it in a moment. Although I'll mostly be referring to Lord Hoffmann who has an authority in my submissions that seem, you know, Lewis Carroll I think can be of some assistance too when it comes to thinking about meaning. So as the Court will see from my roadmap I'm going to spend a little bit of time on relevant principles, then I'm going to look at the application of those principles to registered instruments, and then I'll turn over the page to the facts of this case and the Lakes Resort Golf Club which, in my submission, is the golf club referred to in the covenant.

Now the relevant principles at one level of course elementary in this Court has traversed this terrain a number of times but although they're elementary they're also a fundamental importance and they are the subject of some confusing and at times unhelpful dicta, so I will spend just a little while making sure, I need to pick up at the beginning here where I left off in my reply last time I appeared before the Court, making sure that we're asking the right question before moving on to attempt to answer it.

ELIAS CJ:

Isn't the first question though, as your submission would have it, that the text of the covenant because in a way this is all very interesting but don't we have to start with that?

MR GODDARD QC:

I think it's probably helpful to have it squarely before us as we go. I always have a tendency to proceed from the general to the particular but I recognise that's not always the common law method. So volume 2 of the case on appeal.

ELIAS CJ:

Well we could write an essay on use of extrinsic materials but if the text is sufficient we don't need to.

MR GODDARD QC:

That, of course, is true, but one of the differences in approach between the High Court and the Court of Appeal, which in my submission did contribute to the difference in result, is the level of emphasis placed on extrinsic material, and particularly, for example, the Court of Appeal's emphasis on the fact that the choice of an incorporated society appeared to be a very deliberate, very conscious choice by the original developers. In my respectful submission that's a red herring which has led that Court to attribute much more importance to that aspect of the label. But let me go to the covenant, let me foreshadow what I'm going to be saying about it and then let me come back to

as much theory as the Court can stand before I come back to the interpretation of this instrument

So the covenant is in volume 2 of the case on appeal. It begins at page 218. There are no tabs, I'm afraid, in this case on appeal. So we've got the standard registration page at the front, and then the text of the covenant begins at 219, and the Court will see that there's a whole range of covenants included in this instrument. Covenants in relation to buildings, fencing, floor areas of dwellings, materials, windows, no reflective or mirror glass, all sorts of things, and so on it continues. The particular covenant with which we are concerned is on page 223 of the case on appeal, clause 7, headed, "Membership Pauanui Lakes Golf & Country Club," which is not the name of this club, but that, in my submission, really is immaterial and the respondents never sought to make anything of that.

WILLIAM YOUNG J:
So that's just been copied from another precedent has it?

MR GODDARD QC:
No, I suspect that when it was first registered it was anticipated that the club might have that name.

WILLIAM YOUNG J:
I see.

MR GODDARD QC:
But the world has moved on through a couple of failures of developers and new owners, which is why this case is such an interesting case that raises very starkly the question of relevance of extrinsic materials that passed between the original parties. So 7, "The transferee," and again there's no dispute but that now that Mr Vincent is one relevant transferee, "will, upon becoming registered as a proprietor of any estate in the land," which is satisfied, "including an estate arising from subdivision, immediately join as a member of the," capitalised, "Golf Club, remain a member of the Golf Club in

good standing throughout the transferee's ownership of the land and meet all levies and other lawful impositions levied by the Golf Club." So you've got a number of sections on which houses are to be erected centred on a golf club in this subdivision and one would, just reading to that point, expect the golf club to be the one that runs the golf course on this land, and –

ELIAS CJ:

Just pausing, that, "Immediately join as a member of the golf club," that wasn't possible, was it, at the time of the transfer?

MR GODDARD QC:

That, I think, must be right because there was no golf club at that time. So obviously that couldn't be performed until a golf club came into existence. I'll also be submitting, and we'll come to this later, that there's nothing inconsistent with this clause in there being different entities which are the golf club over time. The question is whether, while it, and I agree with my learned friend on this, the meaning falls to be ascertained at the time that the covenant was given. It can, of course, apply to different golf clubs that meet the relevant description over time. There doesn't have to be one that is for all time the only golf club that can exist, and I'll come to that.

WILLIAM YOUNG J:

It might envisage that the golf club to be incorporated is one that will be incorporated by the time of transfer.

MR GODDARD QC:

And speaking to the future that is a reasonable expectation but it still doesn't require that the one that existed at the time a transferee takes a transfer of title continue indefinitely after that if it were to be wound up, for example, and a new club formed.

WILLIAM YOUNG J:

Why?

MR GODDARD QC:

Well, because in my submission it's intended to operate on an ongoing basis. So if, for whatever reason, one golf club were to be wound up and a new one formed to operate this golf course, that would then be the golf club referred to.

WILLIAM YOUNG J:

Unless the clause is to be taken as referring to a golf club to be set up by the time the transfers are registered?

MR GODDARD QC:

And to remain forever as the golf club.

WILLIAM YOUNG J:

Well, no, no. That doesn't have to be and to remain forever. It would just have to be construed – I mean, just the literal interpretation you would say, "Well, yes, there's presumably a golf club that's envisaged to be about to be formed called the Pauanui Lakes and Golf and Country Club. It will be in place by the time transfers are registered and you've got to join whatever the golf club is as incorporated at that time. It doesn't say anything about the future.

MR GODDARD QC:

No. Perhaps just to –

GLAZEBROOK J:

Although if you were entering into this covenant as you move on, it has to be future looking, seeing it runs with the land presumably.

MR GODDARD QC:

Yes, Your Honour.

GLAZEBROOK J:

Which is your point, I think, isn't it, that it's whatever the golf club happens to be at whatever time is the golf club being referred to in the covenant for the future? That's the argument as I understand it.

MR GODDARD QC:

Exactly, Your Honour, that's my point. Yes, that's exactly right. That is the argument.

WILLIAM YOUNG J:

But there wasn't a golf club there when the respondents, the transfer to the respondents was registered.

MR GODDARD QC:

Yes, which is why, I think, we have clause 9 as a forward-looking definition. So there are some definitions in clause 9 and the key definitions are 9.4 and 9.5. 9.4, "'Golf club' means the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course," and, "'Golf course' means the golf course being developed on the land in certificate of title SA71C/273." Now there's no doubt but that the Lakes Resort Golf Club operated by the first appellant, Golf Management, operates a golf course and provides playing rights on the golf course designated here. The respect in which it does not meet this description is that it was not incorporated as an incorporated society, and the question is, at its simplest, does that matter?

ELIAS CJ:

Is the golf club actually incorporated? It's run –

MR GODDARD QC:

It's an unincorporated golf club.

ELIAS CJ:

That's right, I'd forgotten.

MR GODDARD QC:

So it's an unincorporated golf club operated by a company.

ELIAS CJ:

Well the operation doesn't really matter, does it?

MR GODDARD QC:

No.

WILLIAM YOUNG J:

It's not a member's club?

MR GODDARD QC:

No.

GLAZEBROOK J:

What do you mean an unincorporated, I'm sorry, just in terms of what's an unincorporated golf club? Isn't it just you –

ELIAS CJ:

And your mates.

GLAZEBROOK J:

You can become a member of the golf club by paying somebody.

MR GODDARD QC:

As a matter of contract and then you're entitled to use the facilities of the club. Like the Koru Club.

GLAZEBROOK J:

No, I understand that, it's just I'm not sure you can say it's an unincorporated golf club. It's effectively you're paying a fee and for that fee you are allowed to use that golf club, which is slightly different, isn't it?

MR GODDARD QC:

Except that, I mean I don't know how much we need to get into this, but one of the things golf clubs can do is be affiliated to a national association and administered –

GLAZEBROOK J:

Yes, it might give you those sort of rights of –

MR GODDARD QC:

And in that sense it can operate as a golf club for that purpose, and that was always the intention.

ELIAS CJ:

But if it's not incorporated then you've got two problems, haven't you, because there's the one that the Courts below were exercised by, that it wasn't as an incorporated society, but it's not even incorporated.

MR GODDARD QC:

No, so that phrase is the phrase that I address in my submissions, to be incorporated as an incorporated society, is that a necessary part of the description, and I'll come to this but there are, where you have a description of a person in a document, and this is a concept that's been developed mostly in the context of wills, but it's also applicable to other instruments, where you have a description of a person that has several elements, and some are accurate to describe a particular person, and enable the person to be identified, but others are inaccurate, then you can disregard –

ELIAS CJ:

No, I understand those authorities, that's the *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) sort of thing is it?

MR GODDARD QC:

In the contractual context, and in the will context there's that Latin tag falsa demonstratio which I will touch briefly on later.

ELIAS CJ:

But at the moment all you have is ownership of the golf club land, don't you?

MR GODDARD QC:

And an unincorporated golf club which is a club in the same sense in which the Koru Club.

ELIAS CJ:

Well where is it? Where is it, is there a contract of it?

MR GODDARD QC:

Yes, there are rules in the –

WILLIAM YOUNG J:

There are rules.

ELIAS CJ:

Oh, the rules? I see, the rules form the –

MR GODDARD QC:

It has rules and it provides for membership. The members do not have any role in the management of the club, but it is, it's called a club, it operates as a –

WILLIAM YOUNG J:

Well you can call –

ELIAS CJ:

Where are the rules, sorry, just tell me where they are?

MR GODDARD QC:

The rules are in volume –

GLAZEBROOK J:

Volume 2.

MR GODDARD QC:

Yes, let me just check that these are, yes, so this is the current set of rules.

ELIAS CJ:

Does anyone belong to it?

GLAZEBROOK J:

I imagine there's a number of people I would have thought. It's a very nice club. If you like that sort of thing. It's a very nice golf course if you like that sort of thing.

MR GODDARD QC:

Her Honour is way ahead of me. I'm not a golfer and I bring no subject matter expertise to that aspect of the case.

GLAZEBROOK J:

Well, I am told, so it's very much hearsay.

MR GODDARD QC:

Your Honour is still a step closer, one degree of separation perhaps.

WILLIAM YOUNG J:

Mr Goddard, when you say, I mean there are a variety of – the word "club" is one that has a number of, shades of meaning, one is incorporated society.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

One is a society that could be incorporated but isn't, it may be, but it's still run for and by the members.

MR GODDARD QC:

Yes, and another is a commercially operated club.

WILLIAM YOUNG J:

And then the other is another, and there may be others, but there's a commercially operated club which is a club in name which an entity runs and talks about the people being members of, and the Koru Club is perhaps an example of that.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Some nightclubs might be examples of that.

MR GODDARD QC:

Yes, if they have a membership structure. Which used to be the case.

WILLIAM YOUNG J:

But this isn't really an unincorporated society as I would regard it. This is an unincorporated society I would still see as a member's organisation.

MR GODDARD QC:

It's not an unincorporated society.

WILLIAM YOUNG J:

It's not an unincorporated society.

MR GODDARD QC:

It's a commercially operated club.

WILLIAM YOUNG J:

Golf course.

MR GODDARD QC:

It's a commercially operated –

GLAZEBROOK J:

It's a commercially operated golf course and you can pay a sum which enables you to play at any time in accordance with the rules.

MR GODDARD QC:

To become what is described in the rules as a "member" and access the contractual rights and privileges of a member, and the club as the – let me just check this.

ELIAS CJ:

Sorry, where are the rules?

MR GODDARD QC:

Page 100, volume 2 of the case on appeal, is where the text begins.

ELLEN FRANCE J:

But in terms of what you said before about management, the advisory board is, if it was operating, would be a means by which members could have some role to play in management?

MR GODDARD QC:

Yes, they'd have a voice in management.

GLAZEBROOK J:

Well, consulting role though, isn't it?

MR GODDARD QC:

Yes. Sorry, I deliberately chose "voice" rather "decision rights". So in terms of those different degrees of participation one can have in decision making that we see analysed in political context and company law context, what are your rights? Is it voice, is it exit, is it some sort of decision right? There's voice here, as Your Honour, Justice France, rightly points out, but no other right of control. And the question is, "Does that matter?" And so we get to the question, "What are those words doing to be incorporated as an incorporated

society?" Is it simply one of a number of cumulative methods of identification, in which case, in my submission, it's quite clear what the relevant club is and there's no problem, or is it a matter of obligation –

WILLIAM YOUNG J:

But you're assuming there is a club. You're assuming that there has to be some entity to which these people belong and we should pick the one that looks closest.

MR GODDARD QC:

I'm assuming that the purpose of this is to require purchasers of sections to join a golf club which operates, which provides playing rights on that golf course. That's the natural reading of the purpose of the instrument, and then what we're looking for is which is the golf club that they are required to join.

WILLIAM YOUNG J:

But wouldn't one say they are only required to join a golf club which meets the contractual description?

MR GODDARD QC:

Well, if it's in –

WILLIAM YOUNG J:

I mean, aren't they? Is there a difference? I mean, that's the way I would prefer to formulate it.

MR GODDARD QC:

And that's the question of whether it's a matter of identification or description which is the *Reardon Smith* decision that I'll come to later, and the question is – or if one thinks of it in terms of that falsa demonstratio principle which, of course, is part of the baggage of construction that Lord Hoffmann tells us we now no longer carry with us on our journey, but it illustrates the Court's thinking through these principles in a, in my submission, coherent way. What

we see in the authorities is a statement that if you've got several matters of identification –

WILLIAM YOUNG J:
Like, "I leave everything to my niece, Mary." Now I don't actually have a niece, Mary, but there's a woman called Mary that I'm very fond of who used to call me uncle.

ELIAS CJ:
Well, it's like that "all to Mum" thing.

WILLIAM YOUNG J:
Yes, but, I mean, that's different. I don't see that as really very, as comparable to here, because we know there was an intention. He must have had in mind someone who did exist to whom the description, "My niece, Mary," would be appropriate.

MR GODDARD QC:
Similarly, yes, the question is whether this is intended to be anything more than a method of identification or whether it's intended to impose a substantive requirement and the context is a little different from wills which is why I wasn't going to give those authorities to the Court and then I changed my mind because it seemed to me that it was some sort of analogous information which displayed similar reasoning to the *Reardon Smith* decision in an adjacent, but not absolutely equivalent, context. But again, if we start by saying, "What is the purpose of this?" by reference to factors known to original and future parties, in my submission the covenants are intended to impose a range of obligations on owners of sections in this subdivision centred on a golf course and one of them plainly is an obligation to join the golf club that provides –

ELIAS CJ:
Sorry, now where's the – was there no preceding obligation to enter into this?

MR GODDARD QC:

It's registered on the title so it's simply –

ELIAS CJ:

No, I know, but was there no agreement for sale and purchase or something that contained an obligation that they enter into this contract?

MR GODDARD QC:

There was an option which contemplated, in general terms, something of this kind. The agreement for sale and purchase in the exercise of that option didn't expressly refer to it. But, of course, that was just the original one. Subsequent purchasers simply take the title subject to all the restricted covenants on it.

ELIAS CJ:

Yes, I understand that.

MR GODDARD QC:

So my clients didn't have any antecedent obligation. All that happened is that they turned up to a mortgage sale, participated in a mortgagee sale, and acquired the title, subject to a whole range of covenants and other registered interests in the land as is common with a complex subdivision, and you just take, subject to whatever obligations those impose. Similarly there's already been one transfer from the original holders of this section to Mr Vincent and another co-trustee, and there are many other properties similarly situated. So it's an important part of my case that there is no –

ELIAS CJ:

So you don't have to go behind, yes.

MR GODDARD QC:

You just don't have to go there, yes, and that indeed for most people who are bound for this, or who are entitled to the benefit of it over time, there will be no antecedent transaction that has any bearing on this, it simply runs with the

land, and there is no issue about whether the vast bulk of covenants contained in this registered covenant bite and apply, or about whether this one applies, the question is merely whether there is a golf club at all, and if so whether it is the unincorporated club, commercial club, the label doesn't matter in my submission, operated by golf management.

GLAZEBROOK J:
And presumably that club has the obligation to maintain the golf course.

MR GODDARD QC:
It does, in fact, maintain the golf course, and provides playing rights on it. If you fail to provide playing rights on something which could fairly be described as a golf course, then there would obviously be a problem.

GLAZEBROOK J:
I suppose I was just asking who would maintain the golf course if it wasn't for that.

MR GODDARD QC:
Well it could be the owner of the land, Golf Course Ltd, which in turn leases, or licences the land to golf management, which in turn provides playing rights, and that would be a matter of contract between them.

GLAZEBROOK J:
What I was really asking is do we have those contracts?

MR GODDARD QC:
No.

GLAZEBROOK J:
Okay. Sorry, that was the point of my question.

O'REGAN J:
But presumably if it had been an incorporated society, the society would have had to maintain the golf course.

MR GODDARD QC:

No, not necessarily. The incorporated society could have taken a licence of it pursuant to which the owner of the land.

O'REGAN J:

But if it was an incorporated society of, which was a golf membership society, in other words – I mean I think the argument for the other side is that what was envisaged was that these people would be part of a society that actually owned and controlled the golf course, not just customers of a company that does.

MR GODDARD QC:

I don't think there's any submission that it needed to own the golf course and I don't see how that could be taken from the covenant which very carefully refers to, provides playing rights on the golf course. If it wanted to refer to the owner of the land that would have been a simple matter, but that's not the way this is structured, so it's clearly contemplated that the person providing the playing rights may or may not be the owner of the land, and either the golf club would need to do that or, and this is in my submission absolutely consistent with the covenant, and an important part of the response to the argument that the incorporated society structure is important, the owner of the underlying land could lease or licence the land to an incorporated society that was a golf club on terms that provided for the owner to carry out all the work on the golf course, to maintain it, and to recover its costs, whatever they might be, from the incorporated society, and to recover a profit component from its ownership of the land, and its carrying on of those activities. So there's absolutely, the fact that they would then be passed through those charges, without an additional profit element, doesn't mean, as my friend seems to suggest, that reading this covenant one would expect to be a member of a golf club that operated on a cost recovery basis only would know profit element recovered by the ultimate owner, or manager of the golf club. There's a vast variety of perfectly plausible commercial arrangements consistent with the reasonably exiguous language of this covenant, most of

which would result in the golf course being operated as a commercial enterprise and recovering a profit element.

O'REGAN J:
But if that's so, wouldn't the developer here have just had an incorporated society instead of a golf club?

MR GODDARD QC:
And in my submission it could have but it was open to it to choose not to.

O'REGAN J:
But it didn't.

MR GODDARD QC:
It didn't.

O'REGAN J:
No.

MR GODDARD QC:
And if –

GLAZEBROOK J:
You wonder why, actually, rather than coming all the way to the Supreme Court to argue this –

ELIAS CJ:
They didn't do it.

GLAZEBROOK J:
I mean, if you're right then you could actually have set up an exactly equivalent arrangement, require them to join it with the manager, like they do in most body corporates actually, in there forever, in perpetuity.

MR GODDARD QC:

Yes, and –

WILLIAM YOUNG J:

Well, you might face an argument –

GLAZEBROOK J:

But not –

WILLIAM YOUNG J:

– if it's not the incorporated society that was envisaged by the –

GLAZEBROOK J:

Well, you might have but…

MR GODDARD QC:

That would, I think, be a difficult argument.

ELIAS CJ:

Well, it's a different argument anyway.

MR GODDARD QC:

It's a different argument. It's not the fact situation that's come to this Court and what might be done in light of this Court's judgment is a matter that we can only speculate about.

GLAZEBROOK J:

What might have been done right at the start to avoid this might have been something we can speculate about as well.

MR GODDARD QC:

What we do see, if we look at the material from the time, if it's relevant to look at it and speak about it, is that there was a lot of anxiety about, among other things, the Securities Act and some advice, not all of which, I have to say, I entirely follow and agree with, about the implications of that legislation for

some of these structures. So whether one really has to delve into the understandings and misunderstandings to that legislation that drove these outcomes, in my submission, fortunately we're spared that but that is the –

ELIAS CJ:
So effectively, if you're right, the argument may only be about back payment of fees because if an incorporated society could still be formed, which I would have thought it could be, then you'd say the covenant would bite.

MR GODDARD QC:
Yes, so it's about back payment of fees and about whether the current structure can continue or whether it's necessary to go through the process of setting up an incorporated society and addressing any other legal issues that might raise, whether under the financial markets legislation or otherwise and it's not, I think, for a –

ELIAS CJ:
If it's simply to substitute for the unincorporated club, it's hard to see that it would.

MR GODDARD QC:
It would turn on how the rights to use the course are characterised for the purpose of securities legislation and whether certain exemption notices applied and things like that.

GLAZEBROOK J:
Well, it is a covenant that runs with the land so it would be an interest in the land in some way so I'm not entirely sure how that operates, having done a reasonable amount of retirement village stuff in the past.

MR GODDARD QC:
That adds – yes, it's all changed, of course.

GLAZEBROOK J:

Yes, well, exactly because – so I've –

MR GODDARD QC:

With the Financial Markets Conduct Act 2013 –

GLAZEBROOK J:

No, no, absolutely, I think it's just totally different now.

MR GODDARD QC:

So I've got another one wending its way through the Courts at the moment, currently at the Court of Appeal, in relation to a development where everyone proceeded initially on the basis of an understanding the Security Act didn't apply but the High Court has held it did even though interests in land were involved because it was also part of a scheme and for participation. So that was still not an absolute carve out, as Your Honour will remember.

GLAZEBROOK J:

Yes. No, no, no, absolutely.

MR GODDARD QC:

So that was bad enough but now it has all changed anyway and I don't think that it's possible for this Court to go too far into what would be involved now but certainly if this Court were to dismiss the appeal it would be –

GLAZEBROOK J:

It would have to start again, you're saying?

MR GODDARD QC:

It would be helpful to have some guidance on where the metes and bounds of this clause might lie to save everyone another journey through the Courts.

GLAZEBROOK J:

I think that might be very wishful thinking, Mr Goddard.

MR GODDARD QC:

As I said it I realised that it is, of course, not the role of this Court to provide general advice on how to sort things out next. But I do respectfully submit that in order to decide whether this arrangement is or is not on the right side of the line, it will be necessary to say something about where the line lies, and there would be more and less helpful ways of saying where that line lies. So that's the covenant and the submission I will be making about it is, first, that one just reads it, having regard to the physical arrangement of the land and other matters that the original parties could expect future owners of the dominant and servient tenements, future persons contemplating dealings in relation to this land, to be able reasonably readily to ascertain but not the toing and froing which ultimately produced, after a remarkable amount of indecision, this particular text and that's because that would not be expected to be available to the audience to whom the covenant is addressed in the future. And the way I've put that anticipates the content, though not of course yet the supporting authority, of the first four propositions on my road map.

GLAZEBROOK J:

It actually is something this Court has already said in *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

MR GODDARD QC:

A majority of the Court said that the scope for resort to context may itself –

GLAZEBROOK J:

Well, that's enough, isn't it?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

A majority is enough in terms of what's been said.

MR GODDARD QC:

So what the Court –

GLAZEBROOK J:

Sorry, I don't mean to be facetious there because in fact the other two members of the Court didn't say they disagreed with it.

ELIAS CJ:

No, we didn't.

MR GODDARD QC:

No, they didn't. So the *Firm PI* –

GLAZEBROOK J:

But they also didn't agree with it but it was not a, it's not a case where you have a dissent.

MR GODDARD QC:

No, and in *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167 the Court referred back, although this Court also in *Escrow Holdings* said, "In *Firm PI 1* a majority of this Court said," and that's really where I picked up the language from.

GLAZEBROOK J:

Yes, yes.

MR GODDARD QC:

I wondered if it was a deliberate emphasis in *Escrow Holdings*. But I'm going to urge on the Court the fact that at the most general level what this Court said in *Firm PI 1*, which is that the scope for resort to context is it itself contextual, is right and that the reason for that is because the context in which the original agreement is entered into tells us to whom the instrument is addressed, and the thrust of my argument is that the meaning of a document turns on the – is to be ascertained by reference to the context that is available to the persons

to whom it's addressed, that we're not interested in context available to the speakers alone. It must be context available to the speakers and that they expect to be available to their audience. Now in the ordinary situation of, and I use the word "ordinary" because Lord Hoffmann has although Sir Kim Lewison takes issue with it, as have some other commentators, in the ordinary situation of a bilateral contract between two parties where no third parties are expected to have a significant involvement, of course the speakers and the audience are the same, and that's why we often see reference to the context available to the parties because the paradigm that people writing about this have in their head is that the parties are at once the speakers, the source of the language, and the hearers, the audience for the language. So we don't need to distinguish between the context available to the speakers and the context available to the audience. But where there's a difference, wherever there's a difference, what we see consistently from the Courts, and I'll go to a few of the authorities, is recognition that what matters is the context that's expected to be available to the persons to whom the document is addressed. And that is why we see different types of instrument, different types of contract, treated in different ways. It is why there is no inconsistency between the *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) [*ICS*] principles and the exclusion of material that's passed between the original parties in cases of bills of lading, *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 AC 715 [*The Starsin*], memoranda and articles of association which are contracts that are registered and have effect in the company context, certain others, and I'll go through that as efficiently as I can and then look at what that means for registered instruments.

Again, in my submission, there is no inconsistency between *Westfield Management Ltd v Perpetual Trustee Ltd* [2007] HCA 45, (2007) 233 CLR 528 and *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324, (2008) NSW ConvR 56-200, the two Australian decisions, *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305, the English Court of Appeal decision, and the *ICS* principles. It's not that there's a tension. It's just that the ICS principles need to be properly

understood and the reference to context available to the parties, which Lord Hoffmann made in that case, needs to be understood in context, as with all judicial observations. It's a case where the parties were both the speakers and the audience in ICS and wherever we have a situation where that's not the case we see Lord Hoffmann recognising that what matters is the context available to the addressees. *Starsin* is a good example. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 is another. So let me go to some of that material. First of all in my –

ELIAS CJ:
Sorry, just before you do, because I've just been going through the rules, so what's the date of the rules?

MR GODDARD QC:
They –

ELIAS CJ:
They say, "At the date of these rules the following facilities are available for member use," and then there's the golf course and the practice facilities and buildings.

MR GODDARD QC:
I will come – they are undated, as the index confirms. They will have been adopted after my client's bought into this resort so we know that that is, I should know when that is, October 2009, I'm grateful to my learned friend. So that's some years after the golf course first became available for play, which I think was 2004.

GLAZEBROOK J:
Actually, just while you're on the rules, as the object is to provide a quality golf experience, however under 4.1(a) one assumes that however they do that they would have to contractually meet that obligation, whether they do it because somebody else maintains it, or they maintain itself. If it wasn't a

quality golf experience then presumably the members would have something to say about it in a legal sense.

MR GODDARD QC:
And you'd struggle to recover a fee for failing to provide the very thing that you promised to provide in exchange for the fee, absolutely Your Honour. But there's also nothing in the covenant, or in the rules, which suggest that one can't contract out to a profit-making entity the work involved in providing that quality experience.

GLAZEBROOK J:
And in fact one would assume that one would because one, it's quite a skilled –

MR GODDARD QC:
Specialist.

GLAZEBROOK J:
Specialist skill, one doesn't just get on a tractor and mow the greens.

MR GODDARD QC:
No. I looked at those people and some of those looked like they'd be quite fun to drive but I have also suspected that it wouldn't go as well if I was driving.

These propositions are, the first couple I think, are pretty self-evident, and I won't dwell on them too much. So interpretation of a written document is an objective exercise that really is trite. I do just want to pause briefly on the second sentence. The focus is on the meaning of the words used, not on the intentions of the parties. Probably the quickest way into this is to go to my submissions and turn to page 6 and as I say at 3.1 the disposition of this case turns on the interplay between two principles, that the meaning of a document is ascertained objectively. "The focus is not on what the author(s) subjectively intended to convey, but rather on how their language would be understood by

a reasonable observer." And, "The meaning of a document must be ascertained having regard to the context in which it came into existence."

At 3.3, "There are no special rules of interpretation peculiar to contracts," and I set out the frequently cited passage from *ICS*. And principle 1, sorry, after referring to the fact that almost all the old intellectual baggage of legal interpretation has been discarded, well I think some of Their Lordships have suggested since that small carry-ons might be permitted, I think Lord Neuberger in one subsequent decision, I'll come back to that.

So (1). This is a very important and subtle reframing of how this exercise has traditionally been described. "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." Not what one or both parties intended, or presumed to have intended, inquiries that we sometimes see written down, just as we sometimes see reference to the intention of Parliament, which is of course a metaphor, and actually often a very unhelpful metaphor. Similarly we sometimes see the metaphor about ascertaining the intentions of the parties. That's not actually what we're doing. We're ascertaining the meaning which the document would convey, and not to one party or the other party, or even in my submission to both parties, but to a reasonable person having all the background knowledge, reasonably available to the parties, and that reference to the parties is the one I was mentioning earlier when I said Lord Hoffmann was proceeding there on the basis of the parties to the contract also being the parties to the – the original parties to the contract being the parties at the time of the dispute.

Then there's the famous reference to the breadth of the relevant background in (2). In (3), "The law excludes from the admissible background the previous negotiations," which is not probably the law of New Zealand without some gloss, but, "Declarations of subjective intent," still so. "They are admissible only in an action for rectification." I'll come back to rectification. (4), a familiar point that – actually, I don't need to dwell on (4) and (5). The Courts are very

familiar with those. As I say at my 3.4, the first principle reflects the objective nature of the exercise. The Court stands in the shoes of (or personifies itself as), that's the way it's sometimes put by the Judges, a reasonable person seeking to understand the document at the time of its making. The Court doesn't stand in the shoes of one or other party. The interpretation process is not concerned with the subjective intentions and goals of any one party, or the parties collectively. Lord Steyn put this characteristic elegantly.

ELIAS CJ:
We have, of course, read all of this, Mr Goddard, so you can assume that.

MR GODDARD QC:
Let me take then the Court to, I will just at least draw the Court's attention to it, I won't read through it, a passage in Sir Kim Lewison's text on interpretation which underscores the importance of the shift to focusing on the meaning of the document rather than the presumed intention of the parties. That's in volume 3 of my authorities, the extract from text begins at page 454. What I want to go to is on page 10 of the text book, page 456 of the bundle of authorities. That's in paragraph 1.03 and about half way down the page.

ELIAS CJ:
Sorry, 400 and?

MR GODDARD QC:
56 of the bundle, Your Honour, sorry, page 10 of the text. The paragraph begins, "Beguilingly simple though the formulation of Lord Hoffmann's first principle is, it contains the fundamental philosophy underlying the English approach to the interpretation of contracts. That is that interpretation does not involve the search for the actual intentions of the parties, but for an objective meaning. The purpose of interpretation is not to find out what the parties intended but what the language of the contract would signify to a properly informed ordinary speaker of English. The refocusing of attention on the impression made by the words on the reader, rather than on the intended message of the writer, is a departure from the traditional formulation of the

aim of interpretation, namely to ascertain the presumed intention of the parties. Although some judges continue to describe the object of interpretation as the ascertainment of the intention of the parties, this is a distraction from the real question, which is: what does the contract mean?" And that, in my submission, is at the heart of this case, and this Court has also at times referred to the object of interpretation as the ascertainment of intention of the parties. In one footnote, for example, I refer to Justice Tipping's statement in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 that that is the fundamental aim. With respect, that's not quite right. As a metaphor, it is harmless as long as its metaphorical nature is understood and it doesn't take you somewhere inappropriate and, in particular, there is a risk as soon as you start talking about ascertaining the intention of the parties that you become rather focused on the intention of the original framers of the document. It's when you remember, when you focus on the fact that what we're interested in is the impression made on the reader that we see immediately that you need to ask who is the reader and what impression would be made on them. So, and I've provided some other page references that are particularly helpful from Lewison but I won't go to them, given the familiarity of the Court with these matters.

The relevant context to this, I think, is pretty clear. It doesn't include matters that are not known or reasonably available to a party. Obviously, if you've got two parties it has to be available to both of them. As I say in my written submissions, if you think of a petroleum joint venture, one of those ones that explores of the coast of Taranaki with 10 or 12 members that I think a number of members of this Court will have come across at various times in their judicial or prior careers, you're talking about context available to all of those parties, and there are a couple of passages. Let me just go to them because I think they help to provide a stepping stone to the next proposition. So *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 is in volume 1 of my authorities. It begins on page 1. These are the 99 year leases of holiday chalets.

GLAZEBROOK J:
Sorry where?

MR GODDARD QC:
Volume 1 of my authorities, page 1, is where the case begins, but where I want to take the Court is to page 11. This is – perhaps, at page 9 Lord Neuberger discusses the interpretation of contractual provisions and refers to *Chartbrook* and *ICS*, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. It makes propositions consistent with my paragraph 1. At 21, referring to the fifth, he's setting out a number of points, Lord Neuberger says, "The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic," Lord Diplock, I think, is to be blamed for that word. As I understand it a synallagmatic contract is one where each party makes promises to the other, as opposed to say a unilateral contract where I announce a reward of $1000 if someone finds my lost cat, which is not synallagmatic because there's no promises both ways, for what it's worth.

ELIAS CJ:
Is that an attempt to get around bilateral because it applies to more than one party?

MR GODDARD QC:
No, I think –

ELIAS CJ:
Synallagmatic.

MR GODDARD QC:
I don't know why that word turned up there, and there's been some quite funny downstream commentary about Lord Diplock's use of that term in an earlier case.

ELIAS CJ:

Well Lord Neuberger seems to be suggesting that it's synonymous with bilateral but I wouldn't have thought it could be.

MR GODDARD QC:

No it's not.

ELIAS CJ:

Not that I know. Synallagmatic. I'm going to practice it.

MR GODDARD QC:

So Lord Diplock, another Judge described it as a characteristic although perhaps gratuitous display of learning on the part of Lord Diplock. As Your Honours point out, it's a slight worry that this display of learning has slightly misfired, but be that as it may, involving both parties. "It cannot be right when interpreting a contractual provision, to take into account a fact or circumstance known to only one of the parties." And of course if you've got your 10 participants in a petroleum joint venture, that must apply to all 10. It can't be the case that the contract means different things to different parties to that contract and nor, in my submission, I'll come back to this, as interests in the joint venture change hands, which is how those joint ventures are deliberately constructed, can it be the case that it has a different meaning for the nine remaining original parties, and the one new one that's come in, or that downstream when they've all changed hands suddenly it's changed because one thing is very clear in all the authorities is that a contract has one meaning for the life for which it operates. Which doesn't meant it doesn't apply to circumstances as they arise but it only has one meaning.

O'REGAN J:

But does that mean you have to have some kind of assessment of the likelihood of new parties coming into the contract?

MR GODDARD QC:

Exactly Your Honour. You ask to whom is this addressed. Is this a closed arrangement, really just between these two parties, or is it addressed to a range of participants over time and that turns on, it is as this Court said in *Firm PI 1*, you look at the context within which the original agreement was entered into, and whether it was anticipated that third parties were being addressed. Obviously successors, my petroleum joint venture example, or registered covenants, but also, and this is a theme which comes through in some of the cases I'll take the Court to in a moment, third parties who are expected to take security interests where the whole transaction is set up to enable downstream lending. So one of the cases that I'll go to, *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* [2011] EWHC 2111 (Ch), was notes constituted under a debenture trust deed for the purpose of being used as security for the provision that it advances to Lehman brothers, that's the LB, always designed to define rights that third parties would rely on when they took them by way of security. So that is the key test.

So my submission is not the crude one made by some commentators that because of the possibility of third party interests in any contract one should not look at context or at the negotiations between the parties. That's been rejected in the Courts in England, Australia, New Zealand and rightly, in my respectful submission, so. My submission rather links into that observation in *Firm PI 1* of this Court that the scope for reference to such material is contextual, that when the contract is made you ask who is the intended audience. To whom does this document speak and what context would be available to that audience.

ELIAS CJ:

But I really don't know that anyone has much trouble with those submissions. It's really just the application, surely, in this case that is the real issue. I mean why do you think it's necessary to persuade us of this?

MR GODDARD QC:

Because the Court of Appeal referred to material that would not be relevant on that approach.

ELIAS CJ:

Yes.

MR GODDARD QC:

And it seems to me that I have some burden as an appellant to persuade this Court that something went wrong below, and that's a key part, in my submission, of what went wrong below. Is that the Court of Appeal confirmed a view, which it said it would have reached anyway, but it confirmed a view about the intended operation of this covenant by reference to the, as I said, reasonably gruesome process by which the incorporated society structure was chosen, in my submission, quite wrong, and –

ELIAS CJ:

But if we're of the view that they didn't need that confirmation, why would we bother to revisit all of this?

MR GODDARD QC:

That's a matter for the judgment of the Court depending again on how much guidance it wants to provide about the correct approach to the construction of instruments of this kind.

O'REGAN J:

I think it was one of the leave questions too wasn't it?

MR GODDARD QC:

It was a leave question.

ELIAS CJ:

Sorry, I didn't check the leave questions.

GLAZEBROOK J:

Well I'm saying this Court has already spoken and so it really is a matter of the application.

MR GODDARD QC:

If we go to *Firm PI 1*, it's a little bit more general than that. Perhaps let's just go to that to see why I thought this was still open.

ELIAS CJ:

But this is clearly not a contract of interest only to these parties who originally entered into it.

MR GODDARD QC:

Perhaps the other reason to emphasise this is that the New Zealand Court of Appeal in the *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402 case, to which Your Honour Justice Young was a party, and perhaps also Your Honour Justice Glazebrook, although I think it was Justice Young who wrote for the Court, suggested that the *Westfield* case, which is consistent, the decision of the High Court of Australia, which is consistent with the submissions I'm making, might not be followed, or followed fully in New Zealand. So the other reason I'm dealing with this, Your Honour, is that there is a Court of Appeal decision which I think is actually, which could be understood as casting doubt on whether that's the right approach. It has been understood as casting doubt. If we look at Sir Kim Lewison's book, for example, he refers to it as raising a question about whether New Zealand will take this approach and that, in my submission, is something that ought to be tidied up by this Court in the course of resolving this case. It actually is a very important practical issue where New Zealand is at least understood by many commentators to be out of step with the approach elsewhere in the common law world.

So let me, I've gone to *Arnold v Britton*, go very quickly to *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 [*BCCI*],

that's in my learned friend's authorities, a slender volume, he's been much more economical than I have.

ELIAS CJ:

Who gave us the supplementary ones, however, was that you?

MR GODDARD QC:

That's me. I thought that some of the academic, I thought I'd be remiss not to provide any of the academic commentary on this, especially given how frequently Sir Kim Lewison footnotes to it and that not only was it important to have some of those canonical speeches by Lord Hoffmann, Lord Steyn and others, but also that my old contract teacher Professor McLauchlan would never forgive me if I didn't include a couple of his articles that were relevant to this issue in my authorities, and I was anxious to atone for that sin of omission.

GLAZEBROOK J:

Well he would take the opposite view, wouldn't he?

MR GODDARD QC:

No, and that's why I included them. I'll go to the passage actually in that just to show that.

GLAZEBROOK J:

All right.

MR GODDARD QC:

He sees also an exception in this context, and I'm glad Your Honour asked me that because I hadn't been going to that article but I will.

ELIAS CJ:

I would have thought that really we said that in *Escrow Holdings*. Sorry.

GLAZEBROOK J:

Firm PI 1 and then endorsed in *Escrow*.

ELIAS CJ:

Yes, which was, again, a registered covenant.

MR GODDARD QC:

If we go to *Escrow Holdings* what the Court said was that it wasn't going to decide it, so no, not really, Your Honour. So if we go to *Escrow*, let me show again why I'm troubling the Court with this. *Escrow Holdings* is in volume 1 of my authorities. It's at, it begins at page 122 and the relevant passage is at page 141 of my bundle. So it's paragraphs 41 through 43, and punchline is at the beginning of 43, Your Honour. "Ultimately, however, like the Court of Appeal, we think the present case can be determined without resolving this issue." So the Court in *Escrow Holdings* kicked for touch, I think the phrase is, on this issue, partly perhaps because by this stage leave had been granted in this case and the Court didn't want to pre-empt its decision.

So if we go back, what is the issue the Court's referring to? [41], "The parties made submissions on the approach to be taken to the interpretation of documents on a public register, in particular on the question of the relevance of evidence of the background knowledge that would reasonably have been available." This contentious issue was discussed by the Court of Appeal in *Big River*. The Court of Appeal discussed *Westfield*, "Expressing the view that, if that decision meant that what might otherwise be relevant extrinsic evidence should be ignored when interpreting a registered easement, it was 'open to question' whether it should be applied in New Zealand."

[42], "As is apparent from the Court of Appeal's judgment in *Big River* and as Don McMorland has recently discussed, this is an issue of some complexity, raising a number of difficult policy considerations. Moreover, since *Big River*, a majority of this Court in *PI 1* has accepted there may be situations where the fact a document was intended to be relied on by third parties not involved in its drafting will mean that extrinsic background material is of diminished relevance to its interpretation. The example given was a security trust deed." And then the Court says it's not going to resolve the issue.

GLAZEBROOK J:

Well, of course, you're actually not arguing that you can't look at extrinsic material in this context. You're just saying that the extrinsic material you can look at will be that which would be assumed to be readily available to people.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

So in this context obviously you're looking at a golf course in a particular development rather than a generic golf course in some other area that has nothing to do with the particular development and the fact that the houses surround it, et cetera.

MR GODDARD QC:

Exactly, Your Honour, but what I am also saying is that the other material the Court of Appeal looked at shouldn't be looked at at all. Now there's that article –

GLAZEBROOK J:

Yes, yes, exactly. Because it is material that wouldn't have been thought to be available, at least not readily to, and maybe even at all to.

MR GODDARD QC:

Exactly. At all, as time passes. The Court's referred, I think in *Firm PI 1*, to an article [Matthew Barber and Rod Thomas "Contractual, Registered Documents and Third Party Effects" (2014) 77 MLR 597] about *Cherry Tree Investments* written by Matthew Barber and Rod Thomas which is in volume 3 of my authorities beginning at page 508. I won't go to it now but that article raised two possible responses to the situation where one would expect third parties to acquire an interest under a contract downstream. One was to disregard material that wouldn't be available to the audience and the other was to take it into account but also take into account when deciding what weight to give it the potential that third parties would take an interest at some

time. Now I make the submission in my written submissions that that's unworkable. I don't know when that would lead you to take it into account, when it would lead you to disregard it, what it means to give it some weight, but again that's an issue that hasn't been resolved and that's why my submission is that this Court can and should say where the addressees, where the audience, the intended audience of an instrument, is a range of persons taking an interest over time then the physical features that Your Honour, Justice Glazebrook, described a moment ago of the land, the relationship between the various parcels within the subdivision, are and remain relevant, that extrinsic material is relevant, but material that's passed between the original parties which would not be expected to be available to subsequent parties is not relevant at all.

GLAZEBROOK J:
Yes, it might be difficult to be quite so definitive and to say anything more than we did say in *Firm PI*, isn't it? I mean in this context one can understand that but – anyway, that's just…

MR GODDARD QC:
My submission is that one can be a little bit more confident about that and that it's actually positively helpful to do so, at least at the level of stating the general test of information that would be expected to be available to the intended addressees of the document.

GLAZEBROOK J:
But that may be as far as it's possible to take it.

MR GODDARD QC:
I accept that absolutely. But that principle would be an advance on what the Courts have said so far. It takes *Firm PI 1* and *Escrow* to the next level by focusing the inquiry –

GLAZEBROOK J:

Well, of course, we didn't have in front of us there a registered document. We referred to it but didn't have...

MR GODDARD QC:

Yes, so it takes it to the next level and it provides really important guidance on how to apply these principles in the future. So let me just pause to check whether there's anything else in this material that would be useful to go to. Let me…

O'REGAN J:

You were going to take us to *BCCI*. Are you still going to do that or…

MR GODDARD QC:

Let me just pause to check whether that really is a good use of the Court's time. No, I don't think so. It just provides further support for the fact that where you're talking about the parties, the context that's available to some parties but not all should not be taken into account. That's a stepping stone on the way to the really important issue, I think. Let me turn then to the appropriateness of an emphasis on the persons to whom the document's addressed. That, I think, is implicit in what this Court said in *Firm PI 1* and *Escrow Holdings*. It's made explicit in a number of decisions, including a number of decisions of Lord Hoffmann's, and this, I think, is important because it explains that the reference to the parties shouldn't be taken as anything more than a product of the context of *ICS*.

So first of all, *The Starsin*, which is in volume 2 of my authorities at page 301.

WILLIAM YOUNG J:

Sorry, 301?

MR GODDARD QC:

301 is where the decision begins, and it's one of those enormously long names that shipping cases often have which make it so alluring to refer to it by

reference to the name of the ship, and the relevant paragraphs are on pages 333 to begin with. So it's an interpretation of a bill of a lading. The case is about the interpretation as a bill, and the challenge here was that the bill on its face identified a particular company as the carrier but then there were some provisions in the fine print on the back that cast doubt on whether it was the carrier or whether some other entity might not be, and what we see Lord Steyn saying, and Lord Steyn's speech begins at page 332, is, at [45], after identifying the potential contradiction between the front and the back, [45], "How is the problem to be addressed? For my part," His Lordship says, "there is only one principled answer. It must be approached objectively in the way in which a reasonable person, versed in the shipping trade, would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specially chosen, such as the words which appear above the signature, rather than standard form printed conditions." And then if we go over to Lord Hoffmann's speech, and beginning at page 339, paragraph 71, His Lordship notes that the forms were printed for use as owner's bills but the port agent –

GLAZEBROOK J:
Sorry, I missed the…

MR GODDARD QC:
I'm so sorry, Your Honour, 339 of the bundle. That's the forms were printed for use as owner's bills, but they were signed as a agent for a carrier. "That meant," His Lordship says half way between F and G, "in my opinion, that anyone reading only the front of the document would think that CPS was the party assuming liability as carrier," and then just above H, "The reasonable reader of the front of the bill of lading would have had no doubt that CPS, and only CPS, was accepting liability as carrier."

Then if we come over to paragraph 72 on the next page, "On the other hand, a reader who turned the bill over and read the printed conditions might lose confidence in his initial impression." [73], "How is this conflict to be resolved? The interpretation of a legal document involves ascertaining what meaning it

would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed." So that's what His Lordship clarifies that the reference to the parties in *ICS* was a simplification, a simplification available in that case because the speakers and the hearers were the same. But what we're actually interested in is what it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed. "A written contract is addressed to the parties; a public document like a statute is addressed to the public at large; a patent specification," and I'll come back to the written contracts addressed to the parties. His Lordship does that in *Chartbrook*, "a patent specification is addressed to persons skilled in the relevant art, and so on."

"To whom is a bill of lading addressed? It evidences a contract of carriage but it is also a document of title, drafted with a view to being transferred to third parties either absolutely or by way of security for advances." Common general knowledge, such advances are frequently made by letter of credit, the bill of lading is ordinarily one of the documents which must be presented to the bank before payment can be obtained. "The reasonable reader of the bill of lading will therefore know that it is addressed not only to the shipper and consignee named on the bill but to a potentially wide class of third parties including banks which have issued letters of credit."

And then over at [76], next page, "As it is common general knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will also usually determine the meaning it would be given by any other reasonable person including the Court. The reasonable reader would not think that the bill of lading could have been intended to mean one thing to the merchant or banker and something different to the lawyer or Judge." So that's an emphasis on who we're talking to.

Let's jump next to *Chartbrook* and my learned friend's authorities, the slender volume. *Chartbrook* begins at page 35 of that bundle but what I want to do is look at just one paragraph, paragraph 40 which is on page 50 of the bundle. So reference to the judgment at first instance of Justice Briggs, and the issues in relation to third parties who took assignments being influenced by evidence of pre-contractual negotiations. This is a discussion about whether English law generally should permit reference to negotiations, perhaps with noting at the foot, at the head of this page actually, a reference to the very first few lines, "English law…mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be."

Then there's a reference to the first instance decision, the fairness issue. Clearly strength in this argument, at letter C, His Lordship says, but it's fair to say the same point can be made and has been made, notably by Lord Justice Saville in respect of admissibility of any form of background. Then an important passage, "The law sometimes deals with the problem by restricting the admissible background to that which would be available not merely to the contracting parties but also to others to whom the document is treated as having been addressed. Thus in *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 (EWCA), the Court of Appeal decided that in construing the articles of association of the management company of a building divided into flats, background facts which would have been known to all the signatories were inadmissible because the articles should be regarded as addressed to anyone who read the register of companies, including persons who would have known nothing of the facts in question." And in *The Starsin*, now we've seen that.

Then letter F, "Ordinarily, however, a contract is treated as addressed to the parties alone and an assignee must either inquire as to any relevant background or take his chance on how that might affect the meaning a Court will give to the document. The law has sometimes to compromise between protecting the interests of the contracting parties and those of third parties.

But an extension of the admissible background will, at any rate in theory, increase the risk," to third parties. "How often this is likely to be a practical problem is hard to say. In the present case, the construction of the agreement does not involve reliance upon any background which would not have been equally available to any prospective assignee or lender."

So what His Lordship is saying there is it is often the case that, and it's legitimate for the Court to say, "To whom is this addressed? What background is available to them?" but in the ordinary case of a contract confined to the original parties we don't need to go there. And without going to *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, which is another one of the cases I mention in my paragraph 3, let me just note that His Lordship, delivering the advice of the Privy Council in *Belize Telecom*, made exactly that point in relation to the memorandum and articles of Belize Telecom saying the only background that's needed to understand this is the background that would be available to anyone in Belize who understood that this was a privatised company in which the Government retained an ongoing stake. So I won't go to *Belize Telecom* but I have provided the reference.

Opua Ferries Ltd v Fullers Bay of Islands Ltd [2003] 3 NZLR 740 (PC) is a Privy Council decision on appeal from New Zealand. So it's part of our, a key, as it were, part of our common law. It is worth going to that, I think. So now we're in volume 2 of my authorities. The decision begins at page 234. This is a case about a notice about a ferry service registered with the Regional Council. So it's a unilateral notice provided by the service provider and it's a contrast between *Opua Ferries* and the *Big River* decision that leads Don McMorland in the article that I've included in my authorities in volume 3 to suggest that maybe New Zealand has different rules for the interpretation of unilateral notices and contracts. Respectfully, that can't be right, and the way of reconciling these is again to say the focus is on the persons to whom the communication is addressed.

So, paragraph 28 is where the relevant discussion begins, and Lord Hope, delivering the judgment of Their Lordships. "Mr Tizard for Opua Ferries acknowledged that the answer to the question whether the registration was for one vessel or two depended on the meaning to be given to the documents on the register. But he said that this was only the starting point," and both he and Mr Brown QC, as he then was, argued that you had to look at extrinsic evidence.

[19], "There would be much to be said in favour of this argument if the relevant documents were contained in a contract between the parties which the Court was being asked to construe." Reference to *ICS*.

At [20], "But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public," you might add "competitors", "who consult the register may come from far and near. They may have some background knowledge but they may have none at all. In *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence." Last couple of lines of that paragraph, "The statue makes the position clear. The register is expected to speak for itself."

So, again, one of my submissions is the entirely orthodox approach is saying to whom is this addressed, what context would you expect to be available to them, and that link is made very elegantly in what I think is the only first instance decision that I have inflicted on the Court which is *LB Re Financing*. That's in volume 1 of my authorities. It begins at page 206. It's a decision

referred to with approval by Sir Kim Lewison in his text which is how I found it, a decision of Justice Briggs at first instance at that stage, and the critical passage begins at paragraph 42, which is on page 214. So this is the case about a security trust deed, some notes constituted by it which were intended to be used as securities.

As His Lordship says, “Generally, the Court’s task when addressing issues of construction is to ascertain the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. In the present case the instrument in question is the trust deed, to which the conditions are appended as a schedule. Although devised and initially put in place internally within the Lehman group,” the notes were originally issued and held by different Lehman companies, “it’s function is to constitute and define the terms of the notes, and the Class A notes (in particular) were intended to be used by way of sale or (more likely) security for borrowing, such that the relevant audience for present purposes must be taken to include entities considering buying or lending upon the security of the Class A notes.”

[43], “Identification of the relevant audience is important, because it serves to identify the range of background facts relevant to interpretation.” That sentence is my argument on this in a nutshell. “Although in principle the ‘matrix of fact…includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man’, it is subject to the controlling requirement that it should have been ‘reasonably available to the parties’, and to the exclusion of an examination of the parties’ previous negotiations.” *ICS*, and then a reference to *Re Sigma Finance Corp (in admin rec)* [2009] UKSC 2, [2010] 1 All ER 571, Lord Collins, “Where a security document secures a number of creditors who advanced funds over a long period it would be quite wrong to take account of circumstances which are not known to all of them.” That’s not a fairness argument primarily. It’s just an argument about what a statement means and the fact that it’s artificial to talk about meaning independent from the contextual information available to your audience.

ELIAS CJ:

Well, then the rule for construction could simply be reduced to you look at it when it's helpful and it's helpful only if it's relevant to the audience to which it's addressed, if it would be relevant.

MR GODDARD QC:

That would be a way of putting it. I'd probably –

ELIAS CJ:

Well, it would be so nice to cut through all this, all these words, really.

MR GODDARD QC:

Yes, that's what Lord Hoffman described as the intolerable wrestle with words and meanings, borrowed from T S Elliot, of course, *East Coker*, suggesting that our job is in some ways the same as a poet's, which is quite a nice thought although a little optimistic.

ELIAS CJ:

Well, legislation has been compared to poetry, hasn't it?

MR GODDARD QC:

Has it?

ELIAS CJ:

I suppose judgments should be but that's perhaps too optimistic.

GLAZEBROOK J:

Well, it certainly isn't as enjoyable to read.

MR GODDARD QC:

No. It makes me think of Balzac and, you know, all the years I've been speaking prose without knowing it. Je parle prose.

ELIAS CJ:

I think that's Molière, isn't it? Yes, I think so.

MR GODDARD QC:

You're probably right, Your Honour, I think, yes. One of his plays, isn't it? Dangerous to refer to literary authorities in this Court without checking them first. Let me go briefly to one literary authority that I have brought which I think is helpful. So page 3 of my notes. I refer to this in the footnote but it's just a very nice illustration. What we're actually talking about here is meaning, not a fairness issue. So this is the exchange between Humpty Dumpty and Alice about the cravat which he was given as an unbirthday present by the White King and Queen after some initial confusion about whether it was a necktie or a cravat due to Humpty Dumpty's shape and working out there are – it begins with Humpty noticing that there are 364 days when you might get unbirthday presents. Certainly there is only one for birthday presents. "There's glory for you," says Humpty. "I don't know what you mean by glory," Alice said. Humpty Dumpty smiled contemptuously, "Of course you don't till I tell you. I meant there's a nice knock-down argument for you! But glory doesn't mean a nice knock-down argument," Alice objected. Then the famous phrase, "When I use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean – neither more nor less. The question is, said Alice, whether you can make words mean so many different things," then the comment about which is to be master.

Then after Humpty's reply about some words having tempers and the verbs being difficult. "Impenetrability, that's what I say, says Humpty. Would you tell me please, said Alice, what that means. Now you talk like a reasonable child, said Humpty Dumpty looking very much pleased. I meant by impenetrability that we've had enough of that subject and it would be just as well if you mentioned what you mean to do next as I suppose you don't mean to stop here all the rest of your life. That's a great deal to make one word mean, Alice said in a thoughtful tone. When I make a word do a lot of work like that, said Humpty Dumpty, I always pay it extra." So the point of this is –

ELIAS CJ:

Yes, what do you take from that?

MR GODDARD QC:

We recognise as absurd Humpty's claim that glory means a nice knock-down argument, and that impenetrability means that long phrase. Why do we recognise it as absurd? Why do we know this is nonsense? Because we know that context, or private meanings, to which the audience is not a party, are not meanings in the sense in which we normally use that term, and the common law rejects the need to make the inquiry that Alice makes two-thirds of the way down the page, "Would you tell me please what that means." Humpty says, "Now you talk like a reasonable child." That's exactly the inquiry that the common law says a hearer does not need to make. Rather, if I receive an offer, for example, to enter into a contract, I take that as having the meaning that a reasonable person circumstanced as the speaker and I are, would take it to have.

WILLIAM YOUNG J:

Would, I mean I don't think it really matters as much here, but what do you say to two of the points made in the *Big River* case. A, does the exclusion apply in relation to the parties to the original contract you say it does?

MR GODDARD QC:

I say it does, because their intention was always that it had the meaning that it would have for the whole of the intended audience.

WILLIAM YOUNG J:

So even a point that might be conclusive as to what, a potential point that might be conclusive as to what it meant as between the parties, can't be relied upon between the parties, at most someone can apply for rectification.

MR GODDARD QC:

Your Honour has anticipated by answer. It's not a matter of interpretation but –

WILLIAM YOUNG J:

Even though it would otherwise be a matter of interpretation?

MR GODDARD QC:

If there had not been a wider audience, yes.

WILLIAM YOUNG J:

Yes, sorry. Leaving aside the, it's a registered covenant rather than just an agreement that's intended to –

MR GODDARD QC:

But that's the reason in my submission.

WILLIAM YOUNG J:

All right, and so likewise it doesn't matter if the subsequent parties to the litigation know everything?

MR GODDARD QC:

What it would mean is that rectification maybe available against them as well, because they're not bone fide –

WILLIAM YOUNG J:

But rectification –

GLAZEBROOK J:

Maybe estoppel actually if you're trying to rely on meaning that you've agreed, a private dictionary-type meaning.

MR GODDARD QC:

And if a successor knows of it and acquires with that knowledge, that and a struggle to take themselves outside the scope of that estoppel.

WILLIAM YOUNG J:

Say there'd been a prospectus here, which threw light on what was envisaged, would that be admissible? It may or may not have been looked at by subsequent parties.

MR GODDARD QC:

If it was expected to remain current and available to successors but it –

WILLIAM YOUNG J:

Well it wouldn't be current.

GLAZEBROOK J:

Well it might be if you have to have a prospectus it would have to be renewed for anybody who was buying presumably.

WILLIAM YOUNG J:

But not, so wouldn't be applied to sales from an original purchaser to a secondary purchaser, a further purchaser?

MR GODDARD QC:

So once all the sections had been sold by the original supplier, you wouldn't have to have a prospectus anymore, and that's what, I think there will be difficult boundary questions, I accept that, that's true of any test in this space, but the principal of whether you could reasonable expect subsequent purchasers to look back to that document to me would be the test.

WILLIAM YOUNG J:

So say the prospectus had said, there's going to be a members golf club, we're not going to be like these rapacious developers at Millbrook or Clearwater or anywhere else, and so this means that all members will have a full say in the running of the club and there'll be no profit motive, no disguised profits taken, it'll be absolutely great, you'd say?

MR GODDARD QC:

I'd say 50 years down the track –

WILLIAM YOUNG J:

Irrelevant.

MR GODDARD QC:

It's irrelevant. It's irrelevant. I would say that as between the original parties it's centrally relevant and it would produce at the least an estoppel, Your Honour Justice Glazebrook's point, but potentially it's –

WILLIAM YOUNG J:

But none of these arguments, the law of estoppel, the law of rectification, no doubt it overlap interpretation but it's not, they're never determinist are they?

MR GODDARD QC:

No, and that's important because what it means is that you don't tie yourself in to the sort of knots that with the greatest of respect Barber and Thomas, or actually to some extent Lady Justice Arden in *Cherry Tree* tie themselves in saying well it's admissible and relevant to interpretation as between the original parties but not subsequently, which is where Her Ladyship's dissenting judgment goes in *Cherry Tree*, because that doesn't work when you have multi-party contracts, things like my petroleum joint venture and people coming and going while originals remain. It doesn't –

WILLIAM YOUNG J:

But there's virtually no contract that can't be assigned.

MR GODDARD QC:

And that's why the –

WILLIAM YOUNG J:

I mean I suppose contracts of employment might be…

MR GODDARD QC:

A good example.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

Contracts for the provision of advocacy services. I suspect –

WILLIAM YOUNG J:

But agreements for sale and purchase of land. Purchaser may assign it yet when that case, the possibility of, that a purchaser might assign a contract, does that mean that all context around the agreement for sale and purchase is irrelevant?

MR GODDARD QC:

If there is an expectation of assignment then in my submission it does mean that material that an assignee would not be expected to have access to, could not be referred to for the purpose of interpretation as opposed to rectification estoppel.

WILLIAM YOUNG J:

So that means that even though assignment is only a sort of a 5% possibility, you have a different interpretation rule, or there's going to be a point at which the possibility of assignment is sufficiently substantial to –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– invoke, which isn't a very hard-edged rule based on an indeterminate condition isn't a very good rule is it?

MR GODDARD QC:

It's a rule –

WILLIAM YOUNG J:

Because Judges would perhaps be tempted to say that if it was really crunchy context then it would have to be an overwhelming probability of assignment to exclude it.

MR GODDARD QC:

Even the hardest-edged rules have been the subject of end runs by Judges from time to time, *The Karen Oltmann* is the famous example, under the old rules about exclusion of prior negotiations, and treating that as private dictionary, but in my submission it is better to ask the right question which is what could you expect a reasonable addressee to understand by this.

WILLIAM YOUNG J:

Why shouldn't the right question be, is it reasonable to have regard to this material?

GLAZEBROOK J:

Which is really what was said in *Firm PI* but its contextual depends on – which is why I was suggesting it mightn't be very easy to improve on that, although possibly on the *Opua ferry*, to say if it's a public document registered on a public register then it might be easier to say, well the fact that you've registered it means that you are contemplating that it be handed over, rather than there's a possibility it might be.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

It's an absolutely clear possibility because it's in perpetuity and the whole point about these things is that people get to sell and buy.

MR GODDARD QC:

Exactly Your Honour, so it speaks to a wide class of persons for an extended time. There will be difficult boundary cases, I accept that, but it seems to me that one can go further than to say is it reasonable because that provides little guidance to Judges at first instance, and to people trying to advise on this as Don McMorland emphasises in his article, the first thing that a purchaser's solicitor will do after the purchaser turns up with the agreement for sale and purchase is search the title, and they then have only a limited amount of time

to decide either to accept the title subject to the instruments registered against it, or to raise a requisition and risk being in breach if, in fact, it doesn't justify taking that step, and it's important that the document speak to those people, it's designed to speak to those people making those decisions in a limited period of time, a bit like the commercial people dealing with a bill of lading in the *Starsin*¸ so I think the Court can, with respect, go further and shed some light on factors relevant to reasonableness, which must centrally be to whom is the document expressed, addressed, to what material would they be expected to have access.

WILLIAM YOUNG J:
Say it's a funny clause. Say it's funny, idiosyncratic language. Wouldn't that, mightn't that be a slightly different issue?

MR GODDARD QC:
It might, if the likelihood was that it would prompt an inquiry which one would expect to be able to be answered over time. In *Big River*, or was it – in *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZConvC 193,938 (CA), have I got that right?

WILLIAM YOUNG J:
Yes, *Ohinetahi*, the Governors Bay case.

MR GODDARD QC:
The water supply, which actually made explicit reference to the existing water supply system on the property. Obviously there's a need to make inquiry about what that was at the relevant time, or risk being stuck with it, so a clause that explicitly refers to existing state of affairs triggers an inquiry about that state of affairs. A clause that's so obscure that you can't understand it without more, and that a reader would react to, would reasonably be expected to react to in that way –

ELIAS CJ:
Why is this not a reference in this case to an existing state of affairs?

MR GODDARD QC:

Because it was to be incorporated. It was clearly always looking forward to something to be done in the future.

WILLIAM YOUNG J:

I take it it never happened, is that absolutely clear, because some of the material beforehand suggested that it was at least uncertain whether there was an incorporated society.

MR GODDARD QC:

I think, subject to correction by my learned friend, that there was never an incorporated society that provided playing rights on this golf course. My learned friend nods, yes, that's right.

WILLIAM YOUNG J:

What about the resident's association, didn't –

MR GODDARD QC:

It didn't provide playing rights. It was at one stage thought it might but that was changed.

WILLIAM YOUNG J:

I see.

MR GODDARD QC:

So I'm conscious of time. I think I've really dealt with everything in my points 1, 2, 4 and I've really anticipated what I say in 5 about registered instruments. In fact Your Honour Justice Glazebrook anticipated it for me so I don't need to go there. It's a core example of something addressed to many people over an extended period who will be materially affected by it, and who, as Don McMorland points out, will have to make decisions in relation to its effect within reasonably limited timeframes. Not quite as tight as a banker trying to work out whether or not to honour a letter of credit, but still confined, and Your Honour Justice Young has raised with me the concerns expressed by

the Court of Appeal in *Big River Paradise*. I say that does have the same meaning all the way through, and that it's a mistake to ask interpretation to do all the work that other doctrines do. It's not an accident that the law of contract has a number of tools in its toolbox and the equitable principles of rectification and estoppel enable the sort of difference in outcome between original parties and subsequent parties without notice to be reached, that intuitively most Judges see as relevant, and the position reached by, as I say Lady Justice Arden in *Cherry Tree*, that you have different meanings as between the original parties and subsequent parties, with respect, just can't be right. It's inconsistent with a great deal of other authority that an instrument has one meaning.

WILLIAM YOUNG J:

I'd be surprised if there are cases on easements as between the original parties which were not decided by reference to contextual evidence,

MR GODDARD QC:

If the point wasn't taken then that's not surprising.

WILLIAM YOUNG J:

It might have been seen as too obvious for words.

MR GODDARD QC:

If it's again the point that the English Court of Appeal the majority Sir Kim Lewison and the other Judge in the majority made in *Cherry Tree* was that there was an obvious path to the right answer in that case which was rectification but that it wasn't appropriate to mangle the law of interpretation in order to produce the outcome that should be reached through another channel.

ELIAS CJ:

In this context too there are statutory powers, I'm just thinking about the easement context, where an easement is particularly onerous –

MR GODDARD QC:

Where circumstances have changed for example.

ELIAS CJ:

Yes. A party can make application and one would have thought in this case too the application could, if the incidents became very onerous of membership of the golf club, application could be made under the Property Law Act provisions.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Both ways?

ELIAS CJ:

No, I don't think both ways.

WILLIAM YOUNG J:

Can a covenant rely on a – seek to –

MR GODDARD QC:

I think either party can apply.

WILLIAM YOUNG J:

So could you, you think you could go along and say, well it's a bit awkward because the golf club set up actually isn't so we want the covenant extended with the…

MR GODDARD QC:

I think to say circumstances have changed when they're the product of your own actions might be something that –

WILLIAM YOUNG J:

Well they often are quantified as actions for instance building over something.

MR GODDARD QC:

Yes, if something had been, yes. I mean in some circumstances absolutely, but in my submission what again that shows is that there, and this I think is the point of Your Honour's question, that there are safety valves available in this area, but they're safety valves that can be applied in a nuanced way. You first of all work out what it means, then you ask whether given the change in circumstances it produces unsatisfactory or unworkable results, and if so then there's a power to intervene. But again you can look at the circumstances of the particular parties who have knowledge of what, what would be a just order to make under that statutory jurisdiction, and that's how the High Court of Australia saw the comparable regime under the Australian legislation. They saw it as one of the methods –

ELIAS CJ:

Under the Torrens system.

MR GODDARD QC:

Yes, under the Torrens system like us.

ELIAS CJ:

So did they refer to statutory powers?

MR GODDARD QC:

Yes.

ELIAS CJ:

I can't remember, this is in *Westfield*?

MR GODDARD QC:

Yes, and said that that – in *Westfield*, so they said, well like rectification, like estoppel, there is this other power and that really confirms, they said, the need to give the covenant a fixed, the ability and the need to give it a fixed meaning from the time its first entered into through time as it finds different parties, because there are safety valves that address both the position as between the

original parties, rectification and estoppel, and the position if the covenant interpreted in that way becomes problematic well downstream.

WILLIAM YOUNG J:

Perhaps another problem is that the view that the contract can only have one meaning over time might itself be a metaphor that doesn't have practical significance. That as between the original parties to the easement there's no problem with construing it in accordance to its proper meaning further down the track is where none there call it treason succeeds, none there call it treason, we just exclude all the evidence so there's no question of it having shifted meaning.

MR GODDARD QC:

One could see enormous difficulties with that in a scheme like this one where the same covenant is on 70 or 100 titles.

WILLIAM YOUNG J:

Well that would be a significant factor.

MR GODDARD QC:

And that's one of the factors I rely on here. It's not just addressed to this one person.

ELIAS CJ:

It's the other covenantees.

MR GODDARD QC:

Yes, it's all of them.

ELIAS CJ:

Or covenantors, I always get those wrong.

MR GODDARD QC:

Covenantors. The other covenantors.

ELIAS CJ:

The other residential –

MR GODDARD QC:

Section owners.

ELIAS CJ:

Section owners are entitled to rely on the covenant applying to all owners of sections in the same way.

WILLIAM YOUNG J:

Well I don't think you can say that, would you, because haven't you sold sections without the covenants?

MR GODDARD QC:

I don't know, I don't go that far, but what I say is –

ELIAS CJ:

Oh that's extrinsic evidence.

MR GODDARD QC:

What I say is that it would, it can't be the case that an identical covenant registered on a very large number of properties has different meanings as between different people.

WILLIAM YOUNG J:

Well, okay, I'm pretty sure just reading through the extrinsic material that there's a reference to the previous developer having had to withdraw the covenants because they couldn't get sales, or mortgagees were doing it.

MR GODDARD QC:

Let me check that during the adjournment, which I notice I've trespassed into as well. I'm going to be very brief in dealing with the second part because we began there, and I'll just leap back briefly, and then I'll be done.

ELIAS CJ:

Thank you, we'll take the adjournment.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.53 AM

ELIAS CJ:

Thank you.

MR GODDARD QC:

Your Honour, two things from this morning that I said I'd come back to that I should just do before I move on. First, Professor McLauchlan, and his views on this particular issue. If I can go to the supplementary bundle of authorities, and I am glad that I have found at least one practical use for it today apart from saving Your Honour's clerks some photocopying of the usual suspects when it comes to the background authorities. Tab 9 is Professor McLauchlan's I think most recent discussion of this issue from December last year, the called, slightly sadly, *The ICS Principles: A Failed 'Revolution' in Contract Interpretation?* His Honour – I have a lot of respect for my former teacher. It's probably overshooting. The professor concludes that perhaps its not a completely failed revolution, or at least that there's something of a counter-counter-revolution, but the relevant passage for our purposes begins on page 272 of the article from the NZULR, under the heading roman V, "A retreat from ICS?" Practitioner perspective. Mr McLauchlan says, "Prevailed in an important respect when the House of Lords in *Chartbrook* refused to overturn the rule excluding evidence of prior negotiations," that's not our issue today. "As well as this, the concerns over the impact of the *ICS* principles on third parties have led to what is perhaps best described as a refinement of the principles, albeit that its exact ambit remains unclear. It is now established that the scope of the background facts that a reasonable reader will take into account in determining meaning may vary according to the nature of the contract. Thus, in the case of public documents (such as a company's articles of association or a registered charge), negotiable instruments or other documents transferable by delivery

(for example, bills of lading), or security instruments that will be relied upon by third parties or, indeed, to which third parties may become privy., the position is that *either* the admissible background facts will be limited to those that affected third parties could reasonably be expected to be aware of *or* that the reasonable reader will take into account the additional fact of foreseeable third-party reliance on the document."

So that's the two possibilities relied on in the Barber Thomas article footnoted at 58 and my submission, of course, is that it's the former of those views which should be preferred. But then, and I associate myself and gratefully adopt the next point made by Professor McLauchlan, "However, whichever view is preferred, it need not be seen as involving an exception to the *ICS* approach. As pointed out recently in the New Zealand Supreme Court, "[t]he fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties' awareness being itself part of the relevant background".

So I think Professor McLauchlan is entirely comfortable with this approach and sees it not as an exception to *ICS*, but as a refinement of it.

GLAZEBROOK J:
I didn't think he liked *ICS* at all, was the point I was making, because he thinks it is a subjective interpretation of the contract, doesn't he?

MR GODDARD QC:
No Your Honour. He is very supportive of *ICS* and of the objective approach but what he, the bit about *ICS* that he's not keen on is the exclusion of prior negotiations, which of course the New Zealand Courts have also been less enthusiastic about, and post-contractual conduct might be added. But Professor McLauchlan –

GLAZEBROOK J:
Well that's because he sees it should be a subjective approach to the interpretation to look for the actual intention of the parties.

MR GODDARD QC:

That's not my understanding of his main argument. Rather it's that the negotiations can also shed light on, are also relevant context which can inform an objective approach, and where you've got a contract where the audience is the parties, that's right. It would be inconsistent with a view that it was subjective intention that mattered for the comments made on these pages to be seen as appropriate.

GLAZEBROOK J:

Well I'd always understood that his approach to contractual interpretation was one that looked for the actual intention of the parties, against the need for the look at negotiation, but it doesn't matter in any event because if that is the case it's not what the law is at present.

MR GODDARD QC:

Indeed, and what I do say he has rightly identified in this article, is that the approach in cases like *Starsin*, isn't an exception to *ICS*, it just explains how it works when the speakers and the audience are not the same. A refinement that didn't need to be dealt with in that case. The other thing that I was going to come back to was Your Honour Justice Young's question about the number of properties encumbered with the covenant. In volume 2 of the case on appeal in the evidence of Mr Robertson, whose a director of both of the appellant companies, and I'm on page 65 of volume 2 of the case on appeal. Mr Robertson says at paragraph 26, "There are 39 other properties at the Lakes Resort which are encumbered with the Covenant or something similar." If we then turn over –

WILLIAM YOUNG J:

So how many properties are there in the development?

MR GODDARD QC:

There are some 153, and we see that from the rules of the Residents Association, actually, no, from the encumbrance relating to the

Residents Association, so if I just take the Court to that, page 167 we have another encumbrance registered on all of these titles.

GLAZEBROOK J:

Page 167?

MR GODDARD QC:

Page 167 is where the encumbrance begins. The business entity is another example –

GLAZEBROOK J:

Can you give me a second.

MR GODDARD QC:

Of course, sorry Your Honour, I've been jumping from volume to volume rather. So volume 2 of the case on appeal still, page 167, this is another encumbrance to which the properties are subject between the encumbrancer and the encumbrancee, the Residents Association, and we see various promises made in relation to the golf course land, and what the number of properties is apparent from page 172 in the definitions where we see "development" defined to mean the development comprising approximately 153 residential sections, recreational and associated facilities and the golf course, currently known as Pauanui Lakes Resort. Perhaps just to avoid confusion –

WILLIAM YOUNG J:

Well what's the golf club easement say? Is that not there?

ELIAS CJ:

Sorry, where's that referred to?

WILLIAM YOUNG J:

There's a golf course easement that was in draft that was an attachment I think.

MR GODDARD QC:

And that ultimately, as I understand it, did not proceed in the contemplated form. Clause 5 of this encumbrance, on page 171, refers to terms of encumbrance of the golf course and provides for rights to enjoy and use the golf course. But that was released and let me just show the Court that because that's helpful to two aspects of the argument. So if we look at page 196 of the case on appeal. What we see here is a letter from June 2003 by the then, from the then developer to the Residents Association and we see – and this is an illustration of the point I'll be making shortly also about the extent of control that can be retained over a incorporated society by someone other than members. But what we have here is a letter from the developer to the Residents Association, and incorporated society, "Please be advised that Pauanui Lakes Properties Ltd as controlling member and developer requires the Pauanui Lakes Resort Residents Association Inc pursuant to rule 7.1.3 of its constitution to amend the constitution by revoking the existing constitution and adopting a new constitution," and then references to the golf course easement being an inadequate method of managing the playing rights. The developer now proposes a separate entity, the final details of which have yet to be determined, so it still wasn't a known in June 2003, will be set up to manage and control the playing rights. "Accordingly a new constitution for the Residents Association is required." Then if we turn over the page what we see is a range of notices of motions to be passed at a special meeting.

ELIAS CJ:

Sorry, so it didn't envisage an obligation. It was a right to subscribe to or join.

MR GODDARD QC:

There was also a corresponding obligation.

ELIAS CJ:

Was there?

MR GODDARD QC:

To join.

ELIAS CJ:

Right.

MR GODDARD QC:

But that's the material that hasn't proceeded. The different mechanism was adopted instead.

ELIAS CJ:

I see. Sorry, what page were you taking us to?

MR GODDARD QC:

So then just over to the next page, 197, again we see number 1, "That there now being more than 15 owners (excluding the developer) as members of the association the first members named in Rule 4.1 of the constitution be deemed to have resigned and their memberships terminated." A common mechanism used by developers to have some initial members who are not, in fact, in the class that will ultimately be members of the association, who can adopt rules, approve entry into contracts, take all those other steps, so it's all set up before the association has its intended members, and you see that in many developers, another one coming before this Court in two weeks with a similar structure, and then the new members.

Number 3 over on 198, "That the books of the association show that Pauanui Lakes Properties Limited is the developer and controlling member of the association being the assignee and success of Pauanui Lake Resort Limited (in liquidation)." Actually that should be receivership. That certain actions of people acting as the committee be ratified in relation to the golf course. Then over the page at 199 we see some modifications to the constitution. Number 9, "That the committee be authorised to execute the management agreement with Pauanui Lakes Administration Limited." And number 10, "That the committee be authorised to discharge the memorandum of encumbrance containing the golf course easement from the title to the golf course on the grounds that the playing rights for member are to be provided through a separate golf course structure and not through the

Residents Association." So that's what took out the clauses in the earlier encumbrance.

So that shows both how the right to play was removed from the Residents Association structure, because it was expected it would be dealt with through a different –

ELIAS CJ:
So is there any encumbrance on the title of the golf course at the moment?

MR GODDARD QC:
Of the golf course, there are a wide range of –

ELIAS CJ:
No, relating to the rights of residents to use the golf course?

MR GODDARD QC:
I don't believe so Your Honour.

GLAZEBROOK J:
Or indeed that it remain a golf course?

ELIAS CJ:
Or, yes.

MR GODDARD QC:
I'm not sure, my learned friend may know. There are a range of obligations, for example, as I understand it. A lot of the services for all of the sections pass underneath the golf course land, and so there are a raft of registered encumbrances in respect of the golf course land in relation to the use of that land and the continued ability to run services across it, the details I have to go back and check.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:

It doesn't seem to be an issue, but might there not be a difference between being one of 39 members of a golf club and required to meet the running costs, and one of 153 members of the golf club and required to meet its running costs?

MR GODDARD QC:

If it was only going to be recovered from residents that would be the case, but if membership was expected to be offered more widely there need not be. It might just create more headroom for commercial sales and memberships which might actually be on more favourable terms. Impossible to say in the abstract.

WILLIAM YOUNG J:

Or might it be, I mean I think there was a term, an expression that covers this, but is it, on a development like this implicit in the way that the sections are marketed, the other sections to be marketed will be subject to the same covenants?

MR GODDARD QC:

It's an issue that's discussed by the Supreme Court of England and Wales of *Arnold v Britton* and your right, Your Honour, there is a term for it, a something or other scheme, which I can't remember either, but what Their Lordships said in that case, which is the same here, is that an attempt was not made to argue that there was such a scheme in that case, perhaps because it wouldn't help anyway. There's no suggestion that the absence of that promise from other titles has any bearing on the obligation of the respondent to pay here, because there's no charge to quantum.

WILLIAM YOUNG J:

But it could be, sorry, it could be that the golf club that was envisaged would be one to which all owners of land in the development would be required to be members, whereas the golf club you're proffering is not a golf club of that character.

MR GODDARD QC:

That would be an ambitious argument based on the language of the covenant because –

GLAZEBROOK J:

Well not really because it might have been based on the fact that there was going to be an incorporated society in the same way that the Residents Association was incorporated.

MR GODDARD QC:

But the incorporated society wouldn't necessarily have to be one that every resident was obliged to belong to, and there's no suggestion of that in the covenant. Whereas I think one would see such an expectation in the Residents Association encumbrance because for that to be –

GLAZEBROOK J:

Well can we have a look at it. Where does that say – in terms of these Residents Association rules.

MR GODDARD QC:

Residents or golf club?

GLAZEBROOK J:

No, I was wondering if the Residents Association rules with the encumbrance – were they reprinted without that?

MR GODDARD QC:

I don't know Your Honour.

GLAZEBROOK J:

Because if somebody wants to look at the Residents Association rules, what would they see?

MR GODDARD QC:

There's an obligation to register all amendments with the registrar of incorporated societies.

GLAZEBROOK J:

I understand that, but if you wanted to have a look at it you'd be able to – what would you be looking at in terms of the rules, the rules and the amendment.

MR GODDARD QC:

And the encumbrance and the instrument of discharge which would be on the title.

GLAZEBROOK J:

Which you might then want to find out why that was discharged in terms of the memorandum of encumbrance if you're talking about language that you might want to look at, and that might be available.

MR GODDARD QC:

You might, but that's not the argument that's being made here. No one's suggested that those instruments help either way with this inquiry.

GLAZEBROOK J:

Well they mightn't have to date but it might be that they do help with the inquiry.

MR GODDARD QC:

Yes, as I say no suggestion of anything has been made. Coming back to the encumbrance in relation to the Residents Association we do see that sort of scheme explicitly contemplated here. If we go to page 167 of volume 2 of the case on appeal, what we see is the introduction, recitals, "The encumbrancer is registered as proprietor of the land," that's the whole of the land at this stage. "The encumbrancer is in the process of developing the land into residential lots. Community lots and the golf course and has established the encumbrancee for the purposes of administering the communal assets."

C, “The registered proprietor of each lot from time to time… the body corporate … is required to become a member of the encumbrancee and abide by the constitution of the encumbrancee. D, “The encumbrancer has agreed to encumber each lot severally for the better performance of the obligations of the registered proprietor from time to time of a lot to the encumbrancee.” So there was explicit contemplation in this encumbrance that it will apply to every lot and will confer mutual benefits.

GLAZEBROOK J:
What’s the definition of “communal assets”?

MR GODDARD QC:
So that takes us back to page 172, and it’s a long definition.

GLAZEBROOK J:
I merely wanted to know whether it included the golf course.

MR GODDARD QC:
It doesn’t appear to include the golf course. Actually it’s very general, land held or operated by the encumbrancee, but as the encumbrancee may determine, including roads and walkways, recreational and associated facilities, various things.

ELIAS CJ:
Sorry, where’s that definition?

MR GODDARD QC:
At 172 Your Honour.

GLAZEBROOK J:
It may well be that the specific encumbrance over the golf course might be taken outside of the communal assets.

MR GODDARD QC:

That's my impression from a quick first read of this.

GLAZEBROOK J:

It looks like it, yes.

MR GODDARD QC:

But that's all I'm doing as well. As I say, no party has – although I think there would be a strong argument that an encumbrance of this kind, which is also registered against all of the relevant lots, would qualify as context that would be expected to be available to subsequent parties.

GLAZEBROOK J:

It just does imply that it is a mutual covenant for everybody, doesn't it?

MR GODDARD QC:

For the Residents Association it's very clear.

GLAZEBROOK J:

For the Residents Association but over the golf course.

MR GODDARD QC:

If the golf course is a communal asset, and at this time because –

GLAZEBROOK J:

Well, no, well even if it's not I think it still contemplates that by way of the actual encumbrance, doesn't it, in clause 5?

MR GODDARD QC:

In clause 5, but to the extent that clause 5 was released, and we know that it substantially was, then obviously you can also see that from the title and you'd have to read –

GLAZEBROOK J:

Well all I'm saying is it might have been that they, that the background that you might expect someone to ask about is why was that released and then be provided on the basis that it was going to be replaced by another structure.

MR GODDARD QC:

But it has been.

GLAZEBROOK J:

For everybody. But the implication being for everybody who was a member of the Residents Association because they gave up that, because it was going to be given to them under some other means.

MR GODDARD QC:

In a – bill so your obligation to pay.

GLAZEBROOK J:

The rights and obligations to have in the golf course were going to be given to them by some other means, which does imply everybody who's a member of the Residents Association.

MR GODDARD QC:

That, in my submission, would be a stretch from the material that ultimately was registered, in particular the covenant that deals with the golf course issue, and it's not –

GLAZEBROOK J:

Yes, but if you're saying that, if you accept, which you did I think, that if there was something that you wanted to know about, you would expect someone who was wanting to buy something to go and look at the rules of the Residents Association and the encumbrance and then they would be maybe puzzled as to why it was released and therefore what their, what the new covenant might mean. It could well be part of the relevant background you are allowed to look at and would expect someone to enquire about, i.e. why

was this encumbrance released over the golf course that gave the right and obligation of everybody.

MR GODDARD QC:

I don't know that one could expect an inquiry to be made about the why precisely because one might well expect that the reasons for that would become lost in the mists of time rather quickly. I don't think that would be a reasonable inference Your Honour. The, what was done I think is a reasonable question, but the why wouldn't be in my submission. And again I think we do need, in relation to the golf course obligation, to come back to the covenant relied on which is the range of covenants given in the document beginning at page 218, but most particularly the membership obligation in clause 7 on page 223, and is in my submission clear, first of all, that there's an obligation imposed on this lot to join the golf club and pay the fees, but also that there is no express or implied promise that a similar obligation will be imposed on others, and the contract with the Residents Association encumbrance is very striking on that dimension. There's nothing in the introduction contemplating such a scheme. There's nothing in the clause that would provide a foundation for such a scheme, and it's not been argued by the respondent that there was a need for such a scheme in this case.

I think I can deal pretty briefly with the remaining paragraph of my roadmap, although I suppose only time will tell. The submission, I've already gone to the covenant, that's eight. The relevant context I've addressed orally. In particular the physical layout of the subdivision, the existence of the Residents Association and what it does and doesn't extend to, and as I say at 10 it's not as if there's any suggestion by the respondent here that there's some other golf club they should be joining. There's only one candidate.

WILLIAM YOUNG J:

Well there are two options. Either there is a golf club that the covenant relates to or there isn't.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

I mean it's not really to say well is there another golf club that benefits, which might be a suitable enquiry in a will case.

MR GODDARD QC:

Against the backdrop of the purpose of this covenant, which is clearly to require membership of and financial contribution to a golf club operating a golf course on this designated title, it would be a little surprising to find that there was a gap in which there was no golf club at all. That would be odd. It's not impossible but it's a surprising outcome, having regard to the obvious commercial purpose of this document. So as I say the question is really first of all is this just a question of identification, in which case there's no problem at all because we can identify the only candidate, as Your Honour says. Or is it are these words of obligation, in which case the question becomes whether the obligation is sufficiently immaterial that non-compliance justifies a refusal to pay, and –

ELIAS CJ:

It would be rather odd, I suppose, to find an obligation – well, you'd have to construe I think, but in the definition section.

MR GODDARD QC:

Yes. That's one of my submissions.

WILLIAM YOUNG J:

But there's no, this isn't I suppose a bilateral contract. It's not promise for promise, is it? It's an assertion by, it's a promise by the purchasers that if certain events happen they will do something.

MR GODDARD QC:

It's a mix of restrictive covenants in relation to building and positive covenants in relation to joining the golf course.

WILLIAM YOUNG J:

Yes, but in this respect it's a promise that if there is a golf club it meets, as defined, they will pay, they will be a member and pay the fees.

MR GODDARD QC:

If there's a golf club that comes within the scope of the instrument they'll join and pay fees, yes.

WILLIAM YOUNG J:

But there's not a promise by anyone to provide them with a golf club.

MR GODDARD QC:

No. But there's an expectation that –

WILLIAM YOUNG J:

Its envisaged that there would be.

MR GODDARD QC:

It's envisaged that there would be, exactly, and that that is a basic feature of the subdivision and an integral part of its ongoing character.

GLAZEBROOK J:

But you say there is absolutely nothing to stop them subdividing up the golf course and putting other units on.

MR GODDARD QC:

I don't know and that's not the issue here.

GLAZEBROOK J:

It mightn't be the issue but it's certainly relevant, isn't it?

MR GODDARD QC:

If they did that then obviously there would no longer be, there could no longer be a golf club that provided the sort of quality of playing experience that Your Honour referred to earlier, so the whole thing would be as –

GLAZEBROOK J:

Well it mightn't be a sensible thing to do commercially, but on the other hand it may be for all we know, which is just why I asked whether there was anything, because obviously the Residents Association encumbrance provides that before.

MR GODDARD QC:

Yes, and I just don't know and it's not in my submission relevant to the interpretation – I mean that might give rise to issues of impossibility in the absence of anything that could be described as providing playing rights on a golf course, so obviously if there's no golf course, no playing rights, there can't be a golf club that answers any part of this description. The case would become easy.

GLAZEBROOK J:

Yes, but in that case if there's no corresponding obligation it is envisaged that there mightn't be a golf club you can join.

MR GODDARD QC:

I don't know whether that possibility can be completely excluded by reference to legal obligations, but in any case it's not where we are now, so you have a meaning that's ascertained at the time of creation of the covenant, and it's applied from time to time to ask whether a particular entity is a golf club in the relevant purposes.

So I say the key questions, my 11, is what the words "to be incorporated" as in incorporated society, are doing in this clause, and as Your Honour the Chief Justice pointed out, one of the first things to know is that they feature in the definition section, not in an operate provision, which does rather suggest

that they're doing work as an identification tool, not as a source of positive obligation.

That's a distinction that is teased out most helpfully in a case which, as it happens, is also one of the leading authorities relied on by Lord Hoffmann on how one interprets contracts, *Reardon Smith Line v Hansen-Tangen*, the last case I'm going to take the Court to, promise. It's in volume 2 of the authorities, it begins at page 246, and Lord Wilberforce delivered the first speech with which the other members of the House agreed. I'll come to that. Beginning at page 250, a series of charter parties and sub-charter parties relating to a tanker to be constructed in Japan. The chaterterers wanted to escape because the market had, from the contracts, because the market had collapsed, and as His Lordship notes at letter E on 250, "The ground on which they hoped to do so was that the vessel tendered did not correspond with the contractual description." Well known form of charterparty, and the descriptions appear most clearly over the page at 251 after going through the construction contracts and then the intermediate charter, we see the charter with which Their Lordships were directly concerned between letters F and G, "It is this day agreed between H E Hansen-Tangen of Kristiansands," Norwegian owners, "being disponent owners of the good Japanese flag… Newbuilding motor tank vessel called Yard No 354 at Osaka Zosen… and Rearden Smith Line," and as His Lordship goes on to explain in the next page or so the Osaka Shipbuilding Company actually couldn't build a ship that big so it set about arranging for a new shipbuilding yard to be built at Oshima, which it part-owned along with Sumitomo, and over the page 252, letter B, just under it, "The vessel to be constructed was to be numbered 004 in Oshima's books but also 354 in Osaka's books and in export documents." And as His Lordship says, half way between letters C and D, "These being the background facts, the whole case, as regards the first appeal, turns, in my opinion, upon the long italicised passage in the sub-charter set out above which, for convenience of reference I repeat, '(the good) Japanese flag (subject to clause 41) Newbuilding motor tank vessel called Yard No 354 at Osaka Zosen'," which His Lordship refers to as the box because it's in a box.

Then His Lordship goes on to deal with the importance of reference to context at the foot of that page and over on 253, I don't need to dwell on that. 254, between letters F and G, a paragraph beginning, "In addition, since at the time of either charterparty the vessel was not in existence or under construction, some means had to be agreed upon for identifying the particular vessel – one out of a programme – which would form the subject matter of the charters. This was indispensable so as to enable those committing themselves to hire the vessel, to sub-hire it, if the wished, and if necessary to arrange finance. This necessary identification was to be effected by nomination." And that's just as the situation was with the golf club in 2003. No entity yet, some means of identification.

What we see at the foot of that page, after looking at the insertions in the box, His Lordship says, very last line of 254, "What is vital about each of these insertions is that they were simple substitutes for a name," and that's true here too. If there was a golf club in existence, it could just have been named, but because there wasn't there had to be a description of what it would be doing, it would be providing playing rights on the golf course and it was envisaged that it would be an incorporated society. "But they were simple substitutes for a name, serving no purpose but to provide a means whereby the charterers could identify the ship." Same here.

Then at B, "The appellants sought necessarily, to give to the box and the corresponding provision in the intermediate charter contractual effect. They argued that these words formed part of the 'description' of the future goods contracted to be provided, that, by analogy with contracts for the sale of goods, any departure from the description entitled the other party to reject, that there were departures and that the vessel was not built by Osaka Shipbuilding Co Ltd and was not Hull No 354. I shall attempt to deal with each of these contentions." So first of all His Lordship expresses some scepticism about whether there's a special rule in relation to contracts for the sale of goods.

But the substance of His Lordship's analysis, the part that's important for our purposes, begins at the top of page 256. "In my opinion the fatal defect in their argument consists in their use of the words 'identify' or 'identification' to bridge two meanings." This is the distinction we need to draw her. "It is one thing to say of given words that their purpose is to state (identify) an essential part of the description of goods. It is another to say that they provide one party with a specific indication (identification) of the goods so that he can find them and if he wishes sub-dispose of them. The appellants wish to say of words which 'identify' the goods in the second sense, that they describe them in the first. I have already given reasons why I can only read the words in the second sense." And I say here too all that this definition is doing is identifying the golf club so it can be found, joined and paid. It's not providing an essential part of the description of it.

So continuing just under letter B, "The difference is vital. If the words are read in the first sense, then, unless I am right in the legal argument above, each element in them has to be given contractual force." That's my friend's argument. "The vessel must, as a matter of contract, and as an essential term, be built by Osaka and must bear their Yard No 354 – if not the description is not complied with and the vessel tendered is not that contracted for." That's the argument here. The respondent says –

WILLIAM YOUNG J:
In that case the vehicle was, the vessel was subject to specifications to which it conformed.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
And at the time the agreement was entered into it was intended to be built at the Osaka yard. So one can see –

MR GODDARD QC:

It was never intended to be built at the Osaka yard because they couldn't build vessels that big.

WILLIAM YOUNG J:

Oh, well it was thought to have been intended to be built. Whoever put the words in the box must have thought it was going to be there.

MR GODDARD QC:

There's some explanation of the context which His Lordship goes to having said it is relevant, but that can't have been expected because the yard just never had the capacity to build anything remotely that big. The capacity I think was less than half that.

WILLIAM YOUNG J:

Right. Sorry, but in any event throughout, the contract was in essence to supply a vessel that had certain characteristics.

MR GODDARD QC:

Yes, the golf course –

WILLIAM YOUNG J:

And in issue was whether the idea that it be built at the Osaka yard was critical.

MR GODDARD QC:

And have the number 354 in that yard.

WILLIAM YOUNG J:

Well, it sort of had that number. I mean, it had that number in their books but it wasn't – didn't have that number in the yard.

ELIAS CJ:

Some of their books.

MR GODDARD QC:

Yes. So His Lordship continued, just under letter C, "If in the second sense," that's the identifying sense, the only question is whether the words provide a means of identifying the vessel. If they fairly do this, they have fulfilled their function. It follows that if the second sense is correct, the words used can be construed much more liberally than they would have to be construed if they were providing essential elements of the description." So that's the idea and then what we've got is a pointer to which golf course and bear in mind that what we have here, and it's a bit like Your Honour's reference to the schedule setting out all the detailed requirements for this ship, is the requirement that it provide playing rights on a golf course on a very specific parcel of land. That box gets a tick. The only question is whether the additional element in the definition, that it be an incorporated society, is simply part of the identification, part of the pointer that isn't met but it doesn't matter or whether it's contractually operative and essential. And then His Lordship goes on, at letters D down towards G, to discuss the particular label and the background, and actually there's a reference near F to the fact that the yard, the parties must have known the yard could not construct the vessel, Your Honour.

So just above G, "The question becomes simply whether as a matter of fact it can fairly be said that – as a means of identification – the vessel was Yard No. 354 at Osaka Zosen or 'built by Osaka… and known as Hull No. 354 till named.' To answer this, regard may be had to the actual arrangements," and down at the foot of the page, last two sentences, last three lines, "For the purpose of the identificatory clause, the words used are quite sufficient to cover the facts. No other vessel could be referred to: the reference fits the vessel in question," and in my submission the reference here, the golf course, the golf club that provides playing rights on this very specifically designated golf course again ticks that box.

Then over the page, 257, other facts not to be overlooked, "(1) So long as the charterers could identify the nominated vessel they had not the slightest interest in whatever contracting or sub-contracting arrangements were made

in the course of the building, a fact which no doubt explains the looseness of the language used in the box," and (2), perfectly straightforward action.

So I don't think I need to go further than that. What that tells us is that the first inquiry is are we just identifying and if, as in my submission – so let's go back to the covenant, actually. Let's take volume 2 of the case on appeal and turn to the relevant clause on page 223 and look at clauses 9.4 and 9.5. 9.5 tells us what the golf course is, the golf course being developed, a bit like a ship being built or to be built, on the land in CT da-de-da-di-da. No doubt but that we've got that golf course. "'Golf Club' means the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course." So that's a description with two limbs, "To be incorporated as an incorporated society," "To provide for playing rights on the golf course." No question but that the second half is satisfied. If what we're trying to do is identify the golf club, there's plenty of guidance here to be able to find the right golf club, and in terms of the purpose of this covenant, as apparent from its face, there's no obvious reason why it wouldn't be that one unless there was something important about – unless, first, the language to be incorporated as an incorporated society is language of contractual obligation, not language of identification, in my submission not, and, second, if it is language of obligation that it's sufficiently important, sufficiently essential that failure to meet it justifies not joining.

GLAZEBROOK J:
Even if it's contractual obligation – even if it's identification, it could still be important because what you have to identify is the incorporated society that gives you that right rather than just a golf course.

MR GODDARD QC:
I think that's to run together the two concepts –

GLAZEBROOK J:

Well, I don't think so because if it was in terms of identification important in that ship case that it was actually built by one rather than subcontracted then it could still be identification.

MR GODDARD QC:

The way Lord Wilberforce approached it was to say, "Do we have enough here to point to a unique vessel? Yes, we do and –

GLAZEBROOK J:

But that's because you had a whole lot of other specifications, isn't it. If it just said, if it was just a vessel built by X with nothing further, which of course would not be even possible one would imagine, but it could be a vessel of a particular size and a particular – and it might be important that it was built by one not the other.

MR GODDARD QC:

That it's of a particular size is clearly critical, and all the other performance characteristics that are referred to clearly were important.

ELIAS CJ:

That's not identification, that's description.

MR GODDARD QC:

Yes, and obligation, and that in my submission is, yes. And here what we have is a definition, not a provision, which points us to the golf club that provides playing rights on a very specifically identified parcel of land and so if we ask, are we in any serious doubt, Lord Wilberforce's question about which golf club we're talking about, the answer is no unless the reference to future incorporated as an incorporated society is an essential element of the obligation agreed to be assumed by the covenantor. So we aren't left in doubt about who if we're just doing identification, but does this language serve that purpose, and there are two routes, either of which leads to this appeal being allowed. The first is to say it's merely language of identification, we see that

from the structure and we're not left in any doubt. The other is to say, this is my paragraph 13, so suppose these are substantive obligations or restrictions. Is there a material difference, which means that what's being put forward materially fails to comply justifying a refusal to perform.

ELIAS CJ:
Is that an interpretation argument though. That's really –

MR GODDARD QC:
No.

ELIAS CJ:
It's a consequential question that might arise if there was some dispute, as there is not currently.

MR GODDARD QC:
I think my friend's argument encompasses both the, this is not the golf club –

GLAZEBROOK J:
But even if you say it's identification, if it's an essential identification that it has to be an incorporated society, just as it would be essential to identify in the ship case that it was a ship, having those essential characteristics.

MR GODDARD QC:
I don't think the essential characteristics are matters of identification. You could easily be able to find the vessel which had been identified as yard number 354 Osaka, and then find that it wasn't big enough, or that it didn't have some of the seaworthiness characteristics, and those are matters of positive obligation.

GLAZEBROOK J:
Well then it wouldn't be identified as being the right vessel.

MR GODDARD QC:

No, well no it would be the right vessel, but it would not meet contractual obligations about its characteristics.

GLAZEBROOK J:

Well I'm not sure, I don't really like that bifurcation to be frank.

MR GODDARD QC:

I don't, I mean I think Your Honour is right in the –

GLAZEBROOK J:

It's very difficult to bifurcate the two things because here they were saying, well I'm not even sure that they were doing that in the ship case effectively, so they're saying you wouldn't have any doubt when you looked at that ship, that it was the ship that was being referred to which must encompass the fact that it had all of those characteristics.

MR GODDARD QC:

Well there was no dispute about it having the characteristics in that case.

GLAZEBROOK J:

Well, no, exactly, but if it hadn't had the characteristics then it wouldn't have been easily identified as being the ship, whatever it's number was –

ELIAS CJ:

It might have been identified but not have had the characteristics in which case there would be an argument as to whether it met the contractual specifications, which is not an identification argument.

MR GODDARD QC:

Exactly Your Honour.

ELIAS CJ:

That's what you're saying.

MR GODDARD QC:

So you might be obliged to take it but you might have a claim for damages because one of the obligations wasn't met in relation to the methods of construction, or quality of construction of the vessel, so it's very –

GLAZEBROOK J:

It's possible, I just don't think that that's what you can take from that judgment. So they're saying there was only one vessel that could have been because of that rather than that you would be obliged to take it anyway, even if it didn't meet the specifications.

MR GODDARD QC:

Well Their Lordships didn't have to deal with that issue, but I think it's implicit in Lord Wilberforce's analysis, and that of other members of the House –

GLAZEBROOK J:

Well I think it was implicit to say that you had two ships that meet all of the specifications and that therefore it's fine in terms of identification. So I'm coming at it from the other side I'm afraid.

MR GODDARD QC:

The first question is, do we know what ship is referred to here, and that's what Lord Wilberforce said there was no doubt about. In that case there was no dispute about its compliance with all the specifications which –

GLAZEBROOK J:

But that's why there was no doubt about the identification.

MR GODDARD QC:

No but I don't think –

ELIAS CJ:

But he does draw the distinction too between –

MR GODDARD QC:

Exactly Your Honour and –

ELIAS CJ:

But that's the point of the distinction he's making.

MR GODDARD QC:

It's very easy – the whole point, and it's very easy to envisage a situation in which there are non-compliances with a very detailed specification which is how they describe it, which are not so great as to permit cancellation of the contract but which give you a claim for damages for breach and in that situation His Lordship would have reached, it's quite clear I think from the reasoning, exactly the same conclusion that the charter is ultimately, you know the *Reardon Smith Line* had to take the vessel because it had been properly identified and there was no breach sufficiently serious to justify cancellation in relation to the specifications but that they had a claim for damages and – but I do agree with Your Honour Justice Glazebrook that it would be possible to formulate it another way. It doesn't take us to a different place, it just runs the two inquiries together. I do think it's a helpful way to think about it and that the analogy is a strong one here but my argument does not depend on that bifurcation because if Your Honour runs them together and says is it within the identification because it has all the material characteristics of the thing described, then in my submission the answer is still the point I make at 13. There is no material difference between what we have here and what's described. And that takes us to the question of is there a material difference?

ELIAS CJ:

Before you get to that, it occurs to me that 9.4, the reason 9.4 is expressed as it is, is because there wasn't, because matters haven't progressed, it was expressing what was to come about –

MR GODDARD QC:

Yes.

ELIAS CJ:

– and that if you, if this had been already established you would delete the "to be incorporated as an incorporated society" would be just identifying the golf club which provides playing rights on the golf course so the –

MR GODDARD QC:

You'd probably just use the name actually Your Honour.

ELIAS CJ:

Well you probably would.

MR GODDARD QC:

It's just like the shipbuilding case, if the ship had been built –

ELIAS CJ:

Exactly.

MR GODDARD QC:

– you'd say whatever the ship ended up being called, it had a name ultimately be...

ELIAS CJ:

But the need to put in to be incorporated as an incorporated society is because there was to be something identifiable, there was to be a club.

GLAZEBROOK J:

Well you could just say the golf course is to be formed. Or the golf course was there. So if you put that in –

ELIAS CJ:

Yes but it, the question is whether that is effectively what they were saying.

GLAZEBROOK J:

Well the question is whether it was material, whether it's material as an identifier.

ELIAS CJ:

Yes.

GLAZEBROOK J:

I mean my point is that if there was something in that description that was material, then it would be part of the identification. Because there wasn't in the description, in the particular case that was material, then it wasn't part of the identification, that was the only point I was making.

MR GODDARD QC:

And I was accepting that that would be one way to put it.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

Although it's not my preferred way and it's not the way Lord Wilberforce put it.

GLAZEBROOK J:

I understand why.

MR GODDARD QC:

But that I don't think it –

GLAZEBROOK J:

Well I think because he was dealing with a situation where you had two identical witnesses, sorry not two identical ships but you had a ship that met every single material aspect and then you were just saying is this the ship that is described –

ELIAS CJ:

So it is a question of materiality yes.

MR GODDARD QC:

Yes. The ship in *Reardon Smith* was ultimately built and named *The Diana Prosperity* and the point that they made, I think Their Lordships made was if it had been built already you'd have had a contract for the sub charter of *The Diana Prosperity* flagged wherever it was but because it hadn't been built you needed some identification, you needed to be able to find it and my first submission is that all we're doing is finding the golf club but even if it's a matter of obligation or even if it's a material part of the identification, then in my submission, well if it's a matter of obligation then my submission is it's not a material part of identification, it's not a material obligation that provides the covenanter with the excuse, this is not the golf club I agreed to join. And that's my paragraph 13. And I deal with this in more detail in paragraphs 4.9 through 4.17 of my written submissions and what I do is go through and say from 4.11 onwards, "The Court of Appeal considered there were two respects in which there was a material difference, control and the profit motive. Dealing first with control, the Court of Appeal appears to have assumed that a golf club that is an incorporated society would necessarily be managed and controlled by its members… that is not a necessary feature of an incorporated society under the Incorporated Societies Act 1908," and we just saw as the Residents Association the special category of a develop member with special rights. Again very common. "The Act does not impose any relevant restriction on the rules of an incorporated society… rules can provide for decisions about the management of the society's affairs," generally or in a specific respect, "to be made by a management committee," that's normal, "and can specify that all or most of the committee members will be appointed by a designated person," a develop member for example. "In this case, a golf club could have been incorporated by the developer on the basis that the club would be managed by a committee appointed by the owner of the golf course for the time being." Exactly the sort of structure we saw in relation to Residents Association at page 196 of the case on appeal.

"Alternatively, it would have been open to the original developer to form the Golf Club as an incorporated society of which associated persons (eg its shareholders or employees) were the sole members." I note at 32 you have

to have at least 15 members. I should have also noted that companies count as three, so actually you can also just have five companies. It's a funny rule but that's how it works. The initial members that we saw, the Residents Association, had for example, "Before selling any sections in the development, and to procure entry by the Golf Club into: (a) a long term lease or licence in respect of the golf course land, with provision for unilateral rent reviews at stated intervals by the lessor/licensor; and/or (b) a long term management contract with a third party providing," all the specialised services Your Honour Justice Glazebrook referred to earlier, "to be managed by that person for a fee set pursuant to the agreement," which again could be reviewable unilaterally by the manager.

And this is a key point at 4.14, "If either of these," perfectly orthodox, "options had been adopted, the members of the Golf Club would have had little or no control over the management of the club's affairs. In particular, they would have no say in negotiation of the lease/licence," they would have inherited an association that was already committed to it, and they'd have had no say in the rent and management costs incurred because the incorporated society would have been committed to the payment of those costs. Levies recovered from members on a non-profit basis would still need to cover those costs.

That's my point that I make more generally at 4.15. "Whatever the legal form of the golf club, the golf course owner," the owner of the underlying land, "would remain a commercial enterprise that could decide on the terms of the lease offered to the golf club (including rent, and commercial terms for the operation of any business on the golf course) with a view to making a profit from its ownership of the golf course." My friend relies in his –

WILLIAM YOUNG J:

Just pause there. I mean I wonder, I have some reservations about this. An incorporated society is defined as being a society consisting of not less than 15 persons associated for any lawful purpose but not pecuniary gain. Is an incorporated society, that would appear otherwise to be an incorporated society under the Act, properly so regarded if it's not in substance an

association of not less than 15 persons associated for any lawful purpose. If it's not a society?

MR GODDARD QC:
It would be a society established for that purpose with initial members who were not section owners, who until –

WILLIAM YOUNG J:
I don't really have a problem with the initial members perhaps being placeholders.

MR GODDARD QC:
And making decisions about the contracts to be entered into at that stage.

WILLIAM YOUNG J:
I don't really have a problem about that, except that, I mean on the whole people are societies incorporated for a purpose. It's not normally something that's set up as an adjunct to a business.

MR GODDARD QC:
If it had been established for that purpose, though, it could have been sent out into the world with that purpose but with existing obligations, and that is a very common, as Your Honour Justice Glazebrook will know from the retirement villages background, very common way in which associations of this kind work. That they are set up with a network of contracts for the provision of management services, other forms of services, and then sent out into the world to be owned and operated by the members for the time being, but also often subject to –

GLAZEBROOK J:
Well retirement villages aren't normally operated by the residents at all, you're really thinking of body corporates and other sort of buildings I think rather than retirement villages.

MR GODDARD QC:

Yes, as I was about to say, actually often without those rights, even if you use an incorporated society because –

GLAZEBROOK J:

Well in retirement villages it's really just an incorporated society to give advice and input, usually, and it's never meant to be anything more than that.

MR GODDARD QC:

Right. And perhaps Your Honours I assume in that context often wouldn't own any assets at all either but there are many commercial developments where roads and common assets within the development will be owned by an association of this kind but all of the contracts pursuant to which those are maintained and charged for over time, are set up by the original developer and then on a perpetual evergreen contractual basis of the kind I've described here.

WILLIAM YOUNG J:

But say the incorporated societies put in a liquidation for instance which its members could and members could normally resolve to do.

MR GODDARD QC:

Members can do. So then you'd have a situation where there was at that time no golf club and in my submission what the owner of the golf course, it would then find itself without any entity to which it at leased or licensed the land so it had no obligations. It could set up a new incorporated society. It could enter into contractual arrangements with that and then it could say to the market at large, do you want to join this, incorporated or unincorporated let's say, let's talk about incorporated ones for the moment. And it would be able to say to the residents who were subject to this covenant, this entity is now the golf club and you must join it. So there wouldn't be much point in the members winding it up because it would be replaced with another one which would have the same cost structure. And that's the point which I move into at 4.16. The members of the society must be associated for a lawful purpose other

than community gain but nothing restricts the type of contracts that can be entered into by the incorporated society for the provision of services to it by commercial entities operating for profit and the original developer could and typically would in a structure of this kind put arrangements in place to determine the cost structure of the incorporated society before sections are sold. So this restriction, again, has no material implications for a purchaser for one of these sections. And critically in particular a profit component can be included in the rent for the golf course. And my learned friend refers to the evidence of Mr Ellis, golf professional who didn't seem to think this was all possible but with the greatest of respect to the many skills golf professionals have which I do not have and some members of the Court may not have, I think when it comes to understanding the range of legal frameworks that can be put in place consistent with the Incorporated Societies Act, this Court is better placed to form its own view of that than Mr Ellis perhaps was.

GLAZEBROOK J:

Well I suppose it might be a question if it was an obligation whether the incorporated society that was being envisaged would be one which wasn't in fact incorporated society that the members had links to. The fact that developers set these things up and put themselves in, in perpetuity is true in the market place, but whether it should be the case and especially in a development of this kind might be a matter on which there could be argument. So if it was an obligation and the developers did do that, it might be just as they might have been able to argue well it meant everybody was part of it like the Residents Association and it should have been a proper incorporated society.

MR GODDARD QC:

That would be –

GLAZEBROOK J:

So that's coming at your argument the other way really and saying if it's looking at an incorporated society, is it actually looking at an incorporated

society which in fact ties the residents' hands totally or was it actually saying there were would be a proper incorporated society?

MR GODDARD QC:

And so what you'd have to ask is first of all –

GLAZEBROOK J:

A proper, in inverted commas on this, but I'm not suggesting that these arrangements are illegal or – well they might be for all I know but –

MR GODDARD QC:

Although there's no argument to that effect here and that's very common so that would be –

GLAZEBROOK J:

No exactly so...

MR GODDARD QC:

– a fairly bold place to go.

O'REGAN J:

But what's very common?

GLAZEBROOK J:

Well sorry; it's not illegal, not in the contemplation of this particular clause.

MR GODDARD QC:

The use of incorporated societies by developers –

O'REGAN J:

Is there evidence for that because I'm not so sure that you're right?

MR GODDARD QC:

Well we see it illustrated by the Residents Association here with all the special rules this had. You're right there's no evidence about its frequency of use and

I'm really inviting the Court to take judicial notice, I guess firstly of the potential for doing this consistent with the Act which I think is a question of law but then I think one could easily find extensive case law about similar arrangements and many of the significant developments around Queenstown for example are put together in this way and your Court has got one of those coming before it in a couple of weeks in relation to Kawarau Falls Station, and has had others.

GLAZEBROOK J:

We don't at the moment know whether those are consistent with body corporate rules, to set up those perpetual arrangements when you're in control of them, because I don't think anyone has argued that.

MR GODDARD QC:

No.

GLAZEBROOK J:

Which is why I said leave it open as to whether, in fact, they are able to set those things up in that manner, and that's body corporate rules as against incorporated societies of course in many instances.

MR GODDARD QC:

Body corporate rules are subject to more restrictions and there is case law on the extent to which those can lock in, for example, management, but the Incorporated Societies Act doesn't have the sort of provisions that the unit titles legislation has which has led to the finding that that's not permissible in the body corporate situation. The Act is very short, very simple, very sparse, and it seems to me it would be difficult to read into the Act the sort of restriction Your Honour is referring to. Your Honour began by asking me a question about the contract and whether, assuming it's possible, the contract might restrict the type of incorporated society to what Your Honour referred to as a proper one, a classic members club one, and that would just be a question of contractual interpretation of course.

GLAZEBROOK J:
That's what I was suggesting.

MR GODDARD QC:
So the first question is, is there an express requirement to that effect in here, answer no. Second question, is it implicit in what's contained here, and in my submission no, and critically the covenant quite carefully refers to the golf club as providing for playing rights. It doesn't suggest that it has to own the underlying land which immediately means that the prospect remains open, and indeed I think is very likely from the way it's framed, that the owner would be another entity, a commercial entity, which would lease the golf course land to the incorporated society on commercial terms including –

WILLIAM YOUNG J:
I don't have a problem with that either. What I might have a problem with is a society that is set up to be effectively a conduit in a profit making scheme, for instance a scheme that involves the sale of memberships.

MR GODDARD QC:
That's not the issue we have here.

WILLIAM YOUNG J:
I mean it's referred to in some of the material.

MR GODDARD QC:
But that's not what ended up as I understand it. Being the structure vis à vis the residents who are required to join and pay annual levies but there's no…

WILLIAM YOUNG J:
But if the entity, if the incorporated – I mean in a way it's all hypothetical because we don't have an incorporated society but if the incorporated society was set up in the way you envisaged it would be a pretty funny incorporated society because it would be a conduit through which the developers were selling memberships and deriving an income. It wouldn't just

be an arrangement by which a golf club is managed to the benefit of its members. With the golf club recruiting members in the ordinary sort of way.

MR GODDARD QC:

Well it could be but it might be settled with a cost structure which incorporated all the costs that are recovered through the current mechanism, including the profits. So my submission is that it was suggested, implicitly at least by the Court of Appeal, that there was some financial disadvantage to covenantors because this golf course was run as a commercial club, an unincorporated club, operated by a company which operated for a profit motive. But in my submission that can't be right because the golf club was not required to own the land. It was always readily foreseeable that it would be a lessee or licensee subject to terms that impose on it costs, which would have to be recovered from members, nowhere else to get from, which incorporated all of those returns. That's the distinction drawn by the Court of Appeal and that's the one I say is misconceived.

So there is no cost that is a necessary consequence of this structure, or even a likely consequence of this structure, that members would not be expected to bear in the alternative scenario in which there was an incorporated society which was a licensee or lessee, and the lease, of course, could not only provide for the rights of return but could also confer management rights on the lessor in relation to businesses carried on, and require payment of charges on a particular basis. So all of that – and if it didn't sign up to it, it would not be able to provide the playing rights. It could never be the golf club. So as soon as you've got a situation where the golf club's not the owner of the underlying land –

GLAZEBROOK J:

Well on the other hand you would have two parties negotiating instead of just one negotiating with itself, because effectively if you have a management company owned by the – a golf course owned by the same people as the owners of the land, they're negotiating with themselves, whereas if you

assume an incorporated society it's a two-way negotiation. Now they mightn't have the most…

MR GODDARD QC:
Bargaining power.

GLAZEBROOK J:
Well they may do actually because if that's the only way that you can get, if in fact they are obliged to run the golf course and the, the developer couldn't do anything else apart from put it through the incorporated society which you might argue isn't enough on this because there's no corresponding obligation, although there might be construed a corresponding obligation if they actually decided to subdivide. And not provide a golf course.

MR GODDARD QC:
Not, I think, an immediate issue.

GLAZEBROOK J:
No, no, no, of course not because – but it is a two-way negotiation that you'd be having rather than a one-way or a negotiation with themselves.

MR GODDARD QC:
Not if it's legitimate to set those contractual arrangements in place before sections have been sold and external members have joined, which is what we see happening with the Residents Association –

GLAZEBROOK J:
Well that's you saying the perpetual, that's coming back to your argument that you can have a perpetual arrangement in place.

MR GODDARD QC:
Well if one looked, for example, in terms of permissible context at the Residents Association materials, one would see just that sort of structure in place, and would understand that that was within the contemplation of the

parties. But also even if it's a two-way negotiation it's a situation where the owner of the golf course can effectively say, these are the terms on which an incorporated society will get access to it, otherwise residents will not be able to access it through the incorporated society. If residents want to access it they will have to do so by paying the commercial terms which –

WILLIAM YOUNG J:
Or alternatively they can decline to access it at all.

MR GODDARD QC:
Yes, that would be an option.

WILLIAM YOUNG J:
That's the, I suppose in a way, the respondent's argument.

MR GODDARD QC:
Yes, but I say that there's nothing about the way in which it has been set up which has any material impact on the character of the obligation to join a golf club which provides playing rights here.

ELIAS CJ:
Is that the end of your submissions Mr Goddard?

MR GODDARD QC:
It is. It has to be.

ELIAS CJ:
Thank you. We'll take the lunch adjournment now and resume at 2.15 pm.

COURT ADJOURNS: 1.03 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:
Thank you, yes Mr Fisher.

MR FISHER:

As Your Honours please. I should like to start first by emphasising that the Court of Appeal decided the case on two alternative bases and we can see that in the judgment at paragraph 35, page 15 of the bundle. And it's plain when one reads paragraph 35 and the footnote 13 that the Court reached its decision without regard to the extrinsic evidence and relying on the scheme of the covenant based on the reading of the covenant and the text in the covenant. And that the, to the extent to have regard to the extrinsic evidence, that was the alternative bases of its decision.

I should next like to take Your Honours to the covenant itself and that is at 2.19.

ELIAS CJ:

2.19 of what, of the volume 2?

MR FISHER:

Of the case on appeal, volume 2. It's the second page. And to emphasise something that has not been drawn to Your Honours' attention but if we look at the top of that document on page 219 we see that, "The transferee here by covenants with the transferor for the benefit of every other owner as defined herein of every lot as defined herein as a covenant running with the land." So this was a covenant –

GLAZEBROOK J:

Sorry I've just lost you.

MR FISHER:

I'm right at the top of page 219. We can see page 2 of page 7 of the covenant, you'll see at the very top –

GLAZEBROOK J:

Yes sorry, I've found it now, thank you.

MR FISHER:

So this was a covenant for the benefit of the other residential owners and it wasn't as such in its terms a covenant for the benefit of the, what would have been the position, the party and the position of owner of the golf course or owner of the resort development. And if you go through that document towards the important page, page 6 of 7 at page 223 you'll see that the development identifies the relevant properties and the only one of those which isn't in its entire form a residential section is the last one at 9.3 and that's Lot DPS 91789 and we can see from page 87 of the bundle, if we flick to that –

ELIAS CJ:

Sorry page?

MR FISHER:

Page 87. And that is the title as it was for 80 hectares which subsequently became 70 hectares plus 10 but that's the Lot 91789 referred to in the covenant and the rest of those descriptions, if we go back to 233 of the properties, are the residential sections in the development. And over the page –

O'REGAN J:

Could you just – Mr Fisher could you just pull the microphone towards you.

MR FISHER:

Sorry Your Honour. And over the page at 224 we see the definition of "lot" and we see, "Lot means a residential Lot on..., and it cites, "Those sections and any residential Lot created from the subdivision of Lot DPS 91789." And owner, "Includes any person from time-to-time registered as a proprietor or a proprietor of a Lot on... et cetera and any residential lot to be created from the subdivision of Lot DPS 91789." And 91789 as I mentioned, that was further subdivided into a further block of 10 hectares. So what I submit Your Honours is that when one looks at this covenant it was for the benefit of the residential owners and that is material to a consideration of the positions

of the parties and why I submit that the definition of the golf club is important because it was a golf club as contemplated was one to which all the residential section owners were bound to be members if clause –

WILLIAM YOUNG J:
But the appellant I take it owns some of these, this land?

MR FISHER:
It owns the golf course land and I suspect some other of the sections to the extent –

WILLIAM YOUNG J:
So the golf course land isn't, is not as it were, it's not the right expression but is the owner of the golf course land is not a beneficiary of this covenant?

MR FISHER:
Not, no – in its capacity as owner of the golf course land, no.

GLAZEBROOK J:
But it maybe if it does own some of the sections referred to?

MR FISHER:
Yes.

WILLIAM YOUNG J:
The unsold sections.

MR FISHER:
Yes. And I'm not up to speed with where that is at in terms of what remains to be sold.

GLAZEBROOK J:
Mr Goddard said that that argument had not been made down below.

MR FISHER:

And what was the argument?

GLAZEBROOK J:

The one that you've just made, that it was an incorporated society which it was contemplated that all owners would belong to?

MR FISHER:

Well that's, I can't recall whether that particular submission was made but it's implicit in the submission we've always made that this is what's contemplated by the covenant on its plain wording.

ELIAS CJ:

Sorry what do you, just express what it is you say is implicit?

MR FISHER:

That the golf – every residential owner of a section in this resort would be bound to join as a member of the golf club as an incorporated society, that's what the covenant contemplates and contextually as arose from the exchange this morning, the predecessor to this document is the Pauanui Residents Association document and it was in that document and it might be useful to go to that now at 167 and if you turn in particular to 171 clause 5 you can see that the rights of the residential owners in relation to use of the golf course was initially intended to be subject to that encumbrance.

O'REGAN J:

Sorry which page, sorry?

MR FISHER:

That's at, the start of the document is at 167 of volume 2.

GLAZEBROOK J:

Although that had long gone, as I understand it, before your client bought, is that right – because it went in 2003 didn't it?

MR FISHER:

Well the interesting thing –

GLAZEBROOK J:

The 5.1 encumbrance?

MR FISHER:

That had gone, that had gone before the, what was the Vincent Family Trust had settled its purchase which was in 2003.

GLAZEBROOK J:

So it had, so actually so the timing was how, so they'd entered into it before that went? I did mean to ask Mr Goddard that but forgot.

MR FISHER:

If I can just take you to the document that, where that encumbrance was extinguished because actually one of the members of the –

GLAZEBROOK J:

It was, I think it's at 196.

MR FISHER:

Yes that's right. Now what's interesting about the timing of that, so that's 16 June 2003 and Your Honours might recall that the trustees of the Vincent Family Trust had entered into an option in 2002 to purchase the section and it was actually transferred into the names of the trustees before the transaction had settled. And that had happened on the date of the covenant which is about the 23rd of November 2002 but they didn't actually complete the purchase of the section until the following year so, but if we look at this document 197 you can see, interestingly enough, that one of the owners who signed this change, Michael John Donovan and Richard Wallace Herbert in relation to Lot 75, they're the trustees of the Vincent Family Trust at the time so –

ELIAS CJ:

And that's in respect of Lot 75 and are you saying that this was done as trustees?

MR FISHER:

Yes. Well we don't know that because what happened was there was a negotiation and this is apparent from the documents, in relation to the purchase of the development from the previous insolvent developer and that negotiation took quite a while and along the way there were various options entered into with parties and ultimately what happened is that on or about the 23rd of or November 2002, that's when that transaction settled, where they, what we call the developers, that's when they became the registered proprietors of the golf course land and the resort and at that very day they transferred a number of sections into the names of these parties that appear on page 197 on that day. But – and certainly in the case of Lot 75 it's not clear in what capacity those Donovan and Richard Herbert were holding that property, whether they were trustees for the developers pending settlement of the purchase or not, it's just not known.

ELIAS CJ:

Right.

MR FISHER:

And going back if I may to the covenant itself and we were at page 224 of 1 and 2 and it is to be noted that in this definition section there is also definition of "society" and it is defined to be the Pauanui Lakes Residents Association Incorporated, and I submit Your Honours that the difference between that definition and the definition of the golf club is simply the case that at this particular point in time, when this covenant was made, the golf club had yet to be formed but it was to be an incorporated society and that's the explanation for the difference. There's some argument my learned friend makes that there's some operative element in the definition but accepting that that's so, if it was required to be incorporated as an incorporated society that doesn't mean that a definition of section cannot have an operative provision and

indeed in some of the authorities that my learned friend referred to that's exactly what they say, that it's just not good form, it's not good drafting form, but if a definition section contains an operative provision substantial effect should be given to it and is given to it.

ELLEN FRANCE J:

On its face, Mr Fisher, clause 7 is setting out the obligation and then what follows is of the nature of definitions. Do you say we don't make anything of that?

MR FISHER:

Well to the extent that it's necessary for clause 9.4 to go beyond just pure definition, that is a simple consequence of the circumstance that in this particular point of time the golf club and incorporated society hadn't been formed, and to the extent that it is operative well there's no impediment to that being given effect to legally.

O'REGAN J:

But that assumes it is operative though. I mean that's just assuming what you're arguing, isn't it?

MR FISHER:

Well, it is assuming that this, that on its plain words it was intended that the golf club would be incorporated as an incorporated society, yes.

O'REGAN J:

But there isn't a covenant on the part of the transferral to incorporate a golf club?

MR FISHER:

There isn't a separate covenant, no.

GLAZEBROOK J:

Well of course that's because you say it's just a covenant for the owners, so it's for the owners to form the incorporated society presumably. Is that, would that be the argument?

O'REGAN J:

Well that would need a covenant specifically though, wouldn't it? Because they're not all parties, are they.

WILLIAM YOUNG J:

Well probably they originally were going to be all parties but then marketing difficulties and…

GLAZEBROOK J:

Yes.

O'REGAN J:

So this is only same, I mean this is only one –

MR FISHER:

At this particular time when this was done it was intended that everyone, that the whole residential development is contemplated by both the Residents Association, the encumbrance –

WILLIAM YOUNG J:

Well put it another way. Say someone has bought land which is in the list of the protected, of the titles that are the benefit, presumably they have an entitlement to require the 39 lot holders to pay into a golf club, but they don't have to pay themselves. So that would be a literal approach I guess to the sanction. To the covenant.

MR FISHER:

Well –

WILLIAM YOUNG J:

Let's just say lot 100 doesn't have the covenant registered –

MR FISHER:

Yes.

WILLIAM YOUNG J:

But is one of the lots that's covered by this covenant.

MR FISHER:

Without –

WILLIAM YOUNG J:

So this covenant is made for the benefit of inter alia the owners for the time being of lot 100, all right?

MR FISHER:

Yes.

WILLIAM YOUNG J:

So –

MR FISHER:

But are you saying Your Honour that it doesn't, it's not bound to join the golf club.

WILLIAM YOUNG J:

I'm saying could lot 100, the owner of lot 100, who is not required to join a golf club, insist that the 39 lot holders who are have to fund the golf club.

MR FISHER:

If there was the golf club contemplated by this covenant in place.

WILLIAM YOUNG J:

I mean the argument would be well this isn't the golf club we've agreed to join, we've agreed to join a golf club to which all residential owners have similar obligations.

MR FISHER:

Yes.

O'REGAN J:

Are you saying it was up to the transferees to form the incorporated society?

MR FISHER:

Well the way that that, it would –

O'REGAN J:

Where does it – I mean surely in clause 7 if they wanted the transferees to be responsible for doing it they would have said so in clause 7.

WILLIAM YOUNG J:

It was obvious it was going to be the developer who formed the golf club.

MR FISHER:

Yes but –

WILLIAM YOUNG J:

But it would be a golf club –

MR FISHER:

A golf club of which all the residential owners would be members –

GLAZEBROOK J:

Yes.

MR FISHER:

– and therefore would have the voting control ultimately. That's ultimately what it envisages.

GLAZEBROOK J:

Well the background –

O'REGAN J:

Well there's plenty of incorporated societies where the members don't have voting control, why should we imply that?

MR FISHER:

Well if one looks at the Incorporated Societies Act one can see that the members have the rights to change the rules by a majority vote at general meetings.

O'REGAN J:

Yes but there's nothing in this that says the only members had to be the transferees?

MR FISHER:

No, not the only members but every –

O'REGAN J:

Well I mean they could have been non-voting members or they could have been members with restrictive votes or they could have been outnumbered, I mean there's a whole lot of possibilities.

MR FISHER:

That's right –

WILLIAM YOUNG J:

Can you have members with restricted votes, sorry can you have a class of members who are not entitled to vote on dissolution of the society for instance?

MR FISHER:

The Act doesn't seem to make that distinction but what the Act does provide for is the right for members to alter the rules. And what this covenant does contemplate is that certainly there might be other members of the golf club but all the residential section holders will be members and that's up to 153. And part of the respondent's argument is to say it's pure speculation and conjecture on the part of the appellant as to how this would have unfolded if it had been done as contemplated, and just what the lease might have looked like, what the other contractual provisions or relation in terms of the various contracts that might have needed to be entered into for the operation of the golf club, it's speculation as to what form they'd have taken. And ultimately if one assumes that the members of the club as contemplated by the Act have the ultimate decision making power, they'll be the ones that will decide the levy on the members. And if the developers have fixed the lease on their terms and all other costs on their terms, at it results in it being in the view of the residential section owners, unreasonable costs, well it's within their power not to levy each other for those costs and then you've – and that really highlights the point that it's really not realistic to say that the developers could have set this up however they liked and take it or leave it because ultimately the incorporated society model gives the power, the voting power to the members.

WILLIAM YOUNG J:

Well in any event the affairs of an incorporated society are subject to the control and supervision of the High Court rather as companies are and an incorporated society can be put into liquidation on what in company law would be regarded as just and equitable ground.

MR FISHER:

Yes indeed Your Honour. I was going to highlight particular sections of, in my learned friend's bundle of authorities, volume 3 is the copy of the statute and I wish to highlight a couple of provisions. At page 535 you can see in section 6, "Rules of incorporated society. The rules of a society shall state and provide for the following matters." And the ones I wish to highlight are, "The mode in which the rules of a society maybe altered, added to or rescinded. The mode of summoning and holding general meetings of the society and of voting there at." And then over the page, 21, "Alteration of the rules." And 21(3A) is a right to apply to the High Court in relation to any rule alterations. There's of course the liquidation provisions to which Your Honour refers which is at section 25. So ultimately the submission for the respondent is that it's completely unrealistic for the appellant to argue that had this incorporated society been established and therefore had, as one would have anticipated by its terms, all the residential section owners had been members, that there wouldn't have been some material influence and control on the part of the membership in the way in which the playing rights were regulated and in the amount of annual fees were levied on members. But it all would have depended on what the rules were and what the voting rights were, I mean it doesn't say anything about that.

WILLIAM YOUNG J:

I don't think – section 124 doesn't, would suggest that all members have a right to vote as to whether a company be liquidated. I'm not sure that voting rights could be, that the entitlement to vote on that issue could be the subject of constraint. The right to go to the High Court couldn't be subject to constraint.

MR FISHER:

But yes Your Honour.

WILLIAM YOUNG J:

But in this sense it's, the purpose of the golf club under this covenant is to, is for the benefit of the residential owners, it's not meant to be another

mechanism by which the developer can make continuing profit out of the golf course after all the sections have been sold.

MR FISHER:
That's a, yes that's –

WILLIAM YOUNG J:
And an attempt to use the incorporated society structure to facilitate that would appear to be outside the scope of what the covenant was common place. And I mean in a way these are sort of additional points but they're, I doubt if they're really fundamental to the argument.

MR FISHER:
Yes Your Honour. It just is worth pointing out though that if the members at general meeting can alter the rules then it doesn't matter how it's been set up.

WILLIAM YOUNG J:
Well I think at that one, I think they have to vote in accordance with the way, with the – it has to be in accordance with the way the rules are set up so it maybe that you could constrain that the developer members have a million votes and the paying members have one vote, but I mean that's a technical argument, and it may not really answer what, whether – it doesn't answer the question perhaps whether an incorporated society set up on that basis would be the sort of society the covenant contemplates.

MR FISHER:
Well if one goes back to the point about the purpose of it, it's extremely unlikely that the marketers of this golf resort and subdivisional development would have done it in a way that would have led to real concerns being expressed on behalf of purchasers about having any say or influence in the way in which the golf course was operated and their potential liability under it.

O'REGAN J:

How do we know that? I mean that's just complete guess work. All it says is there will be an incorporated society. At best you can say that's a covenant that the golf club has to be run by an incorporated society, it says absolutely nothing about what the terms of the incorporated society's rules have to be.

MR FISHER:

No, that's correct Your Honour but what it does say is, and I submit that all the residential section owners will be members of it.

O'REGAN J:

But only the residential, only other residential – once all sections –

O'REGAN J:

It doesn't say that.

WILLIAM YOUNG J:

No, no once all –

GLAZEBROOK J:

It says there's a covenant, I think he's implying that from the fact that it's a covenant for the benefit of all of the owners.

WILLIAM YOUNG J:

The only person who can insist on the covenant being complied with is someone else who owns residential land.

MR FISHER:

Yes.

WILLIAM YOUNG J:

Because that's who the covenant's in favour of.

O'REGAN J:
But why can't the developer?

WILLIAM YOUNG J:
Sorry?

O'REGAN J:
Why can't the developer?

WILLIAM YOUNG J:
Well it would have to retain it, well that's true, as long as the developer retains some of that land and the developer is a covenantee.

ELIAS CJ:
But the successor to the covenantee can enforce it so where is this argument going?

WILLIAM YOUNG J:
Well I think the suggestion is, which I don't regard as a silly one, but the beneficiaries of the covenant are intended to be the residential owners in the long run, once all his properties are sold the purpose of the covenant is for the benefit of the other people –

ELIAS CJ:
But it's not either or is it?

WILLIAM YOUNG J:
Well I think it –

GLAZEBROOK J:
Well it would have to be sort of a contracts privity argument that the developer by contract privity could actually insist on them paying for the golf course, but if it's essential it's an incorporated society that is actually a bit of an odd argument, and if it's not essential it's an incorporated society actually I'm not

even entirely sure that the contracts privity would say that Lakes International Golf Management Limited can actually insist on the covenant either, because it's not a contract with Golf Management Limited, so it might be an additional argument that hasn't been put below. Because I'm not sure that it was put below, the benefit of the owners, as Mr Goddard said. But actually on the face of the document it's not a bad argument.

O'REGAN J:
It doesn't matter, I mean I don't think we should have the argument between ourselves either, let's do it afterwards.

ELLEN FRANCE J:
Could I ask Mr Fisher that the rules and regulations of the golf club referred to in clause 7.2, who do you say will be making those?

MR FISHER:
They'll be made by the members of the golf club, of the incorporated society. They'll appoint, they'll exercise their powers, whatever they may be, to have a committee formulate the rules for the golf club and they'll become the rules of the incorporated society. Not unlike the rules, well they're different in substance, but they'll follow the format of the rules that appear in the case on appeal at page 100, with the differences that, as Your Honours will have noted, that 5.2 the manager as owner and manager of the club will retain all operating surpluses and 5.3 members will have no voting privileges and will not be permitted to become involved in the management of the operation of the club, and 9.4 the advisory board will not have any power to bind the manager of the club nor have any general duty to members, which would be quite different under an incorporated society.

ELLEN FRANCE J:
So the reference to regulations is not used in any technical way in clause 7.2?

MR FISHER:

No, I would submit that's contextual in the sense that golf clubs have rules and regulations.

O'REGAN J:

But wouldn't they in this case on your argument be the rules of the incorporated society.

MR FISHER:

Ultimately yes.

O'REGAN J:

Well why doesn't it say that?

MR FISHER:

Because –

GLAZEBROOK J:

Because golf club is defined as being an incorporated society down below so if you bring the definition up there golf club is the golf club to be incorporated as the incorporated society to provide for the rules.

O'REGAN J:

But incorporated societies don't have regulations, do they, they have rules.

WILLIAM YOUNG J:

They can be called whatever they like.

GLAZEBROOK J:

Well I mean I think it's just, would be a common thing for golf clubs to have various rules in terms of not jumping up and down on the greens and all of those sort of things, and playing at particular times. They certainly used to have ladies playing only at certain times.

MR FISHER:

You can see that sort of thing actually in, if you look at the, page 118 you can see the sort of distinction between what are the appellant's rules of the golf club, the rules of the Lakes Resort, page 100 to 117, and then we have the rules and regulations which go more towards that etiquette style.

The next point that I wanted to make, which has really been touched upon already, but it is to say that it just cannot be assumed that if the society had been informed that events would have unfolded, as my learned friend submits in paragraphs 14, 11 and following in his submissions, where everything would have just been put in place and there would have been no occasion or ability on the part of the members/residents of the resort to have an influence and ultimately they would have the power to decide how much they would levy the members irrespective of whatever costs that the developers sought to impose upon them. And so there's a reality about how events would have unfolded if this had been done properly and that's why I submit that fundamentally what my learned friend says is pure conjecture and it's to be viewed against the background of the fact that in fact since 2009 when the appellant became the owner of the golf course and resort, they've had every opportunity to engage with the residential section owners to form an incorporated society to be the golf club and they haven't done it. And Mr Ellis who was an advisor, not just as a golf professional but in his evidence, he was a person who purported to be someone with a great deal of experience in these sorts of things and gave advice to the people down in Clearwater; he gave evidence that there is a difference in these golf resorts between the situation of having a golf club as an incorporated society and a golf club run by the owners of the resort. It's all about control. And that's – these sorts of developments are quite unique and anyone interested in owning or operating them as a developer on the one hand or as a residential section on the other, would be alert to the various tricky little issues that arise in relation to how the resorts were operated, where the powers lie and what sort of influence residential section owners can have.

And the other point that arises is the question of in the alternative view the Court of Appeal did have regard to some of the extrinsic evidence but really if you look at the judgment it was doing so in response to the arguments then advanced by the appellant that the reference to incorporated society was a mistake and the Court of Appeal resorted to the extrinsic evidence to say, well that clearly wasn't the case, it was deliberate. But in any event in a situation like this where someone who would be interested in looking at acquiring a residential property or even a developer in acquiring as this developer did, the interests of the developer from someone else. They would be put on inquiry that there was an issue here around this incorporated society and in that situation –

WILLIAM YOUNG J:
Why, just because it wasn't one or what?

MR FISHER:
Well you'd want, you'd make – if you're a lawyer – these documents are addressed to lawyers, these covenants on the whole and if you're representing someone who was interested in acquiring it, there would be – that issue would be raised and one would certainly have an opportunity to see on the title, for example, the Residents Association encumbrance which would alert anyone looking into this issue around rights to the golf course and so all of that information would be accessible to anyone without going outside and deep down into the negotiations and other things amongst the developers and their lawyers. There would still be the opportunity to make the enquiry and you'd expect any developer would do so and this was a case down the track where by 2009 it was obvious that the incorporated society hadn't been formed, hadn't been incorporated, it wasn't running the golf course. So why in –

O'REGAN J:
So why does that affect the construction of this covenant?

MR FISHER:

Well because –

O'REGAN J:

Because that's years after the covenant is entered into, isn't it?

MR FISHER:

Well because if someone, the argument that I advance is that if in a case such as this where someone who is in the position of a party, a successor in title, if they are on inquiry as to the need to undertake some further investigation into rights and issues that arise under the covenant, which have a bearing on the meaning of the document, why should they not make that inquiry at the time, and so if –

O'REGAN J:

Because they haven't got any entitlement to the information.

MR FISHER:

Well if they don't then that's, the test should be a pragmatic one and the test should be based upon what, if the information is reasonably available to the parties.

O'REGAN J:

So you say they should have asked for the advice given to the original transfer by its lawyers back when the covenant was signed?

MR FISHER:

No, not necessarily because it may be –

O'REGAN J:

Well that's the information that the Court of Appeal was looking at, wasn't it?

MR FISHER:

Yes it was.

O'REGAN J:

So are you saying that was proper or not? Was it proper for the Court of Appeal to have regard to that information or not?

MR FISHER:

Was it proper or not? Well in the circumstances of the case where the appellant was the one who put the information before the Court and invited the Court to look at it, without any objection from the other side, yes.

O'REGAN J:

I'm not, you know, sorry, I'll rephrase the question. Is it a relevant matter in the interpretation by a Court to look at that information? That regardless of who puts it before the Court, really should it even be before the Court, that's probably a better way of arguing.

MR FISHER:

Well it depends in every case.

WILLIAM YOUNG J:

But in this case all it tells you is it gives us some indication as to why the incorporated society idea was put into the documents. But that's only from the perspective of – sorry, that's primarily from the perspective of the developer.

MR FISHER:

Except that Mr Herbert was both –

WILLIAM YOUNG J:

Yes, I know Mr Herbert sort of crosses over.

MR FISHER:

Yes.

GLAZEBROOK J:

Well as you say it was also countering the view that it was a mistake, is that what you're saying?

MR FISHER:

That's right, that's the, that was the only reliance, if you look at the judgment the Court of Appeal placed on that and they acknowledged that obvious caution should be taken in relying on any of that information. But at a general proposition, once you get to the position of saying that the better approach in interpreting agreements between parties, is to have regard to extrinsic evidence if you can, and then say well there might be occasions when it produces unfairness to third parties which can be contemplated. The answer to that, in my submission, is it must always be well it just depends, doesn't it, on the circumstances and there maybe occasions where if the original parties to an easement go to the Court and litigate it, and what would be wrong with, as between those parties, all the extrinsic material being taken into account, if it makes a difference to the construction of the document, and then the next question becomes if someone else comes along and is not on notice and inquiry that there was some anomalies or some things that needed to be properly investigated and they done make the enquiries, then that ought not necessarily mean that information cannot be taken into account by a Court.

O'REGAN J:

What do you say in response to Mr Goddard's argument that that means the same document would have different meanings depending on who was trying to enforce it? So if the original parties are trying to enforce it, it has one meaning.

MR FISHER:

Yes.

O'REGAN J:

But if 30 years later people who had no involvement at the beginning at all, are trying to enforce it, it has a completely different meaning.

MR FISHER:

Well there'll only ever be one meaning because when the original parties have litigated the dispute –

O'REGAN J:

No, but assuming they didn't litigate because they didn't have a disagreement. So 30 years later is the first time the document becomes an issue. You're saying it could be quite, you could get quite a different meaning in that circumstance than you would if the original parties had still been parties to it?

MR FISHER:

That's the consequence of my learned friend's submission, but –

WILLIAM YOUNG J:

Are you saying it's the same meaning throughout? He's saying that's because you ignore all extrinsic evidence the first time around.

MR FISHER:

Yes. Well that's just a, I understand the point, but at the end of the day the question is, is the information, objectively speaking, reasonably available or would it have been reasonably available and expected to be reasonably available at the time of the covenant or the document or agreement and if it was that's a factor to be considered among others. Another factor might be down the track if a successor or an assigned or a third party did have an opportunity to have access to the information which bears on the meaning of the document, it changes its benefit or burden, why wouldn't the Court have regard to that and ultimately exercise its judgment in each individual case as to whether or not it's appropriate to do that, because there will be occasions when it will make quite a fundamental difference to the meaning of a document.

O'REGAN J:

So your answer is it doesn't matter, is that – Mr Goddard's point doesn't matter. You just deal with the situation before you and the parties before you and make your decision?

MR FISHER:

Because there'll be relative unfairness in either way and it depends on the Court's assessment of the relative unfairness.

WILLIAM YOUNG J:

Well it's a legitimate, you can simply say the Court has to deal with it on the basis that's appropriate at the time, if the original dispute is between, if the dispute is between the original parties to the contract, well then there might be more material in than would be the case if it's later. But in any event there will only ever be one interpretation of the contract?

MR FISHER:

Yes.

WILLIAM YOUNG J:

What was envisaged under the, I mean there may be nothing that you can point to, but what was envisaged as being the ultimate ownership – sorry, how was the golf course land going – envisaged as being owned into the future at the time of the first development, at the time of the development was marketed?

MR FISHER:

By the developers essentially, by the owners of the golf course who would not be the residential section owners.

WILLIAM YOUNG J:

Okay and so what was going to be in it for them?

MR FISHER:

A reasonable return on the rental of the land and any other contracts that they might reach with the incorporated society as to how they operated the facilities and on what terms, depending on the requirements.

WILLIAM YOUNG J:

So it would be a return based on a negotiation between the incorporated society and –

MR FISHER:

That's my submission.

WILLIAM YOUNG J:

And if they couldn't reach terms then they'd be left with a golf course that they'd have to get other players for?

MR FISHER:

Well, or they could do what they've done, which is just not incorporated society and just run it themselves.

WILLIAM YOUNG J:

But without the ability to co-op membership fees from –

MR FISHER:

Anyone who wanted to be a member and play.

WILLIAM YOUNG J:

Yes but with the ability to co-op membership fees from the residents?

MR FISHER:

The covenant, yes. And that was the decision ultimately taken by the original developers, that they in the end decided not to run with the incorporated society model and they just formed a company to do it until they went into liquidation in 2009.

WILLIAM YOUNG J:

But they did, look the documents aren't that clear but didn't they seek membership fees from the residents?

MR FISHER:

Not by, they did but not in enforcing the covenant. They expressed it as a request for fees to join the club but they deliberately avoided making a demand under the covenant because they were at that time highly conscious of the Securities Act implications. There is a document I can take you to actually.

WILLIAM YOUNG J:

Well there was an invoice, weren't there invoices? Right at the end.

MR FISHER:

From 2009 onwards, the new –

WILLIAM YOUNG J:

Only from 2009 onwards?

MR FISHER:

Yes. Although there was a request made of the original residential section owners.

GLAZEBROOK J:

So where's the document?

O'REGAN J:

I'd just – there's a couple of invoices right at the end of the case on appeal I think.

MR FISHER:

231. You'll see it's in paragraph, in 3 it says, "Pending issue of a prospectus," and the interesting next document at 232 is an email between one of the developers at the lawyers, but you can see there that they're at that time very much highly focused on the concerns around the need for an exemption under the Securities Act, and they were definitely determined to form an incorporated society as the golf club, but that subsequently changed.

Your Honours, I've covered everything I want to address. Is there anything further?

ELIAS CJ:

No thank you Mr Fisher. Mr Goddard, did you want to be heard?

MR GODDARD QC:

Six short points and a literary corrigendum. The first point, just if the Court still has in front of it, this is volume 2 of the case on appeal, pages 231, this letter from former golf course owners and then the internal toing and froing between those owners and their lawyers. This is a striking example of the sort of document that no one would have imagined when the covenant was put on the title would be available to successors in title of even the golf course owner let alone owners of other properties. The suggestion that it could play any role in the interpretation, or understanding of those documents is as surprising as Humpty Dumpty's assertion that he can announce –

GLAZEBROOK J:

Well to be fair to Mr Fisher, I don't think he was suggesting that, he was just answering a question from Justice Young about the correspondence and the memberships.

MR GODDARD QC:

And questions about what was originally envisaged and my whole submission is, of course, that's –

ELIAS CJ:

Why did all this material come in by consent?

MR GODDARD QC:

There were applications, I think, both ways for summary judgment initially, and summary judgment both ways was declined by the Associate Judge and the Court of Appeal on the basis that context might matter. So it was imprudent,

unsafe to enter summary judgment. What the appellants then did was seek non-party discovery from the solicitors from the former developers and by consent that material was placed before the Court. What then happened, as I understand it, is that in the High Court was, as my friend says in his submissions, the appellants who contended for its relevance to certain issues and the respondent who was unenthusiastic about reference to it. The High Court Judge considered that it wasn't appropriate to refer to it, and that was the position adopted by the appellants in the Court of Appeal, supporting the High Court Judge's approach that it wasn't relevant to interpretation. So it was put in really because the Courts had said it might be necessary. It was one of the grounds on which summary judgment was declined, but then ultimately it proved –

ELIAS CJ:
Well why did it proceed, why wasn't it a hearing?

MR GODDARD QC:
There was a hearing.

ELIAS CJ:
Sorry, why wasn't evidence called?

MR GODDARD QC:
Evidence was called. There were a couple of witnesses whose briefs are at the start of volume 2.

ELIAS CJ:
I see, yes.

MR GODDARD QC:
But no one was called who could give any firsthand evidence about the circumstances in which these letters were sent, for example. None of the witnesses had any – so it went in by consent but actually there was no one who could provide any sort of…

ELIAS CJ:

I see.

GLAZEBROOK J:

Well you'd say that doesn't matter anyway because it shouldn't have been there in the first place.

ELIAS CJ:

That's why I was questioning it.

MR GODDARD QC:

I say that, and I say that the absence of anyone who could shed any light on it really just underscores how dangerous reference to snippets of information from one source are years down the track. It's exactly the sort of, you know, if one can get anything at all it's likely to be this sort of piecemeal and more dangerous than helpful material but really if one asks the right question focused on meaning to the audience, you just don't end up there and that's the better approach. So it's a shame it went in. Everyone takes some blame for that at different points or for contending for its relevance but ultimately the High Court Judge said it shouldn't be referred to for the purpose of interpretation, that's what the appellants supported below and that's what I'm supporting here. With arguments that are a little more developed, perhaps, than those that were presented below which I accept full blame for due to my longstanding obsession with this issue. So that's the first point is this is a really good example of the sort of material that we shouldn't have.

Your Honour Justice Young whose second point asked some questions about the owner of the golf course land not being a beneficiary of the covenant in that capacity, had an exchange with my friend about that based on the way in which the promise is expressed at the start of the covenant. Two points there, first no issue, as I read the judgments below, was taken about the second respondent being able to sue on the covenant.

WILLIAM YOUNG J:

Well it can, obviously it can sue on the covenant because it still owns, presumably, some of the residential land.

MR GODDARD QC:

Well as I was going to say, if there was any question about its question about its ability to sue on the –

WILLIAM YOUNG J:

I'm not raising a question on its ability to sue, I'm raising as a question as to what the covenant means?

MR GODDARD QC:

I'll come to that in a second. And the second response is of course at the golf club also sued Golf Management as the operator of the golf club by virtue of the Contract's Privity Act and was successful in the High Court on that basis.

WILLIAM YOUNG J:

Okay that –

MR GODDARD QC:

And that, if we look at section 4 of the Contracts (Privity) Act 1982 which is in my learned friend's bundle of authorities at page 70, what we see is that, "Where a promise contained in a deed or contract confers or purchaser will confer, a benefit on a person designated by name, description or reference to class who's not a party," and my submission precisely is that there's a sufficient designation by description.

WILLIAM YOUNG J:

Well it depends on, I mean it's a circular argument. If the incorporated society is what it that was envisaged as one which was to be run for the benefit of residents' residence then your argument falls over.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And the fact that the benefit of the covenants is solely, is for residential land provides some weight to that argument, you'd say it's not conclusive and I'm going to come back to that in a minute when you're finished.

MR GODDARD QC:

So but my submission is that if this is enforceable by the golf club, whoever that maybe, and that is sufficient to deal with the suggestion that it's only for the mutual benefit of participants; we then come, I think, and this is my third point to the issue Your Honour has foreshadowed; a promise to all does not, in my submission, imply a promise by all. There is nothing in the nature of this promise that implies that in order to be workable it needs to be made reciprocally. One could run that argument in relation to some of the building promises about heights of buildings and trees and other things like that.

WILLIAM YOUNG J:

Well I think there are – I mentioned this to you even before, I think there are cases which have dealt with properties which are marketed on the basis of restricted covenants where they have been seen as a restrictive covenant scheme and as it being part and parcel of the deal that all other people will be subject to the same covenants.

MR GODDARD QC:

And that's a question of interpretation which turns essentially on whether it's possible for the covenant to achieve its intended purpose in the absence of –

WILLIAM YOUNG J:

Well they'd never have been able to sell the first 39 sections on these covenants if they'd said, but by the way the next 130 people will get the benefit of the covenant but won't be subject to a corresponding burden.

MR GODDARD QC:

Nor on the other had were the sort of promises made that you see in the Residents Association that everyone would be required to take it and that difference is very striking. So you've got two sets of covenants in relation to this land, one set contemplates that the relevant covenant will be required from everyone. This covenant does not do that, so it's not expressed and in my submission can't be implied.

That brings me to my fourth point, which is that my learned friend took the Court to clause 9.9 of the covenant which is on page 224, and pointed out that the Residents Association was named as the society, it's name and its incorporation number both provided. That, in fact, supports the argument I made earlier that clause 9.4 is also just identification, and that what we see in here is the substitute for a name in the absence of an existing golf club with a name. So it's just like the, what was it, *Diana Prosperity* issue before the ship was called *Diana Prosperity* you had to find a way to designate it.

GLAZEBROOK J:

Well so you're suggesting if the Residents Association got rid of itself, there'd be no obligation to have a Residents Association join it? It's going to cut both ways there isn't it?

MR GODDARD QC:

Well that is, on the face of it, how this reads. So for a specific person –

GLAZEBROOK J:

Well I doubt very much it would be interpreted that way to be honest.

MR GODDARD QC:

I suspect if it disappeared in some way one might well find oneself applying under the Property Law Act on the basis that there'd been a material change in circumstances to substitute a new one. It would be a challenge to read the reference to the specific named association with an incorporation number as someone else. That's a, you know, a lot more adventurous than the –

GLAZEBROOK J:

I'm just not entirely sure that you would be able to dissolve it and then say, don't worry we don't have to have one. So I'm not sure, in terms of a sort of oppression of minority sort of view, that –

MR GODDARD QC:

I agree with that Your Honour, but all I was saying was that if one looks at the way the definitions work, all that 9.9 is doing is naming the society that is, performs the Residents Association function, and similarly I say that all 9.4 is doing is providing an identification as a substitute for a name, given that the club does not yet exist with a name. They perform a parallel function, they've not operate provisions, so it supports the argument I made earlier.

Fifth, and last, I want to pick up a point made by Your Honour Justice O'Regan, that there is nothing in the Incorporated Societies Act that requires a society to be controlled by the vote of members or requires that members have the ultimate decision-making power to pick up the language of Your Honour Justice Young.

WILLIAM YOUNG J:

Well what about the decision to wind up.

MR GODDARD QC:

The decision to wind up, there is more room for argument about, but in relation to control of decisions to contract, which is what we're interested in here, for the purpose of materially –

WILLIAM YOUNG J:

Well not really because if you don't like the contract you're a member who doesn't have an ability to control the contract. One of the ways you might deal with it is to have the society wound up. Another way is to go to the High Court and say, I don't like the way the affairs of the society are being run.

MR GODDARD QC:

If we just turn to the Act, I mean in my submission the better approach to 24(1) is that the rules do determine who can –

O'REGAN J:

Whereabouts are you?

MR GODDARD QC:

I'm on page 534 of volume 3 of my authorities, so my last bundle of authorities. Volume 3 of my bundle of authorities, page 534, it's the last document in the bundle. I want to just draw attention to a couple of provisions. First of all, section 6, "Rules of a society shall state or provide for the following matters, (e) the mode in which the rules of the society may be altered, added to or rescinded." So there's no suggestion that it needs to be done by members, rather the rules can specify the mode. Similarly the mode of summoning and holding general meetings of the society and of voting thereat –

WILLIAM YOUNG J:

Do you think that's to do with whether it's proxy or not?

MR GODDARD QC:

No Your Honour, in my submission it also enables the creation of classes of members who have different voting rights.

GLAZEBROOK J:

I mean you do do that because you have sort of associate members and other members.

MR GODDARD QC:

Honorary members, all those things.

GLAZEBROOK J:

But I do have a slight difficulty with saying that you can have an incorporated society that was controlled by one person because it does say you've got to have 15 members. One would assume that those members ought to at least have some voting rights. You might be able to have other, in fact I think that's how it's interpreted actually, come to think of it, by the, by whoever administers this. Who does administer it, somebody.

MR GODDARD QC:

The registrar of incorporated societies.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

I'm not sure that's right, Your Honour, because an Incorporated society that's established for charitable purposes will often have members who, in fact, have a very limited say in the application of the societies proceeds and the decision-making –

GLAZEBROOK J:

Well that's because you absolutely have to have the charitable object set out in order to be able to get the revenue benefit but...

MR GODDARD QC:

And as soon as you can do that and as soon as you can confer the ongoing operation of the society and the management of its funds, to effectively a self-perpetuating board which appoints its own successors rather than members having a vote, which makes key decisions without reference to members who are more in the nature of supporters of the charitable cause rather than decision makers, one sees that the rules are broad enough to encompass that and there's no reason to think that that's limited to the charitable situation. A very common structure for a charitable incorporated society, and that is touched on. I purchased when I was instructed on this in

the hope that it might be of some assistance, Mr von Dadelszen's book on incorporated societies, it's really just a handbook for people who run them, it doesn't get into any of the interesting legal issues that this Court needs to grapple with but it does deal with classes of membership and with some of the issues that arise where you have charitable purposes for the incorporated society.

I was going to touch also on the appointment of officers. Again it doesn't assume that they will be appointed, elected by members. Election is just one method of appointment, it can be a self-perpetuating board. Control and use of the common seal, if the rules can deal with that and control and investment of funds, which can be placed in the hands of trustees or of the self-perpetuating board. All of these things are to be governed by the rules and there's no limit expressed on how they'll work. And then when we come, for example, to section 21(1) is the point made by Your Honour Justice O'Regan, when we look at how rules are altered, "A society may from time to time alter its rules in manner provided by the said rules." So complete flexibility in relation to how that is to work is contemplated by section 6 and 21 read together. And then when we turn over to 24, "Members may resolve to put the society into liquidation. The society maybe put into liquidation if the society at a general meeting passes a resolution appointing a liquidator." And just as one can specify who can or cannot vote at a general meeting. So for example there maybe honorary members who don't have to pay subscriptions but who correspondingly have no vote.

WILLIAM YOUNG J:
Wouldn't you think there'd have to be at least 15 members who proposed?

MR GODDARD QC:
There need to be 15 members or five if they're companies, I suppose, who are associated for a lawful purpose but it doesn't require that they be able to vote.

WILLIAM YOUNG J:

And you say, what about the right to go the High Court if you don't like the way things are panning out?

MR GODDARD QC:

That of course can't be excluded by contract.

WILLIAM YOUNG J:

Do you think as an incorporated, do you say an incorporated society can be run for the pecuniary benefit of one of its members?

MR GODDARD QC:

No the society can't be run for the pecuniary benefit of one of its members but can be established. It can enter into contracts which enable a member to make a profit from the provision of services to the society.

WILLIAM YOUNG J:

Yes but very restrictive, if service is by way of salary, it only permits – this is 6.5(d). Say the golf club, the owner of the golf course retains directly or indirectly membership, it wouldn't be permitted to require the society to be run in such a way as to facilitate the making by if of its profit?

MR GODDARD QC:

No but what it could do is to, and this is the example I was trying to give, it could lease –

WILLIAM YOUNG J:

Yes but wouldn't that just be, wouldn't that just be another – I mean it wouldn't – sorry it wouldn't be a matter of substance, I mean you're talking about form but wouldn't it be, if the substance of the operation of the club that's postulated is to make a profit for the landowner which by, which controls the affairs of the club, wouldn't the club be in breach of its, the fundamental purpose of the Act?

MR GODDARD QC:

I don't think that in a situation where there's a lease from a commercial entity to a incorporated society which incorporates a commercial return to the owner of the land and facilities, the mere fact that the owner is a member of the club –

WILLIAM YOUNG J:

Yes, no it's not just the mere fact, it's on your hypothesis it's the fact that the owner of golf course is controlling the affairs of the club.

MR GODDARD QC:

The club is still not itself associated for pecuniary gain and would just be a pass through of its cost structure.

O'REGAN J:

But it wouldn't have to be the same person anyway?

MR GODDARD QC:

No.

O'REGAN J:

I mean the lessor could be a different company.

WILLIAM YOUNG J:

Well I'm talking about in terms of substance, I agree that you can have, you can disconnect in a formal sense the ownership, but would that really defeat sections 4 and then the rather detailed but limited exceptions in section 5?

MR GODDARD QC:

They're not the only exceptions, they are specific carve-outs that are safe harbours. It doesn't mean that other relationships are not permissible, for example, leasing on commercial terms, premises from a member, but I'd also pick up Justice O'Regan's point that you could have different companies performing those roles within a group.

WILLIAM YOUNG J:
I'm accepting that. I'm simply saying I would have looked through all that.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
And what I'm suggesting is if you look through it and in substance the people who are making the profit are the same people calling the shots within the club, the society, wouldn't that be a breach of at least the spirit of the Act and probably its purpose?

MR GODDARD QC:
In my submission, no, but in any event if we ask why we're looking at this, which is to say can it be taken from this covenant that there will be an incorporated society in which the residents have the substantial control of the golf course land, and pursuant to which no profit can be made by the owner of the golf course land and facilities on it, that just cannot be taken from this covenant, and there are –

WILLIAM YOUNG J:
But that's a different hypothesis.

MR GODDARD QC:
That's my friend's argument and really the Court of Appeal's –

WILLIAM YOUNG J:
Well no, the one I'm dealing with is where the owner of the golf course land, directly or indirectly controls the club.

MR GODDARD QC:
Arguments might be made about the consistency of that, or as Your Honour says the spirit of the Act, and then by way of implication its terms, but as long as there are other ways in which, without raising those issues, members of the

golf club could find themselves paying dues which incorporate a full commercial return to the owner of the land and its facilities, the expectation that those would be provided on a not for profit basis, which was the Court of Appeal's basis for assuming a material difference, disappears. So even if you have a member society that could choose to enter into a contract, and even if you expect that the owner of the land would not agree in a negotiation to any terms that did not provide it with a commercial return, in my submission, a rational reader, a reasonable reader of this clause, knowing that the golf club did not necessarily own the land or any of the facilities on it, would assume, would expect that one possible structure involved the ownership of the land and its facilities by a commercial entity leasing it to the club, would that commercial entity be taking a full commercial return. So if the question is, is incorporated as in incorporated society material, the answer can't be, yes because you'd expect the cost structure to be different, because there are many arrangements completely unproblematic in terms of the Incorporated Societies Act because no control of a society under which nonetheless the cost structure involves a full commercial return on the facilities, and payment of the associated costs on a cost recovery basis through the club. So you can't say, as the Court of Appeal did, that you would expect there to be any material difference in cost structures.

GLAZEBROOK J:
Well apart from the fact that it's a two-way negotiation not a one-way negotiation.

MR GODDARD QC:
But you still couldn't expect the –

GLAZEBROOK J:
Well you'd still expect that you would have a fully commercial return, it's just whether, what that fully commercial return would be after negotiation on a two-way basis rather than a one-way basis, and we all know that negotiations on a one-way basis tend to go one way.

MR GODDARD QC:

They tend to go much better for the person doing the negotiating, yes.

GLAZEBROOK J:

Exactly.

MR GODDARD QC:

But, not –

WILLIAM YOUNG J:

Sorry, there's a difference if one party can walk away. Difference if one party is entitled to say, well I just don't want to play golf on those terms, we'll go and play down the road, whereas on your case they're not entitled to say that. The residents aren't entitled to say, they've got to, they're not entitled to say for the company you're asking for too much, that'd be something else. They, on your argument, have to pay whatever is necessary to ensure that the golf clubs profit, break even anyway.

MR GODDARD QC:

And on any scenario that would well be the case under this covenant. The situation, for example, where the initial owners negotiate but negotiate in a way which does provide a full return to the owner, then someone subsequently buys the land, they clearly have no individual ability not to pay levies to the club on the basis of the commercial transactions it has entered into.

WILLIAM YOUNG J:

Why not the club?

MR GODDARD QC:

Not one member.

WILLIAM YOUNG J:

Yes, but they have a right collectively, with others whose interests are the same, to do so.

MR GODDARD QC:

But any – well that comes back to the question of how one reads the Act, but the rule –

O'REGAN J:

It would also depend on where the assets go in a winding up.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

They might not have any assets.

WILLIAM YOUNG J:

There won't be any assets.

MR GODDARD QC:

They can't go to the members, that's very clear, that's prohibited by –

WILLIAM YOUNG J:

But there's –

GLAZEBROOK J:

No, if you wind it up the assets do go to the members and that's the only place they can go, but they won't have any assets effectively.

WILLIAM YOUNG J:

What about limited liability? Isn't that an advantage an incorporated society has from the point of view of members?

MR GODDARD QC:

There's not liability if you're a member of a commercial club operated by another entity either. You're in the –

WILLIAM YOUNG J:

Yes but they can keep on asking you to pay rent if you're a member, or pay the fee, if you're a member of an incorporated society and you don't like the way it's running you say we're winding it up and all obligations under the lease are at an end.

MR GODDARD QC:

And then a new incorporated society will be established and you go around again.

WILLIAM YOUNG J:

Okay, all right. We are probably going around again.

O'REGAN J:

Because you have to stay, you have to keep paying, don't you, under the covenant, that says you have to keep on paying.

WILLIAM YOUNG J:

Depends on what it means.

GLAZEBROOK J:

Depending upon whether there's an incorporated society.

MR GODDARD QC:

Depending on whether there's a golf club and whether –

GLAZEBROOK J:

Well we understand your argument.

MR GODDARD QC:

Yes, we need to resolve that question Your Honour. So – and, I don't think I need to make that other point and that just leaves me with a literary corrigendum which Your Honour the Chief Justice was quite right that speaking prose without knowing it, is Monsieur Jourdain in Le Bourgeois gentilhomme by Molière, I am mortified to have made that mistake.

ELIAS CJ:

I'm very glad you did.

MR GODDARD QC:

So with that as the one thing I said which is I accept unhesitatingly is completely and in all respects misconceived, unless there's anything else I can assist the Court with.

ELIAS CJ:

No, thank you Mr Goddard, and thank you counsel for your submissions. We'll reserve our decision.

COURT ADJOURNS: 3.32 PM