IN THE SUPREME COURT OF NEW ZEALAND

SC 99/2016
[2017] NZSC 99

BETWEEN	LAKES INTERNATIONAL GOLF MANAGEMENT LIMITED First Appellant	
	THE LAKES INTERNATIONAL GOLF COURSE LIMITED Second Appellant	
AND	HARTLEY CLENDON VINCENT Respondent	

Hearing:	27 March 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	D J Goddard QC and E M Gattey for Appellants M J Fisher and K J Ng for Respondent
Judgment:	29 June 2017

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The respondent is entitled to $25,000 costs plus usual disbursements to be fixed by the Registrar if necessary. We certify for second counsel.**

REASONS
(Given by William Young J)

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Introduction

[1] The Lakes Resort near Pauanui, on the Coromandel Peninsula, consists of a residential development and golf course. The family trust of the respondent, Hartley Vincent, owns lot 75, one of the residential sections at the resort. A covenant is registered against this section requiring the owner to join, remain a member of, and meet all levies imposed by the "Golf Club". "Golf Club" is defined as meaning "the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course".

[2] The golf course has been operating since 2004 but no incorporated society has ever been formed. In 2009 The Lakes International Golf Course Ltd (Golf Course) acquired the resort and it has leased the golf course to an associated company, Lakes International Golf Management Ltd (Golf Management). This latter company has established what it calls the Lakes Resort Golf Club through which the golf course is currently operated and managed.

[3] Golf Course and Golf Management claim to be entitled to enforce the covenant against Mr Vincent, the former as the successor in title to the original registered proprietor under s 301(2)(c) of the Property Law Act 2007 and the latter in reliance on s 4 of the Contracts (Privity) Act 1982. Mr Vincent, who is now a trustee of his family trust,[1] takes no issue with the fact that he alone has been pursued (and not his co-trustee). He has, however, resisted the demands, arguing that the covenant is enforceable only by a golf club as contemplated by the covenant – that is, one which is an incorporated society.

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[1] He was not a trustee at the times that lot 75 was acquired and the covenant was registered.

[4] In the High Court Heath J held the covenant was enforceable by both Golf Course and Golf Management and that the latter was entitled to recover levies from Mr Vincent.[2] Mr Vincent's appeal to the Court of Appeal was successful.[3] Golf Course and Golf Management now appeal to this Court.[4]

Factual background

[5] The original developer of the resort became insolvent and in 2002 Pauanui Lakes Properties Ltd took over the resort. One of the people involved in this company was a Mr Herbert. He was also one of two trustees of the Vincent Family Trust. The other was a Mr Donovan. On 2 August 2002, Messrs Herbert and Donovan, as trustees of that Trust, entered into a conditional option to purchase lot 75 from Pauanui Lakes Properties. Mr Herbert was thus on both sides of the transaction pursuant to which the trust acquired lot 75.

[6] The option envisaged the establishment of "the Pauanui Lakes Resort Residents Association Inc" and also "the completion of the golf club membership structure". The option also stated:

> **Notes & Conditions**
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> 1 …
>
> 2 The purchase price is to include a family membership (or whatever the ultimate equivalent) but annual subscriptions will be met by the owner if option is exercised.
>
> 3 In exercising the option you acknowledge there is no guarantee re completion of the golf course or facilities thereof and accept that once an owner you will have a liability for membership fees of the association irrespective of the finished state.

At this stage it seems to have been envisaged that playing rights in respect of the golf course would be provided pursuant to an easement which had been registered in 2001 and which gave residents the right to use the golf course and facilities.

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2 *Lakes International Golf Management Ltd v Vincent* [2015] NZHC 2771, (2015) 16 NZCPR 807 [*Lakes* (HC)].

3 *Vincent v Lakes International Golf Management Ltd* [2016] NZCA 382 (French, Fogarty and Collins JJ) [*Lakes* (CA)].

4 Leave being granted in *Lakes International Golf Management Ltd v Vincent* [2016] NZSC 153.

[7] The conveyancing in relation to lot 75 was odd. Although registration of the title into the names of the then-trustees (being Messrs Herbert and Donovan) occurred on 26 November 2002, the contract for the sale and purchase of the Vincent Family Trust property is dated 1 July 2003. No concrete explanation for this has been provided.[5]

[8] In mid-2003, Pauanui Lakes Properties advised the residents' association that it was proposing that a separate entity – that is, separate from the residents' association – would be set up to manage and control the playing rights. It said the final details of the separate entity had not then been determined.

[9] The parties placed before the Court of Appeal material related to the evolution of the planning associated with the proposed golf course. Much of this consisted of legal opinions obtained by Pauanui Lakes Properties addressing, amongst other things, the requirements of the Securities Act 1978. In the result, Pauanui Lakes Properties decided that a golf club in the form of an incorporated society was to be formed and that covenants should be put in place which would require owners of residential land in the resort to become members of that golf club.

[10] The covenant in respect of lot 75 was executed on 7 October 2003 and registered on 17 November 2003. It is in these terms:

> 7. The Transferee will:
>
> 7.1 upon becoming registered as a proprietor of any estate in the Land, including an estate arising from a subdivision of the Land, immediately join as a member of the 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;
>
> 7.2 at all times comply with the rules and regulations of the Golf Club;
>
> 7.3 upon selling the Land procure the Transferee acquiring the Land to enter into, execute and deliver to the Golf Club an acknowledgement of membership form effective from the

[5] The respondents have suggested a possible explanation, that "pending exercise of the option, [Messres Herbert and Donovan] held the property as trustees for the vendor, as the title would thereby be excluded from charges granted by Pauanui Lakes Properties Ltd to its mortgagees."

> date the Transferee becomes the beneficial owner of the Land.
>
> …
>
> Definitions:
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> 9. For the purposes of these covenants:
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> …
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> 9.4 "Golf Club" means the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course.
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> 9.5 "Golf Course" means the golf course being developed on the land in Certificate of Title SA71C/273.
>
> 9.6 "Land" means the land transferred by this transfer.

[11] At this time, that is October and November 2003, the golf course was still under construction.

[12] For reasons which are not material to the present dispute, Pauanui Lakes Properties did not form a golf club as envisaged by the covenant. Instead it provided for the golf course to be operated by an associated company. It was not suggested that Mr Vincent was required to pay levies in respect of the operation of the golf course. Pauanui Lakes Properties went into liquidation in 2009 and its interests in the golf course land were acquired by Golf Course.

[13] As we have noted, Golf Management has established the Lakes Resort Golf Club. This club offers memberships and associated playing and other rights. The rules of the club provide for members to pay annual levies to Golf Management. The Lakes Resort Golf Club is thus an unincorporated proprietary club, as described in *Halsbury's Laws of England*:[6]

> **209. Unincorporated proprietary clubs.** An unincorporated proprietary club is of an entirely different nature from a members' club. The property and funds of the club belong to the proprietor, who usually conducts it with a view to profit. The members, in consideration of the payment by them to the proprietor of entrance fees and subscriptions, are entitled to make such use of the premises and property, and to exercise such other rights and privileges, as the contract between them and the proprietor justifies.

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6 *Halsbury's Laws of England* (5th ed, 2009) vol 13 Clubs at [209] (footnotes omitted).

> The management of an unincorporated proprietary club may be given wholly or in part to a committee of the members over which the proprietor will usually reserve ultimate control.

[14] In 2011, 2012 and 2013 Golf Management invoiced Mr Vincent for the annual levies. As he refused to pay, Golf Course and Golf Management sued him in the High Court. Both sides sought summary judgment. Associate Judge Sargisson declined both applications.[7] Mr Vincent appealed the Associate Judge's decision but it was upheld by the Court of Appeal.[8] The case then went to trial before Heath J.[9]

The decision of Heath J

[15] Heath J identified the question for decision in this way:

> [2] The primary question in this proceeding is whether a covenant (the Covenant) that defines the term "Golf Club" as "a golf club to be incorporated as an incorporated society" is rendered unenforceable because the "Golf Club" was subsequently incorporated as a limited liability company.

This formulation, proceeding as it does on the basis that Golf Management is the "Golf Club", addresses the wrong question. The issue is not whether the covenant is unenforceable but rather whether it can be enforced by an entity which is not an incorporated society.

[16] Heath J considered that the covenant was only unenforceable if there were some distinction between the incorporated society envisaged by the covenant and the proprietary club established by Golf Management that "would likely flag immediately a need to take a more cautious approach when determining whether to purchase".[10] He did not see the distinction in that light and concluded that the structure of the golf club (and in particular the fact that it was not an incorporated society) did not render the covenant unenforceable.[11] He concluded that both Golf Course and Golf Management were entitled to enforce the covenant, entered judgment for Golf Management for the outstanding levies and declared that:[12]

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7 *Lakes International Golf Management Ltd v Vincent* [2013] NZHC 2901.
8 *Vincent v Lakes International Golf Management Ltd* [2014] NZCA 323.
9 *Lakes* (HC), above n 2.
10 At [27].
11 At [29].
12 *Lakes International Golf Management Ltd v Vincent* [2015] NZHC 3040 at [10](b).

(i) International Golf Management is the "golf club" defined by clause 9.4, and referred to in clause 7 of Covenant 5800996.1 registered on the property described as Lot 75, Deposited Plan South Auckland 88978, Identifier SA70C/464 and

(ii) Mr Vincent is required to join the golf club.

The decision of the Court of Appeal

[17] The approach of the Court of Appeal was as follows:[13]

> [35] Unlike the approach taken by Heath J, we consider the starting point must be to construe the actual words of the covenant having regard to the factual matrix in which it came into existence. In our view, the scheme of the covenant and the wording of the definition of "golf club" are clear and permit of only one meaning. The obligations were imposed in relation to a golf club that was to be incorporated as an incorporated society to provide for playing rights on the golf course.
>
> (footnotes omitted)

[18] The Court summarised the Golf Management argument in this way:

> [36] In arguing to the contrary, Ms Mansell submitted the context in which the covenant was intended to operate was the context of a resort golf course that was to international standards and that was always intended to be run as a for profit course. It was not, she emphasised, a local golf club run by members for the benefit of members. It had always been owned and run by commercial entities. There had never been an incorporated society. The only entity that had ever existed was a company. In her submission, the words "to be" in the phrase "to be incorporated as an incorporated society" were significant. The drafters had not said "must be" or "will be" but rather "to be".

[19] The Court rejected this argument:

> [37] We do not accept that submission. The words "to be" denote an intention to do something in the future and were used because as at November 2003 the incorporated society had not yet come into existence. The argument also begs the question why if an incorporated society was so inimical to the concept of the development would the drafters have specifically mentioned an incorporated society? When pressed on those points, Ms Mansell was driven to submit the reference to an incorporated society was a mistake. But that is not a tenable argument, especially in light of the extrinsic evidence we have detailed above.
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> [38] The fact the drafters made a deliberate choice to specify the mode of incorporation also undermines arguments that the mode of incorporation was somehow unimportant or immaterial. It also undermines arguments that

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13 *Lakes* (CA), above n 3.

interpreting the covenant to require the golf club to be an incorporated society is a commercial absurdity. After all, the developers were business people and the drafters were their lawyers acting on their instructions.

(footnotes omitted)

[20] The Court went on to say:

> [39] Further, from the point of view of the covenantor (the individual landowner) there are important differences between a golf club that is an incorporated society and a golf club operating under the auspices of a company in which the members of the golf club do not hold shares. The most obvious of these are control and the profit motive.
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> [40] As Mr Fisher submitted, the defined status of the golf club as an incorporated society would provide comfort to the covenantor because:
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> (a) an incorporated society would be managed and controlled by its members, who could not have a personal pecuniary gain making objective when managing its affairs, negotiating the lease or licence for use of the golf course, and levying their fellow members, and who would be expected to have due regard to the interests of the members in providing for the playing rights;
>
> (b) an incorporated society would not be exposed to the financial risks associated with the resort development, would be unlikely to encumber its assets except as necessary to fund its own activities, and could be expected to endure more or less in perpetuity as the entity providing for the playing rights on the golf course.

[21] In the course of its reasons, the Court of Appeal referred to, and to some extent relied on, the extrinsic evidence to which we have referred in [9] above.

The issues on appeal

[22] The appeal raises three questions:

(a) To what, if any, extent was the extrinsic evidence material to the construction of the covenant?

(b) Is Golf Management (and/or Lakes Resort Golf Club) the "Golf Club" for the purposes of the covenant?

(c) If Golf Management (and/or Lakes Resort Golf Club) is not the "Golf Club" for the purposes may it nonetheless recover levies?

To what, if any, extent was the extrinsic evidence material to the construction of the covenant?

[23] Golf Management submitted in the Court of Appeal that the reference to an incorporated society in the covenant was a mistake.[14] The extrinsic material in issue shows that this contention is wrong – at least in terms of the intentions of Pauanui Lakes Properties, as the incorporated society structure was adopted deliberately and on the basis of legal advice.[15] The Court of Appeal also saw the extrinsic evidence as rebutting arguments as to what was said to be the unimportance, immateriality and commercial absurdity of the incorporated society requirement.[16]

[24] In this Court, Mr Goddard QC, for the appellants, did not seek to maintain that the incorporated society reference was a mistake.

[25] The extrinsic evidence is confined to the reasons why Pauanui Lakes Properties chose the incorporated club structure, in other words to its subjective intentions, evidence of which is usually inadmissible. There is also the problem that Golf Course and Golf Management had no involvement in the interactions which produced the extrinsic material relied on.[17] There is, as well, the allied consideration that the purchaser's imputed knowledge of the material is purely adventitious, arising out of Mr Herbert's dual role.

[26] Mr Goddard argued for a pure interpretative approach. Under this approach, agreements registered against land should be construed against a background confined to what subsequent parties could be expected to know or to be able to readily ascertain. He said that this was so even where the dispute is between the original parties and in respect of material which is common to both. He maintained

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14 *Lakes* (CA), above n 3, at [37].
15 See above at [9].
16 *Lakes* (CA), above n 3, at [38]–[41].
17 The same could possibly be said of the current trustees of the Vincent Family Trust as none were trustees at the relevant time.

that this approach was to be adopted not only in respect of agreements registered against land but also to contracts in three other categories, those:

(a) likely to be assigned;

(b) formed by the acceptance of offers to the public; and

(c) customarily relied on by third parties (such as bills of lading).

[27] Issues of this kind have often been the subject of consideration by the courts, for instance: in New Zealand in *Escrow Holdings Forty-One Ltd v District Court at Auckland*,[18] *Opua Ferries Ltd v Fullers Bay of Islands Ltd*,[19] *Ohinetahi Ridge Ltd v Witte*[20] and *Big River Paradise Ltd v Congreve*;[21] in Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*;[22] and in England and Wales in *Cherry Tree Investments Ltd v Landmain Ltd*.[23]

[28] The questions raised give rise to some conceptual difficulty. We do not, however, see them in the context of the present case as warranting extended discussion. In part this is because we are not able to discern a genuine interpretation issue to which the extrinsic evidence might be relevant. The meaning of the definition of "Golf Club" is crystal clear in that the language used shows that the golf club envisaged was to be an incorporated society. In the absence of a genuine issue of interpretation, an elaborate review of the principles of interpretation relied on by Mr Goddard would be largely abstract in character.

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18 *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167, [2017] 1 NZLR 374 at [41]–[43].

19 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740.

20 *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZ ConvC 193,938 (CA).

21 *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402; leave to appeal declined in *Big River Paradise Ltd v Congreve* [2008] NZSC 51, (2008) 9 NZCPR 327.

22 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528.

23 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305.

[29] In any event, a conclusion that the material relied on by Mr Vincent is admissible would require an approach to the admissibility of extrinsic evidence which is more expansive than we would be prepared to accept. We say this because:

(a) The extrinsic evidence relates solely to the reasons why Pauanui Lakes Properties provided for the golf club to be an incorporated society.

(b) These reasons were of no practical moment for the Vincent Family Trust.

(c) Golf Course and Golf Management were not original parties to the covenant and were not aware of the material at the time they took interests in the affected land.

(d) When they took those interests they had no means of obtaining access to that material.

(e) The material does not relate to the physical layout of the land in question or to particular patterns of use or infrastructure to which the covenant related.

(f) There is nothing in the covenant to alert later parties to a need to make enquiry as to what the language used relates.

[30] As will be apparent, we are of the view that, given the context just outlined, the extrinsic evidence relied on is inadmissible on any conceivable approach to the relevant principles of interpretation. We therefore see no need to address the broader arguments of Mr Goddard.

[31] We note in passing that there is another consideration, closely related to the issue raised by Mr Goddard. The knowledge of the extrinsic material can be imputed to the Trust by reason only of the accident that Mr Herbert was on both sides of the transaction. It is not very likely that other purchasers would have been aware of the material which was, in substance, internal to Pauanui Lakes Properties.

The covenant was, however, part of the scheme by which the resort was developed. Given this, there may be difficulties with an approach under which the covenant might have one meaning in respect of lot 75, but another meaning in respect of the other lots.

Is Golf Management (and/or Lakes Resort Golf Club) the "Golf Club" for the purposes of the covenant?

[32] On this aspect of the case, Mr Goddard's argument was necessarily more contextual than literal. The context relied on is that of the physical layout of the resort with houses around a golf course and the broad pattern of the contractual arrangement under which it was contemplated that there would be a golf club which would run the course with the owners to be members of the golf club with associated playing rights and levy obligations. The entity which runs the course and provides playing rights is Golf Management. There is no other entity which can do so. It follows, said Mr Goddard, that Golf Management is the "Golf Club".

[33] On this point we agree with Mr Fisher, counsel for Mr Vincent. The covenant falls to be interpreted in light of the situation as it was in October 2003. At that time the golf course had not been completed and there was no golf club in existence. The covenant cannot be read as a misdescription of an existing entity. Rather it identifies the nature of the entity to be established in the future and to which the obligations related and thus could be enforced by. The undeniable reality is that the proposed entity is described in terms which Golf Management does not match.

If Golf Management (and/or Lakes Resort Golf Club) is not the "Golf Club" for the purposes of the covenant may it nonetheless recover levies?

[34] Mr Goddard's argument was Mr Vincent is required to pay levies unless there is such a difference between the incorporated society envisaged by the covenant and Golf Management's proprietary club that Mr Vincent can say "joining this golf club is not what I agreed to do".

[35] The juridical basis for this argument was never explained with great precision. If it is the case, as we have held, that the proprietary club is not the golf club as envisaged by the covenant, then it necessarily follows that it is not the "Golf Club" that Mr Vincent agreed to join. A legal basis for the contention that Mr Vincent can be compelled to join a different entity is not apparent. Accordingly, we see Mr Goddard's argument on this point as never getting off the ground.

[36] In the course of argument, Mr Goddard suggested that it would have been possible for the developers to have formed an incorporated society which was so structured in terms of its rules that its members would have been in no better legal or practical position than the members of the Lakes Resort Golf Club, in that, under its constitution as postulated by Mr Goddard, they would have had little or no control over the management of the club's affairs. He also contended that the developer could have structured the leasing arrangements in respect of the golf course in such a way as to take for itself whatever profit component it saw as appropriate in respect of the operation of the golf course.

[37] There is room for dispute as to whether: (a) these arguments are necessarily correct given certain provisions in the Incorporated Societies Act 1908;[24] and (b) whether a society as postulated would meet what was envisaged by the covenant. Associated arguments were canvassed with counsel during the hearing. We are, however, satisfied that there is no occasion for us to reach a concluded view in respect of them. This is because the case must be determined by reference to what has, and not what might have, happened. What has happened is that the golf club as established is not of the kind stipulated in the covenant. That it might have been no less onerous for Mr Vincent to join a golf club which was an incorporated society is of no moment as he cannot be compelled to do something which is different from what he agreed.

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[24] Including ss 4 (purposes must not include pecuniary gain), 5 (which suggests that pecuniary gain of another entity may be disqualifying), 13 (as to members not being liable for the debts of a society), 20 (prohibiting, amongst other things, operations for pecuniary gain), 24 (ability of members to place a society into liquidation) and 25 (powers of High Court to put society into liquidation for reasons which include a "just and equitable" ground).

Disposition

[38] The appeal is dismissed.

[39] The respondent is entitled to $25,000 costs plus usual disbursements to be fixed by the Registrar if necessary. We certify for second counsel.

Solicitors:
Martelli McKegg, Auckland for Appellants
Castle/Brown, Auckland for Respondent