IN THE COURT OF APPEAL OF NEW ZEALAND

CA699/2015
[2016] NZCA 382

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

Hearing:	14 July 2016
Court:	French, Fogarty and Collins JJ
Counsel:	M J Fisher and H L Hui for Appellant C C Mansell and R W Akroyd for Respondents
Judgment:	9 August 2016 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed. The decision of the High Court dated 23 December 2015 is quashed and judgment entered for the appellant.

B The costs order made in the High Court is set aside. The respondents must pay the appellant costs relating to the High Court proceeding calculated on a 2B basis under the High Court scale of costs, together with reasonable disbursements.

C The respondents must pay the appellant costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Vincent owns a residential property in a resort that consists of residential houses centred round a golf course. A clause in a restrictive covenant registered in 2003 against Mr Vincent's land provides that the landowner will join the golf club, remain a member of the golf club throughout their ownership of the land and meet all levies imposed by the golf club. "Golf club" is defined for the purpose of the covenant 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 officially open since 2004 but no incorporated society has ever been formed. Instead, playing rights have been provided by commercial entities, including from 2009 onwards by the first respondent, Lakes International Golf Management Ltd (Golf Management Ltd). The second respondent, Lakes International Golf Course Ltd (Golf Course Ltd), owns the golf course land.

[3] The respondents contend that, although neither of them is an incorporated society, they are nevertheless entitled to enforce the covenant and to demand payment of levies from Mr Vincent. Mr Vincent, who has never joined the golf club, has resisted payment. He argues the covenant is only enforceable at the suit of a golf club that is an incorporated society.

[4] In the High Court at Auckland on 23 December 2015 Heath J held the covenant was enforceable by the respondents,[1] and in a separate judgment awarded costs against the appellant.[2]

[5] Dissatisfied with that outcome, Mr Vincent now appeals both the substantive and costs decisions.

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1 *Lakes International Golf Management Ltd v Vincent* [2015] NZHC 2771.
2 *Lakes International Golf Management Ltd v Vincent* [2015] NZHC 3040.

Factual background

[6] The resort in question is known as the Lakes Resort and is situated near Pauanui on the Coromandel. The residential area comprises 10 hectares and the golf course some 70 hectares. The titles for both the golf course land and the residential sections were issued following subdivision of a larger parcel of land. A club house and associated facilities are situated on the golf course.

[7] The resort was originally owned and developed by a company called Pauanui Lake Resort Ltd and then sold by mortgagee sale in 2002 to various entities associated with three developers (the Pauanui Lakes group). One of the developers was a Mr Herbert.

[8] Mr Herbert was also one of two trustees of the Vincent Family Trust. On 2 August 2002 he and his co-trustee Mr Donovan entered into a conditional option to purchase Lot 75, a residential section in the resort, based on tender cost. The option was required to be exercised by 31 July 2003. It was a condition of the option that the sale could not be ratified by Pauanui Lakes Properties Ltd until that company had "completed the arranging of the Pauanui Lakes Resort Residents Association Inc and the completion of the golf club membership structure". Paunanui Lakes Properties Ltd was one of the land owning companies in the Pauanui Lakes group. It is not clear from the evidence when the residents' association was formed but it appears to have existed from a reasonably early stage of the development.

[9] The option also stated:

> **Notes & Conditions**
>
> 1 …
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> 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.

[10] By letter dated 1 July 2003 the trustees of the Vincent Family Trust purported to exercise the option. The letter described the option being exercised as an option to acquire Lot 75 for $21,937.50 inclusive of GST and inclusive of a golf club membership. The letter went on to state that the option was exercised in reliance on the advice of the directors of Pauanui Lakes Properties Ltd that "the issues concerning the Pauanui Lakes Resort Residents Association Incorporated and golf club membership had been completed".

[11] Contemporaneous documents suggest the reference to completion of issues concerning golf club membership and the residents' association was a reference to the removal of an easement that had been registered on the title to the resort in 2001 giving residents the right to use the golf course and facilities. The developers had decided the golf course easement was an inadequate method of managing the playing rights on the golf course. In mid June 2003 the developers had advised the residents' association they were now proposing that a separate entity — ie separate from the residents' association — would be set up to manage and control the playing rights. It was said the final details of the separate entity had yet to be determined.

[12] Curiously, although Messrs Donovan and Herbert exercised the option to purchase Lot 75 on 1 July 2003 and then signed an agreement for sale and purchase bearing the same date, they were already the registered proprietors of the property. Legal title to Lot 75 had been transferred into their names in 2002. Neither they nor Mr Vincent gave evidence at the hearing before Heath J and so the matter remains shrouded in mystery.

[13] At the hearing before us, counsel for the respondents, Ms Mansell, referred us to an affidavit sworn by Mr Vincent for the purposes of an earlier summary judgment application in these proceedings. In his affidavit Mr Vincent stated that in 2002 title was transferred to the two men in their capacity as trustees of the Vincent Family Trust. However, the affidavit was not part of the evidence at trial and, in any event, it is unclear to us how the fact of registration in 2002 impacts on the interpretation of a covenant that was not registered until November 2003. The respondents did not suggest, for example, that the obligation to join the golf club and pay levies arose from the terms of the option or that registration in 2002 indicated the formal

structure of the golf club was not important to the owners of the Vincent property and/or that as a result they were estopped from so arguing now. It was common ground that the source of any obligation (if it existed) was the covenant. That was the sole basis of the respondents' claim as pleaded.

[14] The covenant was signed by the trustees of the Vincent Family Trust on 7 October 2003 and, as mentioned, registered against the title to Lot 75 on 17 November 2003. In addition to the provision at issue in this proceeding, the covenant contained provisions dealing with a variety of other matters, including detailed building covenants regulating house design, fencing, and landscaping. It also contained a provision providing for compulsory membership of the residents' association.

[15] The covenant was drafted by the developers' lawyers.

[16] It is apparent from the documentary evidence that the golf club membership structure was the subject of considerable discussion between the developers and their lawyers over a relatively long period of time, with various proposals and counter proposals. A bundle of correspondence was admitted into evidence by consent, although the parties disagreed as to the extent to which it could be used when construing the words of the covenant. As Ms Mansell also pointed out to us, it was not a complete set of correspondence. Obvious caution is required. However, for the purposes of this recital of the background facts, we have included references to some of the documents.

[17] The suggestion of an incorporated society appears to have originated from the developers' lawyers and first surfaced in April 2003. Previously, the developers had been attracted to the idea of the golf membership structure being a system of 99 year licences to use and play the golf course. However, in a letter dated 1 April 2003 the developers' lawyers expressed concern that such a structure would constitute a contributory scheme under the Securities Act 1978 and require a prospectus. The lawyers proposed that as an alternative the developers consider incorporating the golf club as an incorporated society with rules to govern playing rights and arrange for the golf club to acquire the usage rights of the various facilities on the golf

course. A solicitor's file note of the same date records that one of the developers was "receptive to the proposal that the entity be structured as an incorporated society particularly if that will avoid the need for a prospectus".

[18] In its final form the covenant was forwarded by the lawyers to the developers in August 2003. It is reasonable to assume the developers must have instructed the lawyers sometime between mid June and August 2003 that it had now been decided the golf club would be an incorporated society. It will be remembered that in mid June 2003 the developers had written to the residents' association advising that the final details of the separate entity had yet to be determined.

[19] That the developers gave instructions the golf club would be an incorporated society is supported not only by the final version of the covenant the lawyers drafted but also by later correspondence. It records the developers instructed their lawyers in October 2003 to proceed with the formation of an incorporated society for the purpose of handling the golf club membership.

[20] The correspondence also shows that in a letter dated 21 November 2003 (ie after the covenant had been registered) the developers' lawyers appear to have had a change of mind. They advised the developers against using an incorporated society on the grounds of undue complexity. Instead, it was recommended the constitution of one of the Pauanui Lakes group companies be amended to provide for a golf club to be established for the benefit of players, with the company constitution and the rules of the club comprising a contract between the company and the individual players.

[21] The developers subsequently suggested another alternative themselves, that of creating a subsidiary company to operate the golf club. This was not favoured by the lawyers. Then on 17 February 2004 the developers emailed their lawyers instructing them to "proceed and finalise with urgency the formation of an incorporated society for the purpose of handling the golf memberships". It is evident from the rest of the email that the instruction was prompted by the belief the covenant would need amendment if the golf club was not an incorporated society.

[22] The lawyers duly drafted and forwarded to the developers a constitution for the formation of an incorporated society for the golf club in May 2004. The lawyers appear to have then sought advice from a specialist law firm. There was talk of amending the covenant to remove the obligation to join and remain a member of the golf club. In 2008 the lawyers proposed another structure to the developers.

[23] The covenant was never amended and the developers never sought to enforce it against Mr Vincent. The developers also claimed in 2005 that they did not attribute any value to the golf membership attaching to the residential properties.

[24] There matters rested until 2009 when a number of the Pauanui Lakes group companies went into liquidation. The golf course land was then purchased by the second respondent, Golf Course Ltd. The new owners also formed a related company, the first respondent Golf Management Ltd, to take a lease of the golf club land from Golf Course Ltd and manage the golf course. Golf Management Ltd subsequently promulgated membership rules for an unincorporated golf club it established called the Lakes Resort Golf Club.

[25] In the meantime the trustees of the Vincent Family Trust had changed. Messrs Herbert and Donovan had retired as trustees in 2007 and had been replaced by Mr Vincent and two others.[3]

[26] In 2011, 2012 and 2013 Golf Management Ltd invoiced Mr Vincent for the annual levies. He disputed liability.

[27] The respondents then issued proceedings in the High Court against Mr Vincent claiming recovery of the unpaid levies. They sought summary judgment, as did Mr Vincent. Associate Judge Sargisson declined both applications and held the dispute needed to go to trial.[4] Mr Vincent appealed the Associate Judge's decision but it was upheld by this Court.[5]

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3 As noted by Heath J, Mr Vincent takes no issue that he alone has been sued: *Lakes International Golf Management Ltd v Vincent*, above n 1, at [7] n 2.

4 *Lakes International Golf Management Ltd v Vincent* [2013] NZHC 2901.

5 *Vincent v Lakes International Golf Management Ltd* [2014] NZCA 323.

[28] The amount of the claim is only $5,070. However, there are other property owners in the resort whose land is subject to the same covenant and who are also resisting payment. The respondents told Heath J it was important for them to obtain a definitive ruling so as to be able to plan future business operations.

The High Court decision on liability

[29] Having traversed relevant case law,[6] Heath J held the interpretation of the covenant should be determined by reference to the history of the development and the approach of any prospective purchaser.[7]

[30] The Judge said it was plain that anyone considering the purchase of a section within the resort contemplated the ability to use the golf course. The Judge went on to state that in his view the covenant could only be unenforceable if there were some distinction between establishment of the club as an incorporated society or a company that "would likely flag immediately a need to take a more cautious approach when determining whether to purchase".[8] The Judge considered the differences between the two modes of incorporation were not so significant as to be a deal breaker and that, in the unlikely event it did prove to be a deal breaker, the purchaser would simply not proceed with the purchase.[9]

[31] The Judge concluded that the interpretation point advanced by counsel for Mr Vincent (Mr Fisher) did not have any validity. In the Judge's view, the fact the golf club was incorporated as a limited liability company as distinct from an incorporated society did not render the covenant unenforceable.[10] He entered

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6 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [14], [19] and [71]; *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740; *Slough Estates Ltd v Slough Borough Council (No 2)* [1971] AC 958 (HL) at 962; *Bonnar v Summerland Developments Ltd* (2002) 8 NZCPR 616 (HC); *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 (CA) at [22]–[23]; *Westfield Management Ltd v Perpetual Trustee Ltd* [2007] HCA 45, (2007) 233 CLR 528; *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZ ConvC 193,938 (CA) at [37] and [42]–[44]; *Prenn v Simmonds* [1971] 3 All ER 237 (HL).

7 *Lakes International Golf Management Ltd v Vincent*, above n 1, at [27].

8 At [27].

9 At [28].

10 At [29].

judgment for the respondents in the sum of $5,070 and issued declarations in the following terms:[11]

> Orders declaring:
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> (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
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> (ii) Mr Vincent is required to join the golf club.

Arguments on appeal

[32] On appeal, Mr Fisher submitted the Judge had erred in failing to consider the actual words used in the covenant and had not identified the correct issue. In Mr Fisher's submission the issue was not whether the covenant was unenforceable but whether it was only enforceable at the suit of an incorporated society.[12]

[33] Ms Mansell submitted the interpretation adopted by the Judge accorded with business common sense. The reality was that the golf course could only be run by a profit making entity, which an incorporated society is not allowed by law to be. There was no material disadvantage to Mr Vincent in the golf club being run by a limited liability company.

Analysis

[34] At this juncture it is convenient to set out the full text of the provision in the covenant:

> 7. The Transferee will:
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> 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;

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11 *Lakes International Golf Management Ltd v Vincent*, above n 2, at [10](b).

12 There was no appeal against Heath J's rejection of an argument that because the current trustees of the Vincent Family Trust were not the registered proprietors at the time the covenant was registered it was not binding on them.

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 date the Transferee becomes the beneficial owner of the Land

…

Definitions:

9. For the purposes of these covenants:

…

9.4 "Golf Club" means the golf club to be incorporated as an incorporated society to provide for playing rights on the golf courses.

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.

[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.[13] 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.

[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

[13] The weight of New Zealand authority supports this approach: see, for example, *Vector Gas Ltd v Bay of Plenty Energy Ltd,* above n 6, at [4], [22] and [64]; *Ohinetahi Ridge Ltd v Witte*, above n 6, at [42]; and *Big River Paradise Ltd v Congreve*, above n 6, at [16]–[23]. We are aware other jurisdictions adopt a stricter approach and prohibit reliance on any extrinsic evidence. However, in our view, the outcome of this case would be the same regardless of which approach is adopted.

an incorporated society" were significant. The drafters had not said "must be" or "will be" but rather "to be".

[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.[14] 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.

[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 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.

[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.

[40] As Mr Fisher submitted, the defined status of the golf club as an incorporated society would provide comfort to the covenantor because:

> (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;

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[14] In the decision of this Court regarding the summary judgment applications, above n 5, it is wrongly stated at [24] that at the time the covenant was registered, the golf club was already being operated by a company structure. The evidence was that the golf course did not officially open until 2004.

(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.

[41] Ms Mansell sought to answer those points by arguing that the rules of the Lakes Resort Golf Club promulgated by Golf Management Ltd were similar to those of an incorporated society and contained provision for an advisory board. However, under the rules, Golf Management Ltd has the sole right to offer membership, members have no voting rights and no right to participate in the business policies of the club.

[42] In our assessment, what the respondents' argument really boils down to is that Mr Vincent is behaving unreasonably, enjoying the benefits of living alongside a golf course but not sharing in the burden. He is perceived as taking advantage of a technicality at the expense of the respondents' shareholders, who have made a significant capital investment to maintain and upgrade the golf club for the benefit of not only its members but the surrounding residential properties. The golf club is said to be currently running at a loss and, without the shareholders' capital investment, is unlikely to be able to continue to operate. Ms Mansell further submitted this type of capital investment would be almost impossible if the golf club were run as an incorporated society.

[43] The issue, of course, is not whether Mr Vincent is acting reasonably. Nor are we persuaded there is sufficient evidence to support some general proposition that an incorporated society model for the golf club activities contemplated by the covenant would make a capital investment impossible. Golf Management Ltd undertakes substantially more activities than providing playing rights. We were told it also, for example, carries on a restaurant business and the renting of villas.

[44] That said, we are not without some sympathy for the position of the respondents. However, for the reasons outlined above we consider that as a matter of interpretation the Court would not be justified in departing from the clear words of the covenant. To do so would be to rewrite it.

[45] It follows that we disagree with the approach taken by Heath J. We therefore allow the appeal against the High Court decision of 23 December 2015.

Costs in the High Court

[46] Justice Heath held costs should follow the event. He awarded costs in favour of the successful respondents against Mr Vincent on a 2B basis together with reasonable disbursements.[15]

[47] It was agreed that if Mr Vincent won the appeal, then the costs order made in the High Court should be reversed so as to be in his favour. That renders his challenge to the costs award academic, save for one issue. Mr Fisher argued that the amount of the costs in the High Court should have been reduced by Heath J to reflect the exceptionally low sum at stake and the circumstances that this was in reality a test case for the respondents. As Mr Fisher accepted, if those criticisms of Heath J's costs decision were valid and the costs award reversed in favour of Mr Vincent, then to be true to his own argument Mr Vincent should only expect to receive reduced costs.

[48] The dispute was obviously well within the jurisdiction of the District Court and normally that would result in costs being awarded on the District Court scale.[16] However, in our view, having regard to the complexity of the issue, the proceeding was appropriately in the High Court. We therefore agree with Heath J that the amount of the costs in the High Court should be calculated on a 2B basis.

Outcome

[49] The appeal is allowed. The decision of the High Court dated 23 December 2015 is quashed and judgment entered for the appellant.

[50] The costs order made in the High Court is set aside. The respondents must pay the appellant costs relating to the High Court proceeding calculated on a 2B basis under the High Court scale of costs, together with reasonable disbursements.

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15 *Lakes International Golf Management Ltd v Vincent*, above n 2.
16 High Court Rules, r 14.13.

[51] The respondents must pay the appellant costs for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
Castle/Brown, Auckland for Appellant
Martelli McKegg, Auckland for Respondents