IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-3387
[2015] NZHC 2771

BETWEEN	LAKES INTERNATIONAL GOLF MANAGEMENT LIMITED First Plaintiff
	THE LAKES INTERNATIONAL GOLF COURSE LIMITED Second Plaintiff
AND	HARTLEY CLENDON VINCENT Defendant

Hearing: 5 October 2015

Counsel: C C Mansell and R W Ackroyd for Plaintiffs
M J Fisher and H L Hui for Defendant

Judgment: 9 November 2015

JUDGMENT OF HEATH J

This judgment was delivered by me on 9 November 2015 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Martelli McKegg, Auckland
Castle Brown, Newmarket, Auckland
Counsel:
M Fisher, Auckland

CONTENTS

A question of interpretation

[1] As Alpers J once said: "No question is so apt to divide opinion as a question of construction of a document".[1]

[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.

The claim

[3] The Lakes Resort (the Resort) is a gated community near Pauanui, on the Coromandel Peninsular. It consists of residential housing and a golf course. The titles for both the golf course (the golf course land) and the residential sections were issued following subdivision of a larger parcel of land. The course is of international PGA championship length and standard. A clubhouse and associated facilities are situated on the course.

[4] The Resort was developed by interests associated with Messrs Herbert, Toohill and MacDougall. The residential sections were sold to various purchasers. One of them (the Vincent property) was acquired by the trustees (at that time, Messrs Donovan and Herbert) of the Vincent Family Trust (the Trust). Mr Herbert was also one of the developers.

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1 *Haggitt v Watson* [1927] NZLR 209 (CA) at 232 (Alpers J).

[5] Following the insolvency of a number of the entities involved in the original development, the golf course land was purchased by The Lakes International Golf Course Ltd (International Golf Course). A related company, Lakes International Golf Management Ltd (International Golf Management), was formed to manage the golf club's activities. One of its managerial responsibilities involves the provision of playing rights.

[6] The interest of Messrs Donovan and Herbert (the trustees) as registered proprietors of the Vincent property first appeared on the public register on 26 November 2002. The Covenant was created by a transfer from (and to) Messrs Donovan and Herbert (as trustees) which was registered on 17 November 2003. Later, following the resignation of Messrs Donovan and Herbert as trustees, the land was transferred into the name of Mr Vincent and two other co-trustees.

[7] International Golf Management and International Golf Course each sue Mr Vincent (in his capacity as a trustee)[2] to recover levies imposed in relation to the membership of the golf club.[3] International Golf Management sues as the successor in title to the original registered proprietor, under s 301(2)(c) of the Property Law Act 2007. International Golf Course sues in reliance on s 4 of the Contracts (Privity) Act 1982. The relief sought is based primarily on International Golf Management's cause of action.[4]

[8] As at 16 April 2015 (the date on which an Amended Statement of Claim was filed) the amount in issue was $5,070. I was told that the ability to recover both historical levies from property owners on whose title a covenant in the same terms is registered depends upon the outcome of this proceeding. Both International Golf Management and International Golf Course seek a definitive ruling, so that they may plan their future business operations with knowledge of what income can be generated from this source.

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2 Although this proceeding is brought only against Mr Vincent, he does not take any point about the failure to join the co-trustees.

3 The relevant parts of cl 7 and 9 of the Covenant, pursuant to which the levies were struck, are set out at para [14] below.

4 The pleaded claims for relief are discussed at paras [35]–[38] below.

[9] Initially, applications for summary judgment were made by both plaintiffs and defendant. Each was rejected by Associate Judge Sargisson,[5] in a decision later upheld by the Court of Appeal.[6] Both Judge Sargisson and the Court of Appeal were concerned to ensure that any relevant contextual evidence was considered and (if necessary) tested by cross-examination before a decision on the interpretation point was made. No views were expressed, either as to standing to sue or interpretation, which affect my approach to the issues.

[10] Mr Fisher, for Mr Vincent, has confirmed that there are two live issues with which I need to deal:

(a) Is the Covenant unenforceable because the golf club was not established as an incorporated society?

(b) If otherwise enforceable, does either International Golf Course or International Golf Management have an enforceable claim against Mr Vincent?

Background

[11] On 26 November 2002, in exercise of a power of sale in a mortgage granted in favour of New Zealand Commercial Mortgage Nominee Co Ltd, title to the Vincent property was transferred by Pauanui Lakes Resort Ltd to Pauanui Lakes Properties Ltd. On the same day, a transfer of the Vincent property from Pauanui Lakes Properties to Messrs Donovan and Herbert was registered.

[12] Although transfer of the title into the names of Messrs Donovan and Herbert was effected on 26 November 2002, the contract for the sale and purchase of the Vincent property, between Pauanui Lakes Properties Ltd and the trustees, is dated 1 July 2003.

[13] There is nothing in the agreement for sale and purchase to explain why the Vincent property came to be transferred into the names of the two trustees at an

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5 *Lakes International Golf Management Ltd v Vincent* [2013] NZHC 2901.
6 *Vincent v Lakes International Golf Management Ltd* [2014] NZCA 323.

earlier time. Mr Vincent elected not to give or call evidence in this proceeding, so no explanation is available from that source. Nor were Mr Herbert or Mr Donovan called as witnesses. Mr Herbert, as one of the original developers and a trustee of the Trust, could reasonably have been expected to have shed some light on this issue, as could Mr Vincent himself.

[14] On 17 November 2003, a transfer instrument dated 7 October 2003 (containing the Covenant) was lodged for registration. The purpose of the transfer appears to have been to create land covenants, in the form attached to the transfer. Relevantly, the Covenant provides:

> **Membership Pauanui Lakes Golf & Country Club:**
>
> 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 from effective from the date the Transferee becomes the beneficial owner of the Land*
>
> …
>
> **Definitions:**
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> 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 course*.
>
> 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.

….

(Emphasis added)

The use of extrinsic evidence

[15] In most cases in which extrinsic evidence is admitted to assist a Court to divine the common intention of parties to a contract, the initial contracting parties are in dispute. Each knows the origin of the contractual provision, and is in a position to adduce relevant evidence to support a particular contention. In the present case, none of the three litigants (International Golf Management, International Golf Course and Mr Vincent) were involved in the negotiation of the terms of the Covenant.

[16] On any view, evidence of subjective intention is inadmissible.[7] However, in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[8] the Supreme Court arguably extended the circumstances in which extrinsic evidence may be used to determine, objectively, the intentions of the parties. All members of the Court accepted that correspondence evidencing negotiation of a written agreement was admissible. However, McGrath J identified a need for caution when the original contracting parties were not involved. When discussing the circumstances in which (and the purposes for which) evidence of pre-contractual negotiations could be admitted, McGrath J said:

> [71] Other arguments supporting a firm rule of exclusion of evidence of pre-contractual negotiations to ascertain contractual meaning have included the delay, expense and increased degree of uncertainty that would result. Additional work would become necessary to undertake contractual interpretation as a result of the time-consuming examination of extrinsic material. This would usually be with little return. *The inconvenience and risk to third parties who subsequently acquire interests of contracting parties, without ready access to the content of prior negotiations, has been another concern*.
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> (Emphasis added)

[17] Interpretation of a covenant that is registered against land raises another dimension. Is it appropriate to require the parties (and the Court) to trawl through correspondence and other documents that gave rise to the Covenant in circumstances

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7 Generally, see *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) at paras [14] (Blanchard J) and [19] (Tipping J).

8 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC).

where the disputants before the Court were not aware of the pre-contractual negotiations, are unlikely to have had access to the documents at the time decisions to become bound by them were made, and even less likely to have relied explicitly on them?

[18] That question has been considered in the context of a purely public document. In *Opua Ferries Ltd v Fullers Bay of Islands Ltd,*[9] the Privy Council took the view that the meaning of a timetable published to the public was not to be discerned by reference to the background knowledge of its author. Delivering the advice of the Privy Council, Lord Hope of Craighead adopted earlier observations of Lord Reid, in *Slough Estates Ltd v Slough Borough Council.*[10] Lord Reid had said that "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".[11]

[19] In *Bonnar v Summerland Property Developments Ltd*,[12] I considered the nature of extrinsic evidence that might be used to interpret a restrictive covenant registered against land. An issue had arisen about whether the terms of the restrictive covenant entitled a developer to create cross-leases over land, so that two units, rather than one, might be erected on a particular section. I expressed the view that the covenant should be interpreted by reference to the background against which it was drafted, with a view to establishing its intended *purpose* in the eyes of those who were parties to it.[13]

[20] A few years later, in *Big River Paradise Ltd v Congreve*,[14] a point of interpretation of a restrictive covenant came before the Court of Appeal, On that occasion, counsel submitted to the Court of Appeal that the covenant should be construed as a public document, in accordance with the principles discussed in *Opua Ferries Ltd*.[15] It was contended that approach would exclude consideration of the

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9 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC).
10 *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 (HL) at 962.
11 Ibid, at 750.
12 *Bonnar v Summerland Developments Ltd* (2002) 8 NZCPR 616 (HC).
13 Ibid, at paras [33]–[37].
14 *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 (CA).
15 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC).

type of extrinsic evidence of circumstances at the time the covenant was entered into which was usually relevant to the interpretation of a contract.[16]

[21] The Court of Appeal was referred to a decision of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Ltd*.[17] That was a case involving the interpretation of an easement registered against land. The High Court of Australia unanimously held that a "third party who inspects the register cannot be expected, consistently with the scheme of the Torrens system, to look [beyond the document creating the easement] for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee".[18]

[22] Delivering the judgment of the Court of Appeal in *Big River*, William Young P observed that the *Westfield* approach did not accord with the views previously expressed by the Court of Appeal, in *Ohinetahi Ridge Ltd v Witte.*[19] That case concerned the interpretation of water easements. The President recalled that, in *Ohinetahi*, the Court had construed the easement as if it were an ordinary contract.[20]

[23] William Young P also expressed some concern that the *Westfield* approach might conflict with the circumstances in which the High Court is entitled to modify an easement or covenant, exercising jurisdiction under (what is now) s 317 of the Property Law Act 2007.[21] He continued:[22]

> [22] As well, *Westfield* leaves some unresolved and perhaps troublesome issues:
>
> (a) Should so narrow an approach be taken as between the initial parties to the restrictive covenant or easement?

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16 *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 (CA) at para [16]. As to usual interpretation principles, reference was made to *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (HL) and *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

17 *Westfield Management Ltd v Perpetual Trustee Ltd* (2007) 239 ALR 75 (HCA).

18 Ibid, at para 39 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

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

20 *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 (CA) at para [20]. William Young P had also delivered the judgment of the Court of Appeal in *Ohinetahi*.

21 Ibid, at para [21].

22 Ibid, paras [22] and [23].

(b) If not, when should the narrow approach kick in, when one of the original parties sells or when both sell?

(c) What if the subsequent parties are well aware of the relevant extrinsic evidence? This might arise if the extrinsic evidence relates to a particular pattern of use which existed at the time the document was executed and was continuing when the subsequent party became affected by the easement or restrictive covenant.

> [23] As subsequently applied in Australia, the *Westfield* approach has been held not to exclude consideration of the physical characteristics, including location, of the relevant properties (compare *Sertari Pty Ltd v Nirimba Developments Pty Ltd* (2008) NSW ConvR 56-200 at paras [13] – [16]). In this context, we think it clear that the restrictive covenant should be construed not in the abstract but, at the very least, by reference to the location of the properties which are affected by it. Beyond that we prefer not to go, because irrespective of whether the *Westfield* approach is adopted, the result [in this case] is the same …

[24] When giving judgment on the appeal from Judge Sargisson's decision to decline summary judgment in the present case,[23] the Court of Appeal expressed reservations about the *Westfield* approach. Delivering the judgment of the Court, Ellen France P referred to an acceptance by counsel for Mr Vincent that "this Court has not shown a great deal of appetite for the potentially more restrictive approach to the admissibility of extrinsic evidence in construing a registered instrument adopted by the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*." [24] In light of that indication, I proceed on the basis of the *Ohinetahi* and *Big River* decisions of the Court of Appeal, and leave the wider question for a senior appellate Court to consider in an appropriate case.

Analysis

(a) Interpretation of the Covenant

[25] I begin by referring to the judgment of the Court of Appeal in *Ohinetahi*, to which William Young P referred when giving the judgment of the Court of Appeal in *Big River*.[25] After explaining the form of the water easement, the history of the proceeding and the competing submissions, William Young J said:[26]

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23 See para [9] above.
24 *Vincent v Lakes International Golf Management Ltd* [2014] NZCA 323 at para [20].
25 See para [22] above.
26 *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZ ConvC 193,938 (CA) at paras [37], [42]–[44].

> [37] A right to extract water is properly the subject of the law of easements and is not a profit à prendre, see *Manning v Wasdale* (1836) 5 Ad & El 758 and *Race v Ward* (1855) 4 El & Bl 702. So this case falls to be determined by reference to the construction of the easements in question (particularly, of course, the Witte easement) and the general backdrop provided by the law of easements.
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> …
>
> [42] It is clear that the Witte easement must be interpreted in its proper context, that is the factual matrix which existed at the time. The same is true of the Valentine easement.
>
> [43] That factual matrix plainly included the water supply system in place in 1958 and 1965 and as contemplated by the Witte easement. Each easement refers to the existing water supply system. Neither can sensibly be construed otherwise than by having regard to water supply system as it was at the relevant time.
>
> [44] Construed in that way, the meaning to be placed on the easements is reasonably clear. Water produced from the spring is first to be available to supply the storage capacity on the Valentine property and then the storage capacity on the Witte property with only the surplus being available to the Causer property. Of course, the water provided to the Witte and Valentine properties may only be used for the purposes specified in the relevant easements. We note that there could be scope for argument whether the rights of the Wittes and the Valentines are confined to the storage capacity in existence on their properties when the easements were created, …

[26] In *Ohinetahi*, the Court of Appeal placed emphasis on the factual matrix in which the water easement came into existence. At the time *Ohinetahi* was decided, (in early 2004) that approach was orthodox, drawing on observations of the House of Lords in *Prenn v Simmonds*.[27] Such evidence is designed to explain the context in which the instrument came into existence; "the matrix of facts", as Lord Wilberforce called it in *Prenn v Simmonds*.[28] It does not mandate an approach which would enable one or other of a party to the instrument to rely on a course of conduct between those responsible for bringing the document into existence, as a means of interpreting its content.

[27] Approached in that way, it is appropriate to have regard to the history of the development in determining the intention that those creating the Covenant had. It is plain that anyone considering the purchase of a section within the development contemplated the ability to use the golf course. In my view, the Covenant could only

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27 *Prenn v Simmonds* [1971] 3 All ER 237 (HL).

28 Ibid, at 239–240. Lord Wilberforce delivered the principal opinion in the House of Lords.

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.

[28] Mr Fisher, for Mr Vincent, advanced the proposition that membership of an incorporated society would carry greater influence than involvement in the affairs of a company responsible for managing the playing rights to the golf course. With respect, I consider that Mr Fisher has over emphasised differences between the two modes of incorporation. The Covenant includes a promise than the person acquiring the land will join the golf club and remain a member while owning the land. No doubt, any solicitor acting on the acquisition of such a property would make inquiry as to the nature of the membership. Undoubtedly, he or she would discover that the golf club had been incorporated as a limited liability company. In the unlikely event that that proved to be a "deal breaker", the purchaser simply would not proceed with the transaction.

[29] I do not consider that the interpretation point taken by Mr Fisher has any validity. In my view, the fact that the golf club was incorporated as a limited liability company, as distinct from an incorporated society, does not render the covenant unenforceable.

(b) Is the Covenant enforceable against Mr Vincent?

[30] As I understand the point that Mr Fisher is advancing, it is suggested that, even though Mr Vincent is one of the registered proprietors of the land, the Covenant cannot be enforced against him because he was not one of the trustees of the Trust at the time the Covenant was entered into. Whatever the trusteeship arrangement, it is clear that he has become registered as a proprietor, in terms of cl 7.1 of the Covenant.[29]

[31] The general rule is that trusts are not disclosed on the public register. Section 128(1) of the Land Transfer Act 1952 provides, with limited exceptions, that even if an entry disclosing a trust were made, it has no effect. For that reason, those who are

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[29] Set out at para [14] above.

registered as proprietors of the land at any time are regarded as owners, and it is unnecessary for those dealing with them to make inquiry as to their status. Typically, in loan or mortgage documents, the trust will be disclosed by reference to the liability of a trustee borrower being limited to the assets of the trust. In *Sell v Registrar-General of Land*,[30] Fogarty J described s 128 as reflecting "a longstanding policy position in Torrens systems, that it is not the function of the Torrens Statute to supervise trusts".

[32] I confess to some difficulty in understanding the argument advanced by Mr Fisher. Mr Vincent and his co-trustees are registered proprietors of the land. When they took title to it, the land was subject to the Covenant. On the face of it, they have acquired land knowing of the existence of the Covenant and obligations owed under it.

[33] I do not accept Mr Fisher's argument. The title to the Vincent property shows that the land was transferred from Mr Donovan and Mr Herbert to Mr Vincent and his co-trustees as a result of a document registered on 24 December 2007.

[34] The Vincent property must be registered in the names of the existing trustees because entry of trusts on the register is generally prohibited. As long as the person seeking to enforce the Covenant has standing to sue, the Covenant is enforceable against Mr Vincent.[31]

(c) The claims for relief

[35] Relief is sought by International Golf Management as successor in title to the original registered proprietor. Reliance is placed on ss 301(2)(c) and 303 of the Property Law Act 2007:

> **301 Construction of covenants relating to land: benefits**
>
> …
>
> (2) Unless a contrary intention appears in the instrument, the covenant is enforceable by—

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30 *Sell v Registrar-General of Land* [2013] 3 NZLR 431 (HC) at para [34].

31 As to non-joinder of the co-trustees, see para [6] above.

…

(c) persons claiming through the covenantee or the covenantee's successors in title.

…

[36] The claim made by International Golf Course is based on s 4 of the Contracts (Privity) Act 1982:

> **4 Deeds or contracts for the benefit of third parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

[37] The Amended Statement of Claim, while relying on both International Golf Management's and International Golf Course's causes of action, seeks relief (in general terms) in the form of an order declaring that Mr Vincent (and the co-trustees) must join International Golf Management and pay all outstanding membership fees to it.

[38] I am satisfied that International Golf Management is a successor in title to the original registered proprietor and that International Golf Course is a party entitled to rely on the Covenant and to exercise rights under s 4 of the Contracts (Privity) Act. Subject to clarification of the form of relief, I am prepared to make orders as sought.

Result

[39] For the reasons I have given, I am prepared to make a declaration along the lines sought by counsel for International Golf Management and International Golf Course.

[40] Rather than making an order in the form sought in the Amended Statement of Claim, I direct that counsel file a joint memorandum by 3pm on 20 November 2015

setting out the form of the orders that they submit should be sealed. If there were any disagreement, the position of each party shall be set out in that memorandum and I shall finalise the form of the final order at that time.

[41] There is no reason why costs should not follow the event. One set of costs are awarded in favour of International Golf Management and International Golf Course on a 2B basis together with reasonable disbursements. I do not certify for second counsel.

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P R Heath J

Delivered at 4.00pm on 9 November 2015