

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA373/2023  
[2024] NZCA 342

BETWEEN MANGAWHAI DEVELOPMENTS  
LIMITED  
Appellant

AND LAKE VIEW ESTATE RESIDENTS  
SOCIETY INCORPORATED  
First Respondent

KAREN LEE RUITERMAN AND  
CHRISTOPHER ROSS RUITERMAN  
Second Respondents

VERMONT STREET PARTNERS  
LIMITED  
Third Respondent

Hearing: 6 November 2023 (further submissions received 29 November  
2023)

Court: Mallon, Venning and Fitzgerald JJ

Counsel: D R Bigio KC and A T Grant for Appellant  
D Shahtahmasebi for First Respondent  
T P Mullins and S J Humphrey for Second and Third Respondents

Judgment: 26 July 2024 at 2 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The appellant must pay the second and third respondents one set of costs for a standard appeal on a band A basis together with usual disbursements.**
- C We make no costs order in relation to the first respondent.**
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## REASONS OF THE COURT

(Given by Mallon J)

### Introduction

[1] Mangawhai Developments Ltd (MDL) owned farmland near Mangawhai on which it intended to undertake a staged residential development (the Lake View Estate). A condition of the resource consent for the development was that MDL establish an entity to manage matters associated with the development. That entity was the Lake View Estate Residents Society Inc (the Society).

[2] The Society's Constitution provided that MDL was to be the Controlling Member of the Society until the development was fully completed. The Constitution conferred rights on the Controlling Member to vote down resolutions of the Society or its Committee. It also required the consent of MDL to any amendments to the Constitution or to pass special resolutions relating to covenants on titles in the development in favour of the Society.

[3] After completing the first stage of the development, MDL was placed in receivership and the land intended to be developed in the second stage of the

development was sold, ultimately, to Chris and Karen Ruiterman (the Ruitermans). The Ruitermans carried out a four lot subdivision on the purchased land and entered into an agreement with Vermont Street Partners Ltd (VSPL) for a further, more intensive, subdivision of that land.

[4] A dispute arose, initially between the Society and the Ruitermans, who were later joined by VSPL, as to whether there was any Controlling Member and whether the Ruitermans and VSPL had that status as the owner of the balance of the land intended to be part of the Lake View Estate development. The Society's Committee purported to amend the Constitution to remove the Controlling Member's rights. Twelve years after being placed in receivership, MDL exited receivership and, supported by some members of the Society who were opposed to the development as proposed by the Ruitermans and VSPL, asserted that it remained the Controlling Member. The Ruitermans and VSPL rejected this claim.

[5] These events led to High Court proceedings in which MDL sought declaratory relief that it remained the Controlling Member and that the purported amendments to the Constitution were invalid and of no effect because they had been made without MDL's consent. MDL obtained leave to proceed with this claim by summary judgment when the Ruitermans and VSPL responded to the declaratory relief claim with an application for summary judgment in their favour. They contended that there was no longer a Controlling Member once MDL sold the last of the land intended to be part of the Lake View Estate. Alternatively, they alleged MDL was estopped from asserting its Controlling Member status. They also applied to strike out MDL's claim on the basis that it was an abuse of process because it was brought for an improper purpose. The improper purpose alleged was that the director of MDL, Philip Cotton, wished to ensure that Lake View Estate was developed in a way that was consistent with his vision for the development and sought to oppose the development by the Ruitermans and VSPL unless they paid MDL or him money or provided him with a residential lot.

[6] Woolford J in the High Court granted summary judgment in favour of the Ruitermans and VSPL.<sup>1</sup> The Judge held that MDL lost its Controlling Member status when it sold the land because at that point its development was completed.<sup>2</sup> Had it been necessary to decide the alternative claim of estoppel, the Judge would not have granted summary judgment because there were factual disputes that would need to be tested at trial.<sup>3</sup> It was unnecessary to decide whether the claim should be struck out as an abuse of process and the Judge made no comment on it.

[7] MDL now appeals. The Society supports MDL's appeal.<sup>4</sup> The Ruitermans and VSPL oppose MDL's appeal. They also say that the Judge was wrong to find that the estoppel claim would have needed to be tested at trial. They also maintain that MDL's claim should have been struck out as an abuse of process.<sup>5</sup>

## **Background**

### *MDL's proposed development*

[8] Mr Cotton was the sole director of MDL. He incorporated MDL in 2005 for the purposes of undertaking a subdivision development named the Lake View Estate. He obtained the necessary consents and approvals, created the Society and, through his solicitors, the Constitution. Amongst other things, he intended the Constitution would facilitate the Society's role as the manager of the roads, lake, walking tracks, tennis court, pool and other common facilities of the development. As noted above, MDL as the developer was appointed the Controlling Member.

[9] MDL began work on the development. It was intended to be progressed in stages. The first stage involved the creation of 44 residential rural lots and two lifestyle lots, one "Farm Park" lot containing a man-made lake (around which the residential rural lots were located) and amenities (Lot 51), a balance undeveloped farm lot of

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<sup>1</sup> *Mangawhai Developments Ltd v Lake View Estate Residents Society Inc* [2023] NZHC 1628 [High Court judgment].

<sup>2</sup> At [55].

<sup>3</sup> At [59].

<sup>4</sup> A memorandum dated 23 September 2023 advises that this support was the subject of a resolution passed by majority at its annual general meeting on 26 August 2023.

<sup>5</sup> The Ruitermans and VSPL filed a notice to support the judgment on other grounds.

139.3 ha (Lot 47), and the creation of roads. A resource consent was granted for this development in about March 2006.<sup>6</sup>

[10] In February 2007 MDC prepared a resource consent application and assessment of effects on the environment in relation to the second stage of the proposed development. This application explained that the second stage was in two parts (Stage 2A and 2B). Stage 2A was to involve establishing 11 rural residential sites as an extension of the existing 46 lot cluster in the first stage, establishing five rural lifestyle lots on the western<sup>7</sup> side of the of the central farm park cluster, and fencing of native/riparian vegetation. Stage 2B was to involve establishing a further nine rural lifestyle sites located to the northeast of the central farm park cluster, a small rural lot adjacent to the formed section of Carter Road, further fencing of native, riparian, wetland vegetation, the amalgamation of the balance area of the combined site, and the registration of consent notices prohibiting further subdivision of the balance area for a 10-year period.

[11] As explained in the February 2007 application this would mean a development when combined with the first stage as follows:

In summary the proposed subdivision when combined with the existing Stage 1 subdivision, will result in the creation of:

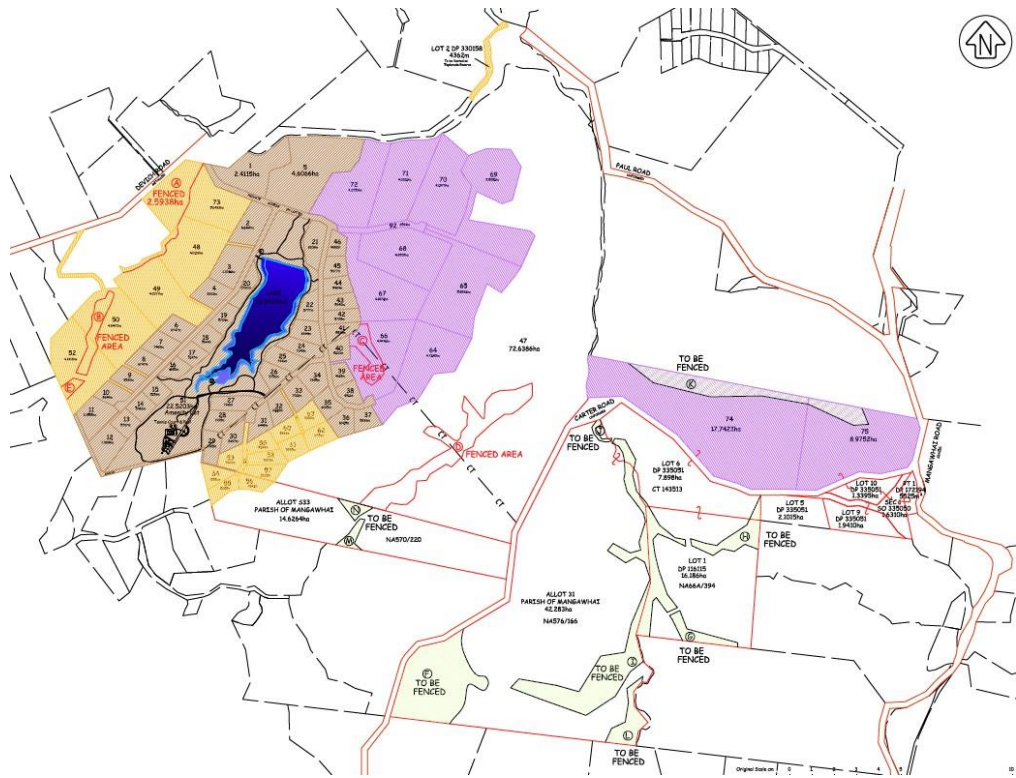
- 56 rural-residential lots of less than 4ha located in a central cluster around the 22.52ha amenity lot (Lot 51) accessed from Devich Road, which contains a 5.6ha man-made lake, a walking track, range of recreational facilities and proposed landscaping and ecological enhancement.
- Two groups of rural-lifestyle lots (14 in total) ranging in size from 4ha to 5.8ha located on the western and north eastern sides of the central cluster and that are accessed from Devich Road.
- A single small rural lot of 8.9752ha (Lot 75) with access from the sealed section of Carter Road.
- An extension of the internal private road network by the creation of access lots 90, 91 and 92 and their amalgamation with Lot 51.
- Creation of a 176.8383ha balance lot (by amalgamation) that is to be retained as a rural property with a Consent Notice preventing further subdivision.

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<sup>6</sup> The resource consent is not in evidence but the decision was summarised in a subsequent resource consent application by MDL dated February 2007.

<sup>7</sup> The application said this was on the eastern side but this appears to have been an error.

[12] This was shown schematically as follows:<sup>8</sup>



### *The Constitution*

[13] We set out in more detail later the main provisions of the Constitution, as relevant to the issues before the Court, filed with Incorporated Society's Registrar on 22 November 2006. There were two earlier versions of the Constitution but it is the later 22 November 2006 version that is relevant to the events at issue.<sup>9</sup>

[14] By way of overview to assist with understanding the events that led to the High Court proceeding:

- (a) The objects of the Society, set out in cl 3.1, were focussed on the communal facilities, the utilities, the private roads, water bodies, wetlands and natural features that were to be part of the Lake View Estate development, as well as the promulgation and enforcement of bylaws and covenants to ensure management obligations were met.

<sup>8</sup> The brown shading shows the first stage, the yellow shows the intended Stage 2A and the purple the intended Stage 2B.

<sup>9</sup> It appears the certificate of rule change did not take effect until received by the Registrar, on 29 November 2006. See Incorporated Societies Act 1908, s 21(3).

- (b) Clause 2.1 defined various terms, including: “Communal Facilities”; “Developer”; “Lake View Estate”; “Member”; “Owner”; and “Residential Property”.
- (c) Clause 4.2 provided that each Owner was to be a Member of the Society and a covenant would be registered against each Owner’s title in favour of the Society requiring the Member to comply with the Constitution. Only Owners were entitled to be Members.
- (d) Clause 4.3 provided for the Developer to be the Controlling Member until the completion of the development of the Lake View Estate.
- (e) Clause 6 provided for the payment by Members of the annual operating expenses and any contingency sum for the Communal Facilities, as well as a sinking fund for capital improvements. It also contained an acknowledgement by Members that the Lake View Estate was to be developed in stages with new Owners becoming Members as each stage was completed.
- (f) Clause 7.1:
  - (i) provided an acknowledgment by Members that the development of the Lake View Estate was ongoing;
  - (ii) required that Members not obstruct the Developer’s use of the Communal Facilities or changes made to them or the granting of interests in the Communal Facilities by the Society to the Developer;
  - (iii) provided that neither Members nor the Society could oppose the development of the Lake View Estate or any land adjoining the development owned by the Developer; and

- (iv) required Members to support any resolution to amend the Constitution in accordance with any agreement between the Society and the Developer.
- (g) Clause 7.2 provided for covenants to be noted against each Owner's title in favour of the Society, the terms of which could not be altered except by special resolution and with the prior written consent of the Controlling Member.
- (h) Clause 11 provided:
  - (i) that the administration of the Society was vested in the Society by general meeting and was delegated to the Committee which could be further delegated to Committee members or the Manager;
  - (ii) for the Committee's composition which included the requirement that it include the Controlling Member (if there was one); and
  - (iii) for resolutions of the Committee to be passed by majority, with each member having one vote and the Controlling Member (if there was one) having one more vote than the number of other committee members present at the Committee meeting.
- (i) Clause 13.4 provided for the quorum for business at any general meeting of the Society, which included the requirement for the presence of the Controlling Member (if there was one).
- (j) Clause 14 provided that resolutions at a general meeting were passed by majority, except where a special resolution was required by the Constitution. Each member had one vote but the Controlling Member had votes equal to one more than the number of Members present at the meeting.



- (k) Special resolutions were required: to change the covenants on Owner's titles (cl 7.2); for the Society to borrow money, encumber the Communal Facilities, or to invest money other than in a bank (cl 10); and to amend the Constitution (cl 17.3). While the Controlling Member did not have a vote in relation to special resolutions, its written consent was required in relation to amending the covenants on the Owner's title or amending the Constitution.
- (l) Clause 15 provided for every Member to encumber their land to the encumbrancer (MDL) in terms set out in that clause.
- (m) Clause 17 provided that the Constitution could not be amended except with the written consent of the Controlling Member (if there was one). It also provided that no amendment could be made of specified clauses (including cls 4.2, 7.1 and 7.2) or "so as to detrimentally affect the rights of the Controlling Member".
- (n) Clause 17 also provided for disputes between a Member and the Society to be referred to arbitration.

[15] In short, the Constitution gave the Controlling Member effective control of the Society. Clause 4.3 defined the Controlling Member as the Developer until completion of the Lake View Estate development. Clause 2.1 defined the Developer as MDL. The Developer was given rights to assist it in developing Lake View Estate, including that Members and the Society could not oppose the development.

#### *MDL's receivership*

[16] MDL progressed the first stage of the development. Capital was secured, agreements were entered into with the purchasers for most of the new lots,<sup>10</sup> roads and amenities (the lake, a jetty, walking tracks around the lake, a competition standard tennis court, a boat ramp, a swimming pool and a playground) were constructed, certification under the Resource Management Act 1991 was granted in

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<sup>10</sup> Mr Cotton's affidavit said 34 agreements were entered into whereas a receivers' report said that 33 were.

September 2007, and titles were issued in October 2007. In relation to the second stage, MDL began preparations for telecommunications infrastructure, in addition to progressing the resource consent application and environmental impact assessment report.

[17] However, following the impact of the global financial crisis, almost all of the purchasers defaulted.<sup>11</sup> This led to MDL being placed in receivership on 9 February 2009. Kevin Gillespie, appointed by the largest secured creditor, was the receiver until December 2012. He was involved in all Society matters in his capacity as receiver of MDL until his resignation. Doug Somers-Edgar then became mortgagee in possession and continued to manage the remaining MDL assets. A settlement was reached with Mr Somers-Edgar and in January 2016 Mr Cotton appointed Digby Noyce as MDL's receiver. Mr Noyce acted in that role until MDL exited receivership in February 2022.

[18] During the receivership, the remainder of the residential and lifestyle lots that were part of the first stage of the development were sold. The last of them was sold in January 2015.

#### *Sale of Lot 47*

[19] Prior to MDL going into receivership, it had sold the balance Lot 47 to King Farms Ltd (KFL) of which Mr Cotton was a director. In turn KFL went into receivership and Lot 47 was offered for sale by the receiver. The property information memorandum described Lot 47 as a farm that was the residue title from a subdivision. The farm surrounded the subdivision on three sides. The title showed that the lot was subject to a covenant and encumbrance relating to the Society.

[20] The property information memorandum described the covenant as follows:

#### ***Land Covenant***

This land covenant sets out certain obligations which must be observed and performed by the owner of the Property. These obligations relate to any construction or development of the Property, permitted building materials, maintenance of the Property and restrictions on the position and height of fences, walls or hedges erected on the Property.

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<sup>11</sup> Mr Cotton's affidavit said that all but two purchasers defaulted whereas a receivers' report said six purchasers completed their purchase.

This covenant also requires the owner of the Property to become and remain a member of the Lake View Estate Residents Society Incorporated and perform the obligations set out in the Constitution of the Society. The Receivers of King Farms Limited (in receivership) have held discussions with Mangawhai Developments Limited (in receivership) (MDL), the developer of the Lake View Estate Development, with the intention of seeking a release from the obligations of membership of Lake View Estate Residents Society Incorporated prior to settlement. MDL have advised the receivers of King Farms Limited (in receivership) that they are not in a position at present to provide or procure the release of the Property from the obligations of membership of the Lake View Estate Residents Society Incorporated at the current time. Accordingly, any purchaser of the Property must be aware that if they purchase the Property, as the owner of the Property they will be required to comply with the rules and regulations of the Lake View Estate Residents Society Incorporated, which rules and regulations include restrictions on the use of the Property (for example the Property must be used for residential purposes unless otherwise approved by the Lake View Estate Residents Society Incorporated). Prospective purchasers should seek independent legal advice.

[21] The property information memorandum described the encumbrance as follows:

***Encumbrance***

This encumbrance requires the owner of the Property to become and remain a member of the Lake View Estate Residents Society Incorporated and to fulfil the obligations set out [in] the Constitution of the Society relating to the payment of monthly levies, the use of communal facilities and the conduct of owners in respect of the Property.

The Receivers of King Farms Limited (in receivership) have held discussions with Mangawhai Developments Limited (in receivership) (MDL), the developer of the Lake View Estate Development, with the intention of seeking the removal [of] this encumbrance from the title prior to settlement. MDL have advised the receivers of King Farms Limited (in receivership) that they are not in a position at present to provide or procure removal of this encumbrance at the current time. Accordingly, any purchaser of the Property must be aware that if they purchase the Property, as the owner of the Property they will be required to comply with the rules and regulations of the Lake View Estate Residents Society Incorporated, which rules and regulations include restrictions on the use of the Property (for example the Property must be used for residential purposes unless otherwise approved by the Lake View Estate Residents Society Incorporated). Prospective purchasers should seek independent legal advice.

[22] The balance Lot 47 was purchased by Mr Ruiterman Sr, the father of Chris Ruiterman, in July 2009. Mr Ruiterman Sr was primarily a farmer but had also made money through developing, subdividing and selling property. The Ruitermans were also farmers. Following Mr Ruiterman Sr's purchase, they began working on the

balance Lot 47 as sharemilkers. They saw the first residents moving into and living on the new properties that formed the first stage of the Lake View Estate through that period.

[23] The Ruitermans purchased the balance Lot 47 from Mr Ruiterman Sr on 2 December 2013. At that stage they had no plans to develop the property as residential lots. They were, however, aware of its development potential, especially because of the interest from residents of the Lake View Estate in its possible development and its status under the Constitution. They were also aware that MDL was named in the Constitution. The affidavit evidence from Karen Ruiterman was that their understanding was that MDL did not have any rights in the Society or the development because MDL had sold all of its land and at that stage was taking no interest or part in the Society's affairs. Ms Ruiterman said they would not have purchased the balance Lot 47 if Mr Cotton had at that stage raised MDL's claim to still being the Controlling Member.<sup>12</sup>

*Ruitermans sought to develop Lot 47*

[24] With a downturn in dairy prices causing financial pressure on the farm in around 2016/17, the Ruitermans decided to develop a small number of lots through a subdivision of Lot 47. They obtained resource consent to do so in February 2017.<sup>13</sup> In doing so the Ruitermans were aware that a clause in the resource consent for the first stage of the development, which prevented further development for 10 years, was due to come to an end in October 2017.

[25] It appears that these development plans led to a discussion at the Society's annual general meeting held on 1 July 2017 about the status of the Controlling Member under the Constitution. The Society resolved to review the Constitution. Subsequently, on 10 July 2017, the Constitution was purportedly amended to remove

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<sup>12</sup> We note that this might have been a topic for exploration in cross-examination at trial given the property information memorandum alerting the purchaser to the covenant and that prospective purchasers should seek independent legal advice, and that Mr Ruiterman Sr was a farmer and the Ruitermans were sharemilkers and then owner-farmers for several years.

<sup>13</sup> It appears that the resource consent application made by MDL for the stage two development was not progressed when MDL did not respond to a request for further information because by then MDL had gone into receivership.

cl 11.8.<sup>14</sup> This clause provided that the Controlling Member was entitled to remain as a Committee member for as long as they remained Controlling Member. Neither MDL nor its receiver were represented at the meeting.

[26] This was followed by an email sent to the Ruitermans on 12 July 2017 proposing a new clause in the Constitution that would apply if the Ruitermans sold their farm for development. This proposed clause would: restrict the size of each lot and the purpose for which the lot could be used; require the development to be aesthetically appropriate for the rural environment; require new lots to adhere to covenants; require new lots to be levied according to the Constitution; require the developer to deposit \$500,000 into the Society's funds for the resealing of existing roads, and to provide further green areas and other communal facilities as agreed with the existing Members and which the Society would manage; require the disclosure of the proposed plan and any proposed changes to a special general meeting of the Society; and require all lots to adhere to the Society's Constitution, covenants and rules.

[27] Ms Ruiterman's evidence is that they took advice from their lawyer and decided to proceed with the subdivision. They responded to the 12 July 2017 email the next day, advising that they had no intention of agreeing to any change to the Constitution that would be detrimental to the future management, development or sale of Lot 47. The email also referred to cl 17.4, which restricted amendments that could be made to various clauses of the Constitution and those that detrimentally affected the rights of the Controlling Member.

[28] Over the ensuing months, there was further correspondence between the Ruitermans and the Society. The Ruitermans were of the view that they had the rights of the Controlling Member and that therefore amendments to the Constitution could not be made without their consent. The Society's position, based on legal advice obtained from two sets of advisers, was that there was no Controlling Member and

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<sup>14</sup> The certificate of alteration of the constitution was not filed until 21 July 2017.

therefore there was no impediment to changing the Constitution if 75 per cent of eligible members agreed.<sup>15</sup>

[29] The Society also advised that the development would need approval from the owners of Lot 51. The Society said that the intention of the obligations and restrictions in the covenants was “to ensure that Lake View Estate maintains the integrity of the development as was intended from the outset”. The Society’s concerns were about a development that impacted on the “rural amenity” of Lake View Estate and which provided access to the already established communal assets without adequate compensation for this.

#### *VSPL involvement*

[30] At some point, VSPL and Edward Sundstrum became involved in the proposed subdivision of Lot 47 with the Ruitermans.<sup>16</sup> Mr Sundstrum is a director of VSPL, which in turn is an operating company of his family trust, the EB Sundstrum Family Trust. He and his family lived in a home in the Lake View Estate that was owned by this trust. That land was purchased in 2013 and a house was built in 2015. Mr Sundstrum was also a Committee member of the Society at various stages between 2018 and May 2022.

[31] The resource consent application for Lot 47 was filed in March 2019. Around this time, the dispute between the Ruitermans and the Society was purportedly settled. This settlement was referred to in a letter to the Members of the Lake View Estate in advance of the annual general meeting to be held on 4 May 2019. As described in that letter, the settlement involved the Ruitermans withdrawing their claim for costs against the Society and the Society not hindering the subdivision of Lot 47 process under the resource consent. It was also acknowledged that the owners of the new lots would join the Society and be subject to the covenants and rules provided in the Constitution.

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<sup>15</sup> It is possible that this advice was based on the erroneous understanding that MDL was in liquidation, as that is the position stated in one of the Society’s communications at this time.

<sup>16</sup> On 20 November 2020, VSPL entered into an agreement with the Ruitermans to purchase Lot 47 “on the occurrence of certain events”. However Mr Sundstrum or VSPL were involved before this because they were involved in the resource consent for the development of Lot 47 filed in March 2019.

[32] It does not appear that the minutes of the 4 May 2019 annual general meeting are before us. However, it is clear that at this meeting amendments to the Constitution were approved. A certificate of the alteration of the rules was signed by the Society's chairperson on 9 May 2019 and filed with the Registrar of Incorporated Societies on 20 May 2019. The changes involved altering cl 11 of the Constitution by: amending the composition of the Committee so as not to include the Controlling Member as a member of the Committee; providing for the quorum to be a minimum of 50 per cent of the elected Committee; and providing that resolutions of the Committee are passed by majority. Glenys McBain, the secretary of the Society, confirmed that neither MDL or its receiver was represented at the meeting when these changes were made.

[33] However, the dispute between the Society and the Ruitermans and VSPL over whether there was a Controlling Member and who that was continued into May 2021. Lawyers' letters were exchanged and litigation was threatened by the lawyers acting for the Ruitermans and VSPL. Their position was that the owner of Lot 47 had the rights as Controlling Member and the documents purporting to alter the Constitution were invalid. The Society's position was that MDL was the only Controlling Member and that, because the development was complete with MDL no longer the proprietor of any lots still to develop, MDL was deemed to have resigned.

[34] A Society Committee meeting took place on 17 May 2021. Draft minutes record that: Mr Sundstrum's lawyer had prepared a draft constitution for the Society to review; Mr Sundstrum and Ms Ruiterman were stood down because of potential conflicts of interest; one person present at the meeting (not a Committee member) suggested the receiver may need to sign off removing the Developer; and Ms McBain said that she had previously been in contact with the receiver of MDL, Mr Noyce, who said no assignment had been made and they had no interest in the Lake View Estate and this had been confirmed by the finance company that appointed the receiver.

[35] In contrast to the record of that meeting, Mr Noyce's evidence was that when he was called by a member of the Society (Ms McBain), he said he had no interest in talking to her about MDL's involvement. He did not say that MDL no longer had rights or legal interests in the development. He said that, if that had been a topic of discussion, he would have told her to contact Mr Cotton, the person who appointed

him. He said that, in reality, all that happened was that he told her that he was not interested in engaging with her.

[36] At some point, issues between VSPL/the Ruitermans and the Society were referred to arbitration. This included the “issue of whether the owners of Lot 47 were the ‘Controlling Member’” which was referred to the arbitrator in August 2021. Also in August 2021 VSPL and the Ruitermans instructed a lawyer, Mr Rice, to contact MDL as to the possibility of taking an assignment of any rights MDL had as Controlling Member. Mr Sundstrum said this was to avoid ambiguity and was a practical step rather than because he recognised that MDL could legitimately exercise any rights.

[37] On their behalf, Mr Rice offered \$10,000 for the assignment. This was said to be a “token sum” intended to put beyond any doubt that any rights MDL had could only be exercised through the actual owner of Lot 47. Mr Rice said that, before making this offer, he reviewed the receivers’ reports and, as they had not been able to identify any assets of MDL over a period of five years, it seemed “very unlikely to [him] that any assets of MDL (tangible or intangible) would not have been identified and realised in connection with [the] receiverships”.

[38] The evidence of Mr Rice and Mr Noyce differed as to the content of the conversation in which the offer was made. On Mr Rice’s account, Mr Noyce said he was “the receiver of nothing”. Mr Noyce denied saying this. On both accounts, Mr Noyce said he would need to talk to Mr Cotton. When Mr Noyce did so, Mr Cotton gave clear instructions that he was not waiving his rights under the Constitution and would not be consenting to the assignment of those rights.

[39] In the September 2021 to February 2022 period, there were further communications between Mr Cotton on the one hand, and Mr Rice, Mr Sundstrum and the Ruitermans on the other. The Ruitermans and Mr Sundstrum said they were “feeling harassed” by Mr Cotton, which Mr Cotton described as hyperbole.

[40] Mr Cotton was also working on bringing MDL out of receivership. He was aware that at least some Members were opposed to the Ruitermans and VSPL’s



development plans because they considered they risked overburdening and degrading the existing amenities, and impacting land values and quality of life. Mr Sundstrum's perspective was that, just as some Members were opposed to the Ruitermans' smaller initial development, there remained Members who opposed the further proposed subdivision of Lot 47, and who sought to impose on the owners of Lot 47 the costs of historical deferred maintenance of the common property.

[41] On 16 February 2022 MDL exited receivership. A few days later, on 21 February 2022, Mr Cotton telephoned Mr Sundstrum about brokering a resolution between VSPL/the Ruitermans and the Society. Mr Sundstrum asked Mr Cotton to write down what he wanted and to provide the legal foundation for his position that he was the Controlling Member. This led to a second telephone conversation that Mr Sundstrum recorded. In this conversation, Mr Cotton said his number one wish was that there be "peace" in the Lake View Estate community. He also said that the wishes of the majority of the Society, whatever they maybe, should prevail in relation to demands that some Members of the Society were making. Mr Cotton proposed that the Ruitermans and VSPL could use MDL to assist with the development and there would be tax benefits through utilising MDL's losses. He also proposed that he be given a section in the proposed development as part of a settlement.

[42] Mr Sundstrum regarded the call as threatening. Having listened to the recorded call, to the extent that there was any "threat", it was Mr Cotton reiterating his position that he remained Controlling Member and, if Mr Sundstrum wanted to go down that track, the issue would be resolved through litigation.

[43] There followed a further exchange of lawyers' letters in March 2022. VSPL and the Ruitermans' position was that MDL was not the Controlling Member. It sought confirmation that, pending resolution through the arbitration process, the Committee would not allow MDL to exercise any powers as purported Controlling Member, failing which VSPL and the Ruitermans intended to apply to the High Court to have a receiver appointed to the Society. Mr Cotton's position was that MDL's status as Controlling Member remained unchanged until the full completion of the planned development for which the Society was formed irrespective of whether MDL was a current owner of any land subject to the Society. This was so that MDL could manage

the development until its completion. Mr Cotton said this served as a protective mechanism for the original members of the Society, to try to maintain consistency of resources and assets of the whole development until its completion. MDL also asserted that the changes that had been made to the Constitution without the Controlling Member were unlawful.

[44] A special general meeting of the Society took place on 15 May 2022. Mr Cotton attended and asserted MDL remained the Controlling Member. We do not have details of the progress of the arbitration at this time, but at some point the arbitrator issued an interim ruling, and subsequently a confidential settlement was reached which Mr Sundstrum said included the Society undertaking not to recognise MDL as the Controlling Member.<sup>17</sup>

[45] VSPL and the Ruitermans' resource consent application for their proposed development of Lot 47 was granted on 8 June 2022 subject to conditions. The consent was for a development of 67 residential lots. It included a requirement for a legal entity to be responsible for managing and maintaining the private roads to be created. Mr Sundstrum accepted that the Society was the "obvious legal entity" and encumbrances would be registered on the new titles requiring all owners to be Members of the Society.<sup>18</sup>

[46] On 3 August 2022 MDL filed proceedings in the High Court.

### **High Court judgment**

[47] The Judge determined the issues to be:

- (a) whether MDL was still a Controlling Member of the Society;
- (b) whether the amendments to the Constitution were invalid; and

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<sup>17</sup> The precise terms of the settlement reached are not before us. We are advised by the Society's counsel that the agreement was for the Society not to take the point until it was determined.

<sup>18</sup> An appeal to the Environment Court was heard on 31 August and 1 September 2023. We were recently informed that the Environment Court delivered a results judgment on 17 June 2024 upholding the decision to grant the consent. We mention this for completeness although it has no relevance to the issue before us.

- (c) whether MDL was estopped from acting as, or claiming to be, a Controlling Member.

[48] On the first issue — whether MDL was still the Controlling Member — the Judge’s decision focussed on the Constitution. He noted that:<sup>19</sup>

- (a) Both the original and revised constitution defined the Lake View Estate as meaning the residential development of at least 45 lots in various stages together with reserves, road pathways, golf course, golf course facilities, and stormwater system and facilities, as defined on the plan annexed as sch 2.
- (b) By cl 7.1 of the original and revised constitution, the members acknowledged that the development of Lake View Estate was ongoing and the Society was required to allow the developer access to the community facilities as necessary or desirable for the development to proceed.
- (c) Both the original and revised constitutions provided for the transfer of communal facilities from MDL to the Society. The annexed deed of transfer defined the development as meaning the construction of Lake View Estate as a complete development. The deed also provided for the developer to transfer to the Society any constructed communal facilities as each stage of the development was completed.

[49] The Judge therefore accepted that MDL intended to further develop Lake View Estate after the first stage of the development.<sup>20</sup> The Judge went on to find that, because MDL had sold all the balance land to third parties, no further development by MDL was possible.<sup>21</sup> The Judge concluded that this meant the development was completed because:

[54] In terms of clause 4.3, the development of Lake View Estate (including any adjoining land owned by the developer) is fully completed.

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<sup>19</sup> High Court judgment, above n 1, at [49]–[52].

<sup>20</sup> At [53].

<sup>21</sup> At [53].

MDL is therefore no longer the controlling member of the Society. The purpose for which MDL was the controlling member has been exhausted. It has come to an end. The underlying premise is gone. It makes no sense for MDL to remain as the controlling member of the Society when any further development is to be undertaken by others.

[50] On the second issue — whether the constitutional amendments were valid — the Judge considered that, because MDL had lost its status as Controlling Member when the development came to end due to the sale of the balance property, it was not the Controlling Member at the time of either the 2017 or 2019 annual general meetings.<sup>22</sup> This meant the amendments to the Constitution were not invalid by reason of the lack of MDL’s written consent.<sup>23</sup> Similarly, there was a quorum at the 2019 annual general meeting, as required by cl 13.4 of the Constitution, because MDL was not the Controlling Member at the time.<sup>24</sup>

[51] As to the third issue — whether MDL was estopped — the Judge considered oral evidence would be required to determine the relevant facts and it was therefore unsuitable for resolution by way of the summary judgment procedure.<sup>25</sup>

## Appeal

### *MDL as the Controlling Member*

[52] The parties agreed that that the principles governing the interpretation of a contract apply to an incorporated society’s constitution. The contractual interpretative task is to ascertain the meaning the contract would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in their position at the time of the contract.<sup>26</sup> Primacy is given to the words, but they are to be read in context.<sup>27</sup> Where the ordinary meaning of the text is clear, a

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<sup>22</sup> At [55].

<sup>23</sup> At [55].

<sup>24</sup> At [56].

<sup>25</sup> At [59].

<sup>26</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] per McGrath, Glazebrook and Arnold JJ, quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann. The Supreme Court’s general approach to contractual interpretation as articulated in *Firm PI 1 Ltd* is regarded as settled: see *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43] per Winkelmann CJ and Ellen France J.

<sup>27</sup> See *Firm PI 1 Ltd*, above n 26, at [88]–[89] per McGrath, Glazebrook and Arnold JJ.

conclusion that the meaning produces a commercially absurd approach should only be reached in obvious and extreme cases.<sup>28</sup>

[53] It is the case that constitutional documents and rules of incorporated societies are enforced on the basis that they have contractual effect as between a society and its members.<sup>29</sup> We are not, however, to be taken as necessarily agreeing that the principles governing the interpretation of a contract apply in their full force to such documents. It can be argued that where constitutional or other legal instruments are available on a public register, their meaning should be ascertainable without reference to context or conduct that is not available to those who may be bound by them.<sup>30</sup> For that reason the approach to extrinsic evidence may be more restrictive.<sup>31</sup> We take this point no further because we have not had argument on the point and in the present case any differences in approach would not be material.

[54] The starting point in this case is the words of cl 4.3. It provided for the Controlling Member as follows:

4.3 Until the development of Lake View Estate (including any adjoining land owned by the Developer) is fully completed, the Developer shall be the controlling member (“**Controlling Member**”) of the Society, regardless of whether the Developer is at any time a Member. The Controlling Member shall have only the rights specified in this Constitution, and shall have no other rights or obligations of a Member. No reference in this Constitution to a Member shall be taken as including a reference to the Controlling Member. Upon development of Lake View Estate (including any adjoining land owned by the Developer) being completed, the Developer shall be deemed to have resigned as Controlling Member, and thereafter, there shall be no Controlling Member in respect of the Society.

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<sup>28</sup> See *Firm PI 1 Ltd*, above n 26, at [60]–[63] and [93]; and *Bathurst*, above n 26, at [45] per Winkelmann CJ and Ellen France J.

<sup>29</sup> *Gilbert v Body Corporate 162791* [2016] NZSC 61, [2018] 1 NZLR 1 at [31] per William Young and Glazebrook JJ; and *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) at 177.

<sup>30</sup> See generally: Paul Davies, Sarah Worthington and Chris Hare *Gower: Principles of Modern Company Law* (11th ed, Sweet & Maxwell, London, 2021) at [11–002].

<sup>31</sup> *Bathurst*, above n 26, at [47] per Winkelmann CJ and Ellen France J; *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [60] and [73]–[74] per William Young and O’Regan JJ; and *Firm PI 1 Ltd*, above n 26, at [62] per McGrath, Glazebrook and Arnold JJ. See also *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935 at [24]–[31] regarding the construction of a covenant.

[55] Relevant definitions in cl 2.1 are as follows:

...

“**Developer**” means Mangawhai Developments Limited, a duly incorporated company having its registered office at Auckland.

...

“**Lake View Estate**” means the Residential Development of at least 45 lots in various stages together with reserves, vehicle access ways, pathways, golf course, golf course facilities, stormwater system and facilities at Devich Road, Mangawhai as delineated on the plan annexed as Schedule 2.

...

“**Member**” means each person who shall from time to time be a member of the Society pursuant to rules 4.1 to 4.6.

...

“**Owner**” means each person regarded as a proprietor (whether individually or with others) of a residential property.

...

“**Residential Property**” means a residential property within Lake View Estate for which a Certificate of Title have [sic] been issued.

[56] There are three parts to the words in cl 4.3:

- (a) The first part defines who is the Controlling Member and for what period.
- (b) The second part specifies the rights and obligations of the Controlling Member.
- (c) The third part provides the circumstances in which the Controlling Member is deemed to have resigned.

[57] As to the first part, it provides that “the Developer” is the Controlling Member. The Developer is defined as MDL. The definition does not include MDL’s successors or assigns. The words are clear that the only person or body that can be the Controlling

Member is MDL.<sup>32</sup> This means that the position the Ruitermans and in turn VSPL took at various points that they were the Controlling Member was incorrect.

[58] Further, the words say that MDL is the Controlling Member “[u]ntil the development of Lake View Estate (including any adjoining land owned by the Developer) is fully completed” and this is so “regardless of whether the Developer is at any time a Member”. As “Member” is defined as an “Owner”, which in turn is defined as someone who is the registered proprietor of a *residential property*, whether MDL is the Controlling Member is not dependent on whether MDL owns a residential property in the Lake View Estate.

[59] This means that MDL’s submission that its status as Controlling Member subsisted “regardless of whether MDL owns land at [Lake View Estate]” is not correct. It subsisted regardless of whether it was a Member. The words contemplated that MDL as Developer had Controlling Member status without MDL having to be an Owner of a residential property in the development. The words did not say that it was the Controlling Member regardless of whether it owned land that was to be part of the Lake View Estate development.

[60] This is reinforced by the second part of the clause which emphasises the distinction between the “Controlling Member” and “Member”. The Controlling Member has only the rights specified in the Constitution, does not have the rights or obligations of a Member and references to a Member in the Constitution do not include the Controlling Member.

[61] The third part of cl 4.3 provides for when the Controlling Member position comes to an end. That is upon the completion of “development of Lake View Estate (including any adjoining land owned by the Developer)”. At this point the Controlling Member is deemed to have resigned and there is no Controlling Member. This complements the first part of the clause that there is only to be a Controlling Member until the development of Lake View Estate is “fully completed”. There is no

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<sup>32</sup> This contrasts with the constitution in *Inert Holdings Ltd v Gulf Harbour Marine Village Residents Assoc Inc* [2022] NZCA 379, [2022] NZCCLR 27 in which the definitions of “Developer” and “Controlling Member” in each case included the original developer or “its successors or assigns”.

meaningful distinction for these purposes between the language “fully completed” and “completed” in cl 4.3.

[62] The issue before us is when the “development of Lake View Estate (including any adjoining land owned by the Developer)” is “fully completed” or “completed”. The Judge took the view that the “development of Lake View Estate (including any adjoining land owned by the Developer)” meant a development by MDL.<sup>33</sup> Once MDL had sold the land no further development by MDL was possible.<sup>34</sup> Because no further development by MDL was possible, the Judge considered that the underlying premise for why MDL had Controlling Member status was an end.<sup>35</sup> In the Judge’s view, it made “no sense” for MDL to remain as the Controlling Member if any further development was to be undertaken by others.<sup>36</sup>

[63] The definition of “Lake View Estate” (set out above at [55]) was carried over from two earlier versions of the Constitution (the first version prepared in May 2005 and the second version as filed on 9 August 2005). Breaking that definition into its parts, Lake View Estate means:

- (a) “the Residential Development”, a term that is not defined in any version of the Constitution;
- (b) “of at least 45 lots in various stages together with reserves, vehicle access ways, pathways, golf course, golf course facilities, stormwater system and facilities at Devich Road, Mangawhai”; and
- (c) “as delineated on the plan as annexed as Schedule 2”.

[64] As to what is “delineated on the plan as annexed as Schedule 2”:

- (a) In the May 2005 Constitution (which was not filed), the plan in sch 2 depicted what was then envisaged as the first stage of the development:

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<sup>33</sup> High Court judgment, above n 1, at [49]–[54].

<sup>34</sup> At [53].

<sup>35</sup> At [54].

<sup>36</sup> At [54].



namely 44 residential lots numbered two to four and six to 46 around a man-made lake; a further lot described as “farm park” with tennis court and swimming pool amenities; other fenced areas on Lot 47; and with the balance of Lot 47 undeveloped.<sup>37</sup>

- (b) In the 9 August 2005 Constitution the plan in sch 2 was a larger scale scheme plan depicting the first stage of the development with residential lots two to 46 around the lake and the farm park lot.
- (c) The November 2006 Constitution contained two plans, neither of which are labelled sch 2. The first was a replica of the scheme plan depicted in sch 2 in the unfiled May 2005 Constitution. The second was a clearer version of that scheme plan.

[65] In short, the sch 2 plan showed the contemplated first stage development and did not show the contemplated further developments on the balance Lot 47. We consider that this is consistent with the words of the definition of “Lake View Estate” as being a development of “at least” 45 lots. In other words, it referred to a development of least, but not necessarily more than, the first stage.

[66] Background context is that, by the time of the filing of the November 2006 Constitution, the resource consent for the first stage of the development had been granted. There was therefore a degree of certainty about the shape of the first stage of the development and that it could proceed. We consider the “at least” wording recognised that further stages were envisaged but no scheme plans had been prepared and no resource consent filed and so what those stages would encompass was not certain. It likely also reflected that the possibility that further stages might not proceed for whatever reason. It also recognised that, if further stages proceeded, they would be part of the Lake View Estate.

[67] As to what could be part of the Lake View Estate, cl 6 of the Constitution conveyed to a reasonable person that it was any development in which the Owners of

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<sup>37</sup> The reproduction of the plan in sch 2 is not that clear in the May 2005 Constitution. However, by matching it with other materials in the case on appeal, it becomes apparent that it shows the first stage of the development as we have described.

Residential Property were required to be Members. That in turn was any development on the balance of Lot 47 which was subject to the covenant and encumbrance that the Owner was to become and remain a Member of the Society and comply with the obligations of the Society. It may also have included any development on any adjoining land owned by MDL (if MDL owned any such land) if the owners of a development of such land were required to be Members of the Society and to have access to the Communal Facilities and to comply with the Society's rules.

[68] This means that "the development of the Lake View Estate" was not fully completed at the time MDL sold the balance of Lot 47 to KFL. We do not have details of any arrangement between KFL (a company controlled by MDL), for example as to whether there were circumstances in which MDL could remain as Developer of that land (if, say, MDL came out of receivership). Subject to any such arrangement and its terms and effect, MDL was no longer able to undertake any further development of the Lake View Estate once it sold the balance of Lot 47 in January 2008.

[69] In any event, once the balance of Lot 47 was sold to an independent party, here Mr Ruiterman Sr, MDL could no longer proceed with the further development of the Lake View Estate. The land was still subject to the requirement to be a Member of the Lake View Estate and to comply with the Society's obligations, as prospective purchasers (including Mr Ruiterman Sr) were advised in the property information memorandum. But the sale did not involve the transfer of Controlling Member status if the land was to be developed. Nor did it carry over the benefits conferred on MDL as Developer in cl 7.1 that enabled the further development to proceed unhindered by Members or the Society. Any such transfer of Controlling Member status and the benefits conferred on the Developer would have required an amendment to the Constitution. The indication in the property information memorandum that the covenant and encumbrance could not be released suggests any such amendment may have been unlikely, but in any case no such amendment was made.

[70] More specifically, those benefits were as follows:

## **7 MEMBERS' ASSISTANCE TO DEVELOPER**

### **Future Development**

7.1 The Members acknowledge that development of Lake View Estate is ongoing, and that the Society is required to allow the Developer such access to, and interests in, the Communal Facilities as are necessary or desirable for the development to proceed, and to allow the Developer to add, remove or alter structures and services forming part of the Communal Facilities, and to procure that its Members amend this Constitution if such amendment is necessary or desirable for the development to proceed. Each Member agrees:

- (a) Not to prevent, hinder or obstruct the use by the Developer of the Communal Facilities, the addition, removal or alteration of structures or services forming part of the Communal Facilities by the Developer or the granting of any interests in the Communal Facilities by the Society to the Developer;
- (b) That neither the Member nor the Society shall oppose, or take part in any opposition to the development of Lake View Estate or any land adjoining the same owned by the Developer;
- (c) To support any resolution to amend this Constitution, where the Society is bound by agreement with the Developer, to procure such amendment.

[71] By the time the land was sold to Mr Ruiterman Sr (if not earlier when the land was sold to KFL), the question is whether the rights of the Controlling Member continued even though MDL was no longer the developer of land that was subject to the requirement to be a Member of the Society and to comply with its Constitution (that is, the balance of Lot 47).

[72] On the one hand, an argument can be made that the Constitution intended that it was not necessary that MDL be the developer of this land. This is because the Constitution defined "the Developer" as "MDL" and did not further provide that it was necessary that MDL be the developer of the balance of Lot 47 in order to have Controlling Member status. On the other hand, it can be argued that it was implicit in the fact that the Controlling Member status was conferred in cl 4.3 on "the Developer" that MDL was only the Controlling Member if it was intending to and still capable of developing the balance of Lot 47. We consider the better interpretation of the Constitution is the latter.

[73] We say that in part because, under the Constitution, the Controlling Member and the Developer were one and the same. The definitions in cl 2.1 did not include a definition of the “Controlling Member” as MDL as it could have done. Rather, through cl 4.3, the Constitution defined the Controlling Member as “the Developer”. In this way, we consider the Constitution intended that Controlling Member status was linked to being the Developer, while also ensuring that only MDL (and not any subsequent developer) had that status. By ensuring that only MDL could have that status, it also provided MDL with rights that any subsequent developer might wish to have. In other words, it made MDL’s ongoing role in the development a possible asset to, say, potential investors in MDL or to any third party investing in the balance of Lot 47 for development.

[74] Mr Cotton says that the rights of the Controlling Member enabled him to maintain his vision for the overall development. That may be so, but that vision was not stated in the Constitution and was therefore amenable to change by MDL if, for example, the economics of further development required it. Moreover, if he, through MDL, was no longer the developer, there was no longer the same imperative for the development to be in accordance with his vision. The real benefit to Controlling Member status was ensuring that MDL had control over decisions made about the Communal Facilities to assist MDL’s development, and that MDL as Developer could proceed with the development without opposition from the Society.

[75] We conclude that “[u]pon the development of Lake View Estate (including any adjoining land owned by the Developer) being completed”, as conveyed to a reasonable person in context, meant the development by the Developer (namely, MDL) of land subject to the requirement to be a Member of the Society and to comply with the rules of the Society. We therefore agree with Woolford J that this development was complete when the balance of Lot 47 was sold and MDL could no longer proceed with any further development of Lake View Estate.

[76] All of this meant that if someone other than MDL wished to develop Lot 47, cl 4.2 applied without the commensurate rights conferred on the Controlling Member under cl 4.3. It also meant that a third party developer did not have the benefit of cl 7.1(b) unless MDL was contracted to undertake the development or the third party

purchased the shares in MDL, neither of which occurred. This meant Members were entitled to oppose the development of the balance of Lot 47 as proposed by VSPL and the Ruitermans, and whether it would proceed was dependent on the resource consent application process and any appeal.

[77] We therefore consider that the Judge was correct to decline MDL's summary judgment application for a declaration that it is the Controlling Member. The Judge was also correct to grant VSPL and the Ruitermans' application for summary judgment that MDL was no longer the Controlling Member and that amendments to the Constitution in 2017 and 2019 were not invalid because MDL was not present for a quorum or because MDL did not provide written consent.

#### *Other matters*

[78] It follows from this conclusion that it is not necessary to determine the other issues on appeal. We can say, however, that estoppel by silence as alleged by the Ruitermans and VSPL had difficulties. Estoppel by silence arises where there is a duty to speak.<sup>38</sup> The estoppel claim was raised in rather general terms. As a result, it is unclear when, if there was such a duty, it arose. It is unclear when it is said that Mr Cotton first learned of the Ruitermans or VSPL's development plans, much less when he knew they had made those plans understanding that MDL was not the Controlling Member. It is also unclear what loss MDL or Mr Cotton is said to have caused the Ruitermans or VSPL, and when that loss arose. While, for example, Ms Ruiterman said they would not have purchased the land had Mr Cotton raised his claim that MDL was the Controlling Member, it is not clear that this gave rise to any loss. We note in this respect that the Ruitermans purchased the farm from Mr Ruiterman Sr and the Ruitermans' decision to develop arose only following a downturn in the dairy industry. It is also unclear whether any such reliance was reasonable when no steps were taken to contact MDL or Mr Cotton about the matter until 2021, at which point Mr Cotton asserted MDL's claim to Controlling Member status. We also note that the Ruitermans and VSPL were able to obtain a resource

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<sup>38</sup> *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309; [2020] 3 NZLR 626 at [99]–[104]; and *Thornley v Ford* [2024] NZCA 154 at [124]–[131].

consent despite the Society and MDL's opposition. In any event, we agree with the Judge that the evidential basis for the claimed estoppel would need to be tested at trial.

[79] We can also say that the strike out claim for abuse of process is without merit. MDL was entitled to have the position of whether it retained Controlling Member status determined and to seek to negotiate with the Ruitermans and VSPL given the value to a developer of having the Controlling Member status.<sup>39</sup>

[80] We decline the application by the Ruitermans and VSPL for increased costs, which was at least partly premised on the abuse of process allegation. Declaratory relief was a proper way to have the long-standing issue of Controlling Member status determined. Further, summary judgment or strike out on estoppel or abuse of process grounds was ambitious and led to extensive affidavit evidence traversing the history of the dispute.

## **Result**

[81] The appeal is dismissed.

[82] The appellant must pay the second and third respondents one set of costs for a standard appeal on a band A basis together with usual disbursements.

[83] We make no costs order in relation to the first respondent. Their support of the appellant's appeal did not materially add to the costs of the appeal.

Solicitors:  
Gaze Burt, Auckland for Appellant  
Martelli McKegg, Auckland for First Respondent  
Lee Salmon Long, Auckland for Second and Third Respondents

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<sup>39</sup> See the discussion of litigation brought with an ulterior purpose in *Solicitor-General v Siemer* HC Wellington CIV 2010-404-8559, 13 May 2011 at [67]–[69].