IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-000525
[2024] NZHC 3073

BETWEEN	MAIDA VALE MANAGEMENT LIMITED First Plaintiff
	HOWARD STANLEY MOORE and GILLIAN PATRICIA MOORE Second Plaintiffs
	KENNETH and SERENA MUIR and MKG RESOURCES LIMITED Third Plaintiffs
	SELWYN CURRIE and LIZ YATES Fourth Plaintiffs ….. cont’d

Hearing: 6 – 8 August 2024

Appearances: M Heard and B Forbes for Plaintiffs and Second Defendant
D Shahtahmasebi and T M Milne for First Defendant

Judgment: 22 October 2024

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 22 October 2022 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date ……………………….

RAY and CHRISTINE OXENHAM
Fifth Plaintiffs

JASON HAMBROOK and CHERIE LOVETT
Sixth Plaintiffs

AND

LAKE VIEW ESTATE RESIDENTS SOCIETY INCORPORATED
First Defendant

VERMONT STREET PARTNERSHIP NO 1 LIMITED
Second Defendant

Introduction

[1] This is a dispute about the management of an incorporated society that owns communal facilities in a subdivision situated on Devich Road, Mangawhai. The subdivision is known as Lake View Estate (the Estate).

[2] The Estate is a residential, private and gated community. It comprises 56 residential lots, a common lot, and a balance lot largely composed of farmland (Lot 47). The communal facilities include a private roading network comprising 2.5 kilometres.

[3] Resource consent was recently obtained for the development of Lot 47. The developer, Vermont Street Partnership No 1 Ltd (VSPL),[1] proposes a further 67 residential lots, with associated membership of the Society. That would more than double the number of lots in the Estate. However, Lot 47 was and remains a farm with one dwellinghouse on it.

[4] The plaintiffs are all members of the first defendant (the Society). The plaintiffs say that the Society is dysfunctional and oppressive to its minority members. They say the dysfunction manifests itself in the Society failing to fulfil its obligations under its constitution and as required by law.

[5] The plaintiffs seek the following:

(a) the appointment of a receiver to the Society for the purpose of ensuring it fulfils its legal obligations and, in particular, its road sealing obligations:

(b) declarations about certain legal issues, such as breach notices and associated penalties and levies, that are in dispute; and

(c) such other relief as the Court sees fit.

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[1] The second defendant, Vermont Street Partnership No 1 Ltd (VSPL), is the purchaser of Lot 47. It was joined to the proceedings as second defendant on application by the plaintiffs during the hearing. I accept that it should be joined as a party to address the issue of a declaration sought in relation to a disputed levy that relates to Lot 47.

[6] In defending the proceedings, the Society says that any dysfunction has been created by the plaintiffs and, in particular, by Mr Edward Sundstrum, a director of the first plaintiff and of VSPL. The Society says that the plaintiffs are seeking to subvert the democratic will of the majority in furtherance of their own financial interests; that they have pursued a ruthless litigation strategy to create unnecessary problems for the Society.

[7] The dispute is a longstanding one; there has already been an arbitration, related proceedings in the Environment Court, and proceedings in this Court and the Court of Appeal.

Factual background

[8] The first plaintiff, Maida Vale Management Ltd, is the trustee of the EB Sundstrum Family Trust. Mr Edward Sundstrum is one of its directors and its sole shareholder. Mr Sundstrum is also a director of VSPL, which is the purchaser of Lot 47. Mr Sundstrum and his family previously lived in a home in the Estate that was owned by his family trust. That land was purchased in 2013 and a house was built in 2015. Mr Sundstrum has also been a member of the committee of the Society at various stages between 2018 and May 2022.

[9] In 2005, Mangawhai Developments Ltd (MDL) purchased adjoining rural lots that were being farmed in Mangawhai with the intention of undertaking a staged residential development. In February 2006, the Kaipara District Council (KDC) granted a resource consent for the property to be subdivided into 44 residential rural lots, two lifestyle lots, a road to vest in Council, one farm park lot and one balance rural lot (Lot 47). The development was to be completed in stages.

[10] The consent application contemplated that Lot 47 would continue to be used as a farm during the first stages of development. Lot 47 was defined as the "remainder land" and a restrictive condition was imposed that prohibited Lot 47 from being developed for 10 years.

[11] Another condition of the resource consent was that MDL must ensure an entity was set up to manage matters associated with the sub-division, more particularly in respect of maintenance of the lake on the property, maintenance of re-vegetation and

restorative planting, control of pests and so on. MDL had already created the Society, in August 2005, to own the common areas and communal facilities of the Estate, and it thereby satisfied this requirement.

[12] The Society is registered under the Incorporated Societies Act 1908. It is governed by a constitution registered with the Registrar of Incorporated Societies on 10 August 2005 and amended from time to time since (the Constitution).

[13] The Society was formed to promote certain objects "for the benefit of members". The Society's objects concern, in essence, the ownership, maintenance and use of communal facilities and the creation and enforcement of related rules benefiting members in the Estate. Under the Constitution, the administration of the Society is vested in the Society by general meeting and is delegated to the committee (cl 11.1). The members of the committee are elected by the Society at every annual general meeting (cl 11.5).

[14] The Constitution also included provisions allowing for future developments. These included provisions giving a great deal of control over the operation of the Society and the decisions it makes to the "controlling member". At that stage, the controlling member was MDL.

[15] As titles were issued, encumbrances were registered requiring owners of residential lots in the Estate to be members of the Society, and also requiring the owner of Lot 47 and owners of all titles derived from it to be members of the Society.

[16] Only the first stage of the subdivision was completed. In January 2008, MDL sold Lot 47. MDL then went into receivership in February 2009. Mr Chris and Ms Karen Ruiterman eventually purchased Lot 47 in December 2013.

[17] MDL's receivers sold the last of the subdivided lots authorised by the original resource consent in January 2015. The High Court determined that at this point MDL ceased to be a "controlling member", with the development of the Estate being

completed insofar as its role was concerned upon sale of the lots that it owned.[2] This was then confirmed by the Court of Appeal.[3]

[18] In 2017, the Ruitermans obtained consent to create four residential lots out of Lot 47. A dispute then arose between the Ruitermans and the Society in relation to registering the encumbrances on the new titles. In 2019, the Ruitermans and Mr Sundstrum agreed to develop Lot 47 together.

[19] In August 2020, the then-committee commissioned a report from Hutchinson Consulting Engineers (Hutchinson). Hutchinson were engaged to investigate and provide remedial works options for the private roading network within the Estate and provided a draft report (the Hutchinson Report).

[20] In November 2020, following completion of the four-lot development of Lot 47, the Ruitermans and VSPL entered into a conditional sale and purchase agreement as part of the further proposed development of Lot 47. That involved dividing and selling the remaining balance land of Lot 47 into 67 additional lots. As the owners of Lot 47, the Ruitermans also subsequently claimed to be the controlling member of the Society under its Constitution.

[21] Ms Ruiterman and Mr Sundstrum are directors of VSPL. VSPL has two equal shareholders, each of which are companies indirectly owned by Mr Sundstrum and the Ruitermans respectively.

[22] In December 2021, the Ruitermans, Maida Vale Management Ltd and Mr Sundstrum filed a "points of claim" against the Society for the purpose of an arbitration. The arbitral proceedings included disputes over:

(a) the powers of the Society to impose joining fees on new members and the validity of amendments to the Constitution;

(b) the status and identity of the "developer" and "controlling member" under the Constitution;

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2 *Mangawhai Developments Ltd v Lake View Estate Residents Society* Inc [2023] NZHC 1628 [*High Court decision*] at [55].

3 *Mangawhai Developments Ltd v Lake View Estate Residents Society Incorporated* [2024] NZCA 342 [*Court of Appeal decision*]. In that case, the court noted that under the Constitution the controlling member had effective control of the Society.

(c) the Society's obligations in relation to actions alleged to have been taken by members in wilful default of the Constitution; and

(d) whether the Society was obliged to sign the documents necessary to formally encumber the titles of subdivided lots and to accept vesting of roads and similar communal infrastructure.

[23] In February 2022, MDL was brought out of receivership. It then sought to assert its status as controlling member. MDL subsequently sought declaratory relief in this Court that it remained a controlling member and that purported amendments to the Constitution were invalid and of no effect because they had been made without MDL's consent.

[24] On 8 June 2022, resource consent was granted to VSPL and the Ruitermans for the proposed development of Lot 47, subject to conditions.[4] The consent is for a development of 67 residential lots. It includes a requirement for a legal entity to be responsible for managing and maintaining the private roads to be created. Mr Sundstrum's view is that the Society is the "obvious legal entity" and encumbrances would be registered on the new titles requiring all owners to be members of the Society.[5]

[25] A further notice of arbitration was issued by the Ruitermans and Maida Vale Management Ltd in July 2022, claiming that the Society was not meeting its obligations by failing to complete the roading works recommended in the Hutchinson Report.

[26] On 8 August 2022, the parties settled the arbitration and entered into a full and final settlement agreement (the Settlement Agreement). Clause 3.1(d) of the Settlement Agreement reads:

> 3.1 The Society undertakes:
>
> …
>
> (d) That the roading works recommended in the Hutchison [sic] Roading Report dated August 2020 (Ref L22354) will be

[4] An appeal to the Environment Court was heard on 31 August and 1 September 2023. On 17 June 2024, the Environment Court upheld the decision to grant the consent.

[5] See *Court of Appeal decision*, above n 3, at [45].

> undertaken by the Society within three years, and that the Society will otherwise maintain Lake View Estate's Communal Facilities as required by the constitution.

[27] The Society also agreed not to recognise MDL, or any other person, as "controlling member" absent a court order, not to pursue or seek to impose joining fees on any new lot and to promptly execute all documents necessary to encumber new titles subdivided from Lot 47.

[28] Following the Settlement Agreement, a number of committee members resigned and a new committee was formed comprising the second–sixth named plaintiffs.

[29] On 31 August 2022, MDL applied to this Court for a determination (declaratory judgment) that it was the controlling member under the Constitution.

[30] At a committee meeting on 26 April 2023, there was discussion and concerns were raised about the costs implications of completing the recommendations of the Hutchinson Report.

[31] In May 2023, following a vote of no confidence, the previous committee was removed. A new committee was elected and currently remains in place.

[32] In June 2023, the committee issued a correction levy to recover the costs resulting from the arbitration proceedings that had been settled in 2022 (see above at [26]).

[33] On 28 June 2023, Woolford J dismissed MDL's application for declaratory judgment (see above at [29]) and granted the application by the Ruitermans and VSPL for summary judgment. His Honour held that MDL was no longer the controlling member of the Society. He also held that because MDL had lost its status as controlling member when the development came to an 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. That meant that the amendments to the Constitution were not invalid by reason of the lack of MDL's written consent.[6]

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[6] *High Court decision*, above n 2, at [55].

[34] At the annual general meeting on 26 August 2023, the Society passed a resolution to support MDL's appeal to the Court of Appeal on the issue of "controlling member".

[35] In September 2023, Mr John Bryant, civil engineer, was engaged by the Society to provide consultation advice and guidance in relation to the roading network in the Estate. Mr Bryant recommended that the resealing of the roads be completed in two stages and completed over two sealing sessions by April 2026. He recommended that in the 2025 season, Blomfield Court and Daniel Parade be completed first, followed by Wallbank Way and Cotton Lane. Cotton Lane and Wallbank Way should be completed by April 2026.

[36] The present proceedings were issued in March 2024. Two days later, "breach notices" were issued by the Society contending that the plaintiffs were in breach of the Constitution and imposing a penalty of $250 per day.

[37] At a special general meeting on 6 April 2024, the Society voted to change the way it calculated levies. It subsequently issued a levy notice to the owners of Lot 47 for $74,744.81. The plaintiffs dispute the lawfulness of this levy. The Society has put the levy "on hold".

[38] On 24 April 2024, the committee sent to all its members (except for the named plaintiffs) a poll that asked each member to vote its position (i.e. agree or disagree) on a number of issues, including obligations under the Settlement Agreement, the status of the Hutchinson Report and the issue of receivership.

[39] On 26 July 2024, the Court of Appeal issued its judgment in *Mangawhai Developments Ltd v Lake View Estate Residents Society Inc*, dismissing the appeal from this Court on the issue of controlling member.[7]

[40] At a committee meeting on 27 July 2024, the committee passed a resolution to make an offer to accept a levy calculation for Lot 47 on a one-off basis (i.e. only for one year) based on the capital value of Lot 47. The committee noted that this would lower the levy for Lot 47 by "around half".

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7 *Court of Appeal decision*, above n 3.

[41] On 7 August 2024, a contract was entered into between the Society and Robinson's Asphalt Ltd, as contractor, to carry out roading repair works in the Estate. The contract was signed by the Society on 28 May 2024.

Relevant legal principles

[42] It is agreed, and I concur, that the Court has an inherent jurisdiction to appoint a receiver and manager of property to an incorporated society. This power has been preserved by s 12 of the Senior Courts Act 2016.[8]

[43] Receivers have historically been appointed by the Court in its equitable jurisdiction where there was a need for the interim protection of property, including disputes about partnerships or the administration of estates, or to facilitate the execution of judgments where no remedy was otherwise open to the entitled party.[9]

[44] In *Porima v Te Kauhanganui o Waikato Inc*, Hammond J held that:[10]

> The [Incorporated Societies] Act [1908] is not a complete code, and this Court has an inherent jurisdiction (often proceeding by analogy with other well-settled legal principles) to preserve assets or resolve deadlock situations. For instance, if a society's assets are not being managed, it may be appropriate to appoint a receiver as an interim measure.

[45] In *Te Runanganui o Ngati Te Kahungunu Inc v Scott*, Neazor J considered an application to appoint a receiver to an incorporated society against an objection that matters had not yet got "out of hand".[11] His Honour held that:[12]

> It was not appropriate to refuse to grasp the nettle and for the Court to decline to take control … or to defer taking control until the affairs of the society could be shown to be getting seriously out of hand.

[46] His Honour further held:[13]

> After hearing counsel for eight hours on the present application I was left with the profound impression that the shadow of dissolution hangs over this enterprise and that in the end nothing the court will be able to do will lift it. That is because its malaise springs from an inability of the parties to depart from particular stances, no doubt conscientiously held, in an effort to achieve

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8 *Bennett v Ebert Construction Ltd (in rec and liq)* [2018] NZHC 2934 at [93].
9 *Bennett v Ebert Construction Ltd (in rec and liq)*, above n 8, at [95]. See also *Rea v Omana Ranch Ltd* [2012] NZHC 2639, [2013] 1 NZLR 587 at [7]–[11].
10 *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 (HC) at [84].
11 *Te Runanganui o Ngati Te Kahungunu Inc v Scott* [1995] 1 NZLR 250 (HC).
12 *Te Runanganui o Ngati Te Kahungunu Inc v Scott*, above n 11, at 250.
13 *Te Runanganui o Ngati Te Kahungunu Inc v Scott*, above n 11, at 252.

> positive results for the benefit of the communities the society is supposed to serve.

[47] Neazor J held that it was necessary to appoint receivers to protect the assets of the society until (in that case) disputes over governance were resolved. His Honour also observed that the jurisdiction to appoint a receiver should be exercised sparingly and only when no other practical solution can be obtained.[14]

[48] The Society has not applied for incorporation under the 2022 Act. While that Act does not apply here, I note that it provides a statutory jurisdiction to supervise the operation of incorporated societies by making any orders it sees fit, which specifically includes the appointment of a receiver, if the court is satisfied that the Society is conducting itself in an oppressive, unfairly discriminatory or prejudicial manner and that it would be just and equitable to do so.[15]

The issues

[49] The overarching issue is whether I should appoint a receiver to ensure that the Society fulfils its maintenance obligations and protects its road assets.

[50] In addressing that overarching issue, there are a number of subsidiary issues, including:

(a) Is the Society in breach of the Settlement Agreement of 8 August 2022 and, in particular, cl 3.1(d) relating to roading works?

(b) Did the Society act contrary to the interests of members by supporting an appeal to the Court of Appeal by MDL?

(c) Are the breach notices and imposition of penalties lawful?

(d) Did the Society have the power to impose a levy on Lot 47?

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[14] His Honour relied upon *Steel v Matatoki International Ltd* (1988) 4 NZCLC 64,710, where Holland J expressed the view that the Court's inherent jurisdiction should only be exercised as the "last resort" and when the Court is satisfied that the existing law and contractual arrangements are such that no other means of achieving the desired object can be obtained.

[15] Incorporated Societies Act 2022, ss 141 and 142.

Analysis and decision

Issue (a) – Is the Society in breach of the Settlement Agreement?

[51] The plaintiffs say that the Society is in breach of the Settlement Agreement of 8 August 2022, the arbitral award of 15 August 2022 and the Society's Constitution; it has refused to complete within three years the road sealing work set out in the Hutchinson Report.

[52] At issue is the interpretation of cl 3.1(d) of the Settlement Agreement. I have set it out at [26] above but repeat it here:

> 3.1 The Society undertakes:
>
> …
>
> (d) That the roading works recommended in the Hutchison [sic] Roading Report dated August 2020 (ref L22354) will be undertaken by the Society within three years, and that the Society will otherwise maintain Lake View Estate's Communal Facilities as required by the Constitution.

[53] At the heart of the dispute is a change in the wording during the final period of negotiations leading to the ultimately agreed wording of cl 3.1(d). Earlier wording referred to the roading works being "completed" by the Society within three years. That wording was changed at a late stage to the works being "undertaken" by the Society within three years.

[54] The Society accepts that it has an obligation under its Constitution to maintain its communal facilities, including the roading network. However, it denies that it is in breach of those obligations or those under cl 3.1(d) of the Settlement Agreement. In particular, it says that it has undertaken the roading works recommended in the Hutchinson Report because it has committed itself to, and begun or taken on, those roading works. It disputes the interpretation advanced by the plaintiffs that the works had to be completed within three years.

[55] The Court's interpretative task is to ascertain the meaning that cl 3.1(d) would convey to a reasonable person having all the background knowledge which would

reasonably have been available to the parties in the situation in which they were at the time of the contract: the test is an objective one.[16]

[56] If the language has an ordinary, natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. The wider context may point to some interpretation other than the most obvious one and may also assist in determining intended meaning in instances of uncertainty or ambiguity.[17]

[57] In terms of the overall task:[18]

> [46] … Giving primacy to the written words of the agreement accords with the policy of providing commercial certainty. It also recognises that since the written contract contains the words the parties chose to record their agreement, the language used to do so has to be important. But by allowing a contextual reading of those words, the *Firm PI* approach recognises both that words have to be read in context and that the promotion of commercial certainty should not be allowed to defeat what the parties actually meant by the words in which they recorded their agreement. The objective approach to this contextual assessment is a legal construct designed as the best way of reliably determining the true agreement as recorded in the words of the contract. It rejects the parties' subjective evidence of intent as irrelevant to what both parties meant and as generally unreliable. Rather, the court (embodying the reasonable person) assesses the evidence reasonably available to both (or all) of the parties at the point of contract which could bear upon the meaning of those words. …

[58] The Supreme Court further confirmed in *Bathurst* that there is no blanket exclusionary rule on the admissibility of extrinsic evidence of prior negotiations, subject to that evidence being relevant. So:

(a) extrinsic evidence of prior negotiations is admissible to the extent it informs an assessment of the objective mutual intent of the notional reasonable person.[19]

(b) evidence of subsequent conduct is admissible to the same extent.[20]

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16 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43], citing *Firm PI1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

17 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [43], citing *Firm PI1,* above n 16, at [63].

18 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [46].

19 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [75]–[76].

20 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [89].

(c) a party seeking to rely on a communication as relevant to mutual intent must establish mutuality.[21]

(d) evidence of conduct after a dispute has arisen is "very unlikely" to be admissible, because parties will have retreated to their corners and their conduct may well be self-serving.[22]

[59] A problem specifically recognised in *Bathurst* is that of non-parties to negotiations seeking to adduce evidence of subsequent conduct as demonstrating mutual intent.[23] Plainly probative evidence cannot be given by people who were not involved in contract formation or whose views cannot be taken to represent the view at the time of formation of the person they represent.

[60] I accept that at the time the Settlement Agreement was entered into the Hutchinson Report was in draft form and was, in fact, never finalised. However, that is not material. Clause 3.1(d) expressly recognises that it is the recommendations that will be undertaken and there is no basis for concluding that the status of the report as a draft and non-finalised statement somehow undermines the clear binding commitment that the parties agreed to.

[61] I also accept that with the passage of time, and having regard to the expert evidence, that from an engineering perspective there may be a valid basis for reviewing some of the recommendations in the Hutchinson Report – particularly on the basis of more complete and up-to-date data. However, that is really no more than background and not of any direct relevance or probative value in determining the meaning of cl 3.1(d). Nevertheless, and as addressed below, the need for up-to-date data is of relevance to the ultimate issue I must address, namely whether a receiver should be appointed.

[62] Clause 3.1(d) does not, of course, contain the detail of the Hutchinson Report recommendations. It is thus necessary to turn to the report itself to understand the roading works contemplated.

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21 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [76].
22 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [90].
23 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 16, at [90].

[63] In the introduction to the report, it is noted that Hutchinson had been engaged by the Society to investigate and provide remedial works options for the private roading network within the Estate. The report notes [at 2.0] that the scope of works comprises the:

> … improvement and remedial works to the existing sealed private roading network, associated minor drainage improvements and the provision of all-weather access to the community swimming pool and tennis courts. The works are proposed in order to provide a long term, low maintenance solution for Lake View Estate Residents Society members.

[64] The critical portion is at [7], and in particular at [7.2] entitled "Sealed Private Carriageways". It reads:

> As per previous sections, we believe the condition of the private carriageways within the Lake View Estate to be fair given the age of the pavement (we understand around 10 years). At this stage the underlying pavement is still fit for purpose and serviceable for its current use, however in order to ensure its longevity with minimal on-going maintenance we recommend the following is actioned.
>
> <u>Short term (0 – 2 years)</u>
>
> - Water tabling works where required to provide adequate subgrade freeboard
> - Cut-off drains formed at maximum 200m centres to disperse run-off preventing scour
> - Crack sealing of edge beams where pavement is exposed preventing water ingress
> - Edge break repairs where surface meets unsealed shoulder
> - Installation of vehicle crossing culverts where required.
>
> <u>Mid term (2 – 5 years)</u>
>
> - Shape correction to Daniel Parade to reform crown
> - Shape correction to remove rutting from Cotton Lane
> - Stabilised patch or granular dig-out at shoulder blowout on Cotton Lane
> - Stage resurfacing of the entire development with Grade 4/6 chip seal
>
> <u>Long term (5 – 15 years)</u>
>
> - Pavement strength testing to identify any areas likely to prematurely fail

- Pavement rehabilitation upon further significant deterioration

> We do not foresee any immediate requirement for pavement rehabilitation and regular ongoing maintenance combined with the short and mid term measures above will prolong the life of the pavement, however eventually more significant maintenance will be required and it would be prudent to start planning for this work.

[65] It is clear from [7.2] that there are three categories of works recommended. Mr Shahtahmasebi, on behalf of the Society, submitted that having regard to the three stages of work contemplated, it would be a commercial absurdity for the parties to have agreed that all of the works, including those contemplated over the long term would have been completed within three years, namely by August 2025. He argued that the parties, and in particular the Society – having to levy its members, would not have committed to significant expenditure within a compressed period of time and in a manner not contemplated by the Hutchinson Report's recommendations themselves. However, it is critical to focus on the detail of the recommendations, particularly those contemplated at the first two steps. It is of significance that the mid-term works expressly contemplate the resurfacing of the entire roading network with chip seal. A commitment to completing that work within three years of 2022 is entirely consistent with this mid-term time projection (2 – 5 years) being a recommendation made in 2020 (i.e. the date of the Hutchinson Report).

[66] The short-term works (0 – 2 years) involve priority urgent work of a "must do" nature. This includes drainage work which the plaintiffs' expert, Mr Blackburn, addressed. The mid-term works (2 – 5 years) contemplates shape correction to Daniel Parade and Cotton Lane and, as already noted, resurfacing of the entire development.

[67] The long-term works (5 – 15 years) clearly contemplates work to be carried out after the resurfacing of the entire development (i.e. stage 2). It includes pavement strength testing and pavement rehabilitation upon further significant deterioration. I agree with the submission of Mr Heard, for the plaintiffs, that pavement rehabilitation is essentially keeping an eye on the resurfacing and "when it breaks, fix it". As to pavement strength testing, as the experts agree, that would involve two days' work with vehicle to determine whether there are any weak areas in the pavement.

[68] There are three further important factors about the Hutchinson Report. First, it contains a set of plans showing the relevant people what is required. Second, there

are cost estimates consistent with a professional engineer's direction to a contractor. Third, Hutchinson itself was asked to tender this work and did, in fact, do so.

[69] Clause 3.1(d) is to be interpreted in the context of the Settlement Agreement as a whole. One of the issues dealt with in the arbitral process that resulted in the Settlement Agreement and the arbitral award was whether or not the Society was meeting its obligations to maintain roading and infrastructure. I acknowledge that this issue was advanced relatively late in the arbitral process. The background section of the Settlement Agreement expressly records and defines the roading obligation issue as a "dispute". Clause 2 records that the Settlement Agreement is intended to be a full and final settlement of the disputes, as defined in the background.

[70] I acknowledge that the Society has had flooding and related insurance issues to address in the critical period since the Settlement Agreement was entered into. I also acknowledge that members of the Society, understandably, have had concerns about the financial implications of the Settlement Agreement. This includes the apparently widely held sentiment that the Society was placed under significant financial pressure to make the Settlement Agreement. However, I find that on an objective reading of the Settlement Agreement, and having regard to all the relevant background circumstances, that the Society is at real risk of breaching its road sealing obligations in the Settlement Agreement.

[71] The late change in wording of cl 3.1(d) may have signalled some slight watering down of the Society's commitment. I note also that the clause uses both the words "undertakes" and "will be undertaken" (i.e. the root word "undertake" is used twice). However, that clause, as a matter of objective interpretation, means that the roading works as recommended in the Hutchinson Report must be substantially underway and at least nearing completion within three years. It does not mean, as the Society submitted, that the works had to be commenced within three years. The obligations are more onerous than that.

[72] On the evidence before me, I find that the Society has not taken the necessary steps to date to achieve the outcome it contractually committed to, namely that the roading works are to be substantially underway and at least nearing completion by August 2025. It is particularly notable and of concern that the recent contract entered

into between the Society and Robinsons Asphalts Ltd, signed in August 2024, contains no details at all (Schedule 1) as to the works to be carried out. It is also notable that the scope of the instructions given by the Society to their expert, Mr Bryant, have not included the seeking of recommendations as to how to meet the particular Hutchinson Report obligations.

[73] The plaintiffs have not sought a formal declaration as to breach of the Settlement Agreement. As the Society submitted, no anticipatory breach is pleaded. In any event, I note that the three-year time period at issue has not yet expired. However, in order to meet its road sealing obligations, the Society now needs to take immediate steps to give effect to those obligations (i.e. the short and mid-term works) in accordance with my findings in this judgment. It has to date misdirected itself as to the extent of its road sealing obligations.

Issue (b) – Supporting the appeal to the Court of Appeal by MDL

[74] The plaintiffs claim that the decision of the Society in supporting MDL in its appeal to the Court of Appeal was both contrary to legal advice and the interests of members. The Society took no formal position in the High Court proceeding but, following a change in lawyers, it formally supported MDL's appeal in the Court of Appeal. The plaintiffs further say that the Society has failed to identify a single good reason why it would be in the interests of members to have MDL to take control of the Society and its assets. The plaintiffs submit that the Society exercised its powers for an improper purpose, namely to stop development.

[75] I have some reservations about the wisdom and the judgment of the Society in deciding to support the MDL appeal. It does appear that this was contrary to legal advice, which assessed the prospects of the appeal succeeding as low. However, as a party to the proceedings, the Society was, as a matter or orthodoxy, entitled to take a position and, having regard to the findings of the Court of Appeal,[24] I am not persuaded that I could properly conclude that the Society acted outside its powers or for some improper purpose in acting to support MDL. The dispute about the controlling member began with the second defendant, VSPL (associated with and part of the

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[24] *Court of Appeal decision*, above n 3. I note also that, at [83] of the judgment, the Court of Appeal made no order for costs in relation to the Society, stating: "Their support of the appellant's appeal did not materially add to the costs of the appeal."

plaintiffs' camp). The issue was, of course, referred to in the Settlement Agreement. Clause C of the background expressly records a dispute over the status and identity of the "developer" and "controlling member". Furthermore, and importantly, cl 3.2 of the Settlement Agreement expressly states that the parties are free to take a position in a dispute resolution process which puts in issue the status of controlling member (whether or not that process involves MDL).

[76] The plaintiffs say that the decision to support MDL on appeal was an improper attempt to stop the plaintiffs' development. However, I note the Court of Appeal's conclusion that members of the Society are entitled to oppose the development of the balance of Lot 47 as proposed by VSPL, and that the third-party developer, VSPL, does not have the benefit of cl 7.1(b) of the Constitution.[25]

[77] Despite my reservations, I am not persuaded that there is a proper legal basis, based on the evidence, for this Court to second-guess the democratic decision of the members to support MDL on an issue of fundamental importance under the Constitution. This is not a clear and compelling case of the Society having acted contrary to the interests of its members and somehow in breach of the Constitution.

[78] I conclude on this issue that the evidence does not support a finding that the Society acted contrary to the best interests of its members in supporting MDL's appeal.

Issue (c) – The breach notices

[79] The Society has issued "breach notices" to the plaintiffs for allegedly bringing the present proceedings without following the Constitution's dispute resolution procedure. A "breach notice" was issued on 21 March 2024 in the form of a letter from the chairperson of the committee. The letter stated:

> Please be advised that the Committee met on Tuesday 19 March 2023 to discuss this matter and have made the decision to put you on notice that the society is starting a procedure for resolving a dispute pursuant to clause 17.13(1)(2) of the society's constitution. …

[80] Clause 17.13(1)(2) states that the Society may make a complaint against a member by giving the member notice in writing that the Society is starting a procedure

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[25] *Court of Appeal decision*, above n 3, at [76].

for resolving disputes in accordance with the Constitution and setting out the allegations.

[81] The letter of 21 March 2024 gave notice that the plaintiffs had failed to:

> a. First make a complaint by giving to the committee a notice in writing that states you are starting a procedure for starting a dispute, the allegation to which the dispute relates and whom the allegation is against, and sets out is required by the Society (clause 17.13(1));
>
> b. Afford the Society the opportunity to allow you to be heard in respect of the dispute (clause 17.13(2)); or
>
> c. Afford the opportunity for the Society to investigate the dispute fairly, efficiently and effectively.

[82] The letter also stated that the plaintiffs were in breach of the Constitution by:

> a. The failure to prevent pecuniary gain of Members, per 3.2 of the Constitution.
>
> b. The failure to comply with 6.10 of the Constitution.
>
> c. To indemnify and keep indemnified the Society from and against any action, claim, demand, loss, damage, cost, expense and liability which the Society may suffer or incur or for which the Society may become liable in respect of or arising from any breach of the Constitution by the Member - per clause 17.12.

[83] The letter informed the plaintiffs:

> Please refer to Sections 8 and 14 of the Constitution for the consequences of breaches. You are currently deemed to be in breach of the Constitution and subject to the penalties outlined in the Constitution.
>
> …
>
> If your breaches are not dismissed, the financial penalties will commence from the date agreed by the Society at the SGM.

[84] Counsel for the plaintiffs then wrote to the Society’s legal representative contending that the application to appoint a receiver is not one that sits within the constitutional framework and that it cannot be a breach of the Constitution to invoke the supervisory jurisdiction of this Court.

[85] At a Special General Meeting held on 6 April 2024 to, amongst other things, discuss the “breach notices”, it was stated that:

> The breach notice has advised each of these six members that if the Society agrees there is a breach, they face a penalty of $250/day as long as the breach remains and has also claimed reimbursement of all costs caused by this harm to the Society (i.e. legal costs and any other costs).
>
> …
>
> To remedy this, a member would need to withdraw their legal proceedings and enter the Constitution's Disputes Process instead.

[86] The minutes of the SGM record that the "outcome of discussion" was that the plaintiffs' actions in bringing the proceedings were "a breach and a breach notice should be issued, with the committee taking next steps in line with the Constitution".

[87] On 22 April 2024, the chairperson of the committee again wrote to the plaintiffs informing them that:

(a) the Society had determined that they were in breach;

(b) the Society, however, would not take steps to enforce the necessary penalties until the matter has been determined by this Court;

(c) the plaintiffs had five working days from the date of the notice to withdraw their receivership application and follow the process under the Constitution; and

(d) if the matter proceeds through the Court, a $250/day fine would be applied, and all legal costs incurred by the Society "will apply".

[88] The plaintiffs contend that there is no power in the Constitution to levy a fine for a purported breach of the Constitution, following a breach notice or otherwise. They further contend:

(a) the application to appoint a receiver is not one that sits within the constitutional framework. It invokes the High Court's jurisdiction to supervise the operation of incorporated societies where governance is failing by appointing a receiver. It cannot be a breach of the Constitution to invoke the supervisory jurisdiction of the High Court.

(b) the clauses of the Constitution upon which the Society seek to rely upon do not provide that the Constitution's dispute resolution process is

mandatory. This is not surprising given that the Society has adopted in the Constitution ss 2 – 8 of sch 2 of the Incorporated Societies Act 2022.

(c) the purported penalties (fines) for "breach" of the Constitution are unenforceable.

[89] In defending these allegations, the Society relies upon cl 8 of the Constitution (breach of obligations) and the said power to impose a penalty conferred by a conveyancing, land transfer document (i.e. a transfer between MDL as transferer, and MDL as transferee, in respect of the original land covenants that apply to the Estate). However, I find that the Society's position on this issue is misguided; there has been no breach of the Constitution, there is no power to issue the notices in dispute, and no power to impose a penalty. The liquidated damages clause, for breach of land covenants, and contained in the land transfer document, is simply irrelevant to the issue here. Likewise, neither cl 8.2 (consequences) nor cl 17.12 (indemnity) apply. I agree and accept the submission of the plaintiffs that the breach notices and penalties are unlawful.

[90] As the plaintiffs submit, the clauses of the Constitution do not provide that the Constitution's dispute resolution process is mandatory. It is not a breach of the Constitution for the plaintiffs to invoke the supervisory jurisdiction of this Court. A member of the Society is free to choose whether to utilise the Constitution's dispute resolution mechanism but is under no obligation to do so. While the Incorporated Societies Act 2022 is not applicable to the Society, the Society's dispute resolution provisions have been directly taken from it. The wider provisions of that Act are illustrative of the fact that the provisions the Society have incorporated are not mandatory and are not a bar to a member seeking relief through this Court. Section 129 of the 2022 Act provides for the general right for court applications to be made. Sections 129(2) and 130 of that Act confirm that this right is not affected even if its dispute is being, or has been, dealt with under a society's dispute resolution process.

[91] As to the issue of fines, there is no power under the Society's Constitution to impose a fine. The document relied upon by the Society, namely the transfer document, relates to the performance of covenants. It does not apply in this context. Furthermore, cl 8 only applies in the event of a breach of the Constitution by a member.

As I have found, there has been no breach here. In any event, cl 8.2(c) of the Constitution does not extend to the imposition of a fine. Rather, that provision is concerned with the recouping of expenses incurred in attempting to remedy any breach of the Constitution.

[92] It is not necessary for me to address the issue of whether the doctrine against penalties is engaged in this case.[26] The key point is that there is no power under this Constitution to impose a fine in the circumstances here.

[93] For all these reasons, I grant the declaration sought by the plaintiffs in their amended statement of claim that the first breach notice and the second breach notice are ultra vires and unlawful.

Issue (d) – Disputed levy for Lot 47

[94] In April 2024, the Society decided to change the way it calculated levies. It imposed a levy on Lot 47 of $74,744.81, being approximately 26.87 per cent of the Society's total budget. The plaintiffs say that that was unconstitutional and unlawful.

[95] Clause 14.6 of the Constitution states:

> Members shall in exercising any vote at any General Meeting, or as a Committee Member, exercise such vote in good faith with a view to ensuring that all Members are treated equally by the Society and that each Member shall bear that Member's Proportion of all Operating Expenses and of all costs and expenses to be met by levies made by the Society under rule 6.5 irrespective of whether any expenditure by the Society benefits all Members.

[96] Members of the Society are to contribute a "Member's Proportion" to the Society's operating expenses each year (cl 6.1 of the Constitution).

[97] "Member's Proportion" is defined in cl 2.1 as meaning the:

> … proportion that the aggregate of the Section Values of the developed properties owned by a Member bears to the Total Value.

[98] Levies have previously been raised against all lots, including Lot 47, but on the basis of equal sharing. The owners of Lot 47, the Ruitermans, are agreeable to

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[26] See *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152, [2017] 3 NZLR 293.

paying levies on an equal sharing basis,[27] but object to the change to the aggregate value approach now adopted. VSPL also accepts that when new residential lots are created from Lot 47 and titles transferred to the new owners, then the owners of those new lots will be obliged to join the Society and pay levies.

[99] The Society says that it has put "on hold" the levy in relation to Lot 47. It also says that in an effort to resolve this matter, it sent to the owners of Lot 47 a letter dated 27 July 2024 proposing a one-off reduction in Lot 47's levy by using the capital value of all members' properties (and not each member's entire section value as per the Constitution). That is said to effectively halve the current levying amount.

[100] The key issue in dispute is whether Lot 47 is a "developed property" for the purposes of cl 2.1.

[101] I find that Lot 47 is not a developed property. It is currently a working farm, intended for future development under the Constitution and the original KDC resource consent. The Constitution is clearly designed to differentiate between properties that have been "developed" (i.e. subdivided from the large original farm lots) and the remainder "land", namely Lot 47, that at the inception of the Constitution had not been subdivided into residential lots and could not be developed for a further 10 years.

[102] I find that the imposition of a levy on Lot 47 of $74,744.81 was unlawful, as contended.

[103] I accordingly grant the declaration that Lot 47 is not "developed" within the meaning of the levying provision in the Constitution.

Issue (e) – Should a receiver be appointed?

[104] I have concluded in my above analysis that the Society is at real risk of breaching the Settlement Agreement and, in particular, its road sealing obligations under cl 3.1(d). Essentially, the Society has misdirected itself as to the nature of its obligations under cl 3.1(d). I have also concluded that the Society breached the Constitution in purporting to impose penalties and determining that the plaintiffs were

[27] I note that Lot 47 has a house on it. Presumably, the owners receive the benefit of the common facilities for which the levy is used to manage.

in breach of the Constitution in bringing these proceedings. However, I find that while relevant, none of those factors, whether on their own or considered cumulatively, are determinative on whether I should grant the application and appoint a receiver.

[105] I agree with the submission of Mr Heard that the equitable jurisdiction to appoint a receiver is a wide one and it is important to have regard to all the circumstances of the particular case. The context of what is said to be a comparable case must be considered. However, in a case such as this where the appointment of a receiver will interfere and cut across the democratically taken decisions of a representative committee and society, the jurisdiction should be exercised sparingly and cautiously. Here, the plaintiffs seek to place the affairs of the Society in the hands of a receiver with potentially significant financial implications for the members of the Society. The Estate is the home of members of the Society and the decisions at issue directly affect their daily lives. Members have voted in a democratic process to make their views on funding priorities very clear. I note, too, that there is no longer a "controlling member" under the Constitution, a party that enjoys special constitutional rights. Attempts by Mr Sundstrum and entities associated with him to achieve that status were not successful.

[106] I accept that there is a degree of dysfunction within the Society. That is regrettable. There are clearly different factions. Recent disputes such as cattle from Lot 47 accessing the roading network point to a degree of pettiness and suggest that communication between the different parties could certainly be improved. The plaintiffs and their skilled advocates have presented a formidable case. The Court must obviously treat its findings of breach of legal obligations, under both the Settlement Agreement and the Constitution, seriously.

[107] There are troubling aspects of this case which have given me cause to pause and reflect. However, on balance, I am not persuaded that a receiver should be appointed. In the circumstances here, that would be a blunt and inappropriate measure to address the problems the Society confronts and importantly, the need to progress and complete the road sealing obligations. Such an extreme step is not justified, at least at this stage; the degree of dysfunction should not be overstated.

[108] My conclusions do not absolve the Society and the committee from taking the necessary and immediate steps to address its outstanding road sealing obligations. This will require leadership from the committee, compromise from all involved, and a renewed commitment to working together to achieve these outcomes. It is clear that amongst its members the Society has a pool of talented people, and those skills could usefully be employed in enabling the community at the Estate to move forward. In my view, the Society, under the leadership of the committee, does have the capacity and should be given the opportunity to bring about the necessary change. This might appropriately involve the committee engaging Mr Blackburn as well as Mr Bryant. Both are experienced and impressive independent experts who have addressed the issue of road maintenance in detail. It would be wrong for the committee to regard Mr Blackburn as simply part of the plaintiffs' camp.

[109] While of some concern, the level of dysfunction is not such that a receiver should be appointed. I accept that there has been significant and disruptive litigation, including the arbitration, the proceedings in the Court of Appeal and the opposition by a number of members of the Society to the development of Lot 47 (opposition before the Environment Court). The litigation, and no doubt its significant financial implications, has created difficulties for the committee, but the ultimate resolution of a number of key disputes through the litigation process does now give the Society greater certainty going forward. Having said that, in my view it would be prudent for the committee now to obtain further legal advice as to the implications of the Court of Appeal decision (i.e. no longer any controlling member), and how they might meet any concerns about the levy issue.

[110] The defendants submit that this proceeding is "your typical hegelian dialectic. This is part and parcel of the plaintiffs' attempts at creating a problem, managing the reaction, and then creating the solution". In my view, that is an overstatement of what has happened here, but I accept that there are elements of truth to it. Mr Sundstrum has been particularly litigious and has had significant success. This includes obtaining costs from the Society ($70,000) as part of the Settlement Agreement. To his credit he candidly acknowledged in evidence that he was likely part of the problem. He, too, will need to accept that a change in approach is required.

[111] I accept that there have been errors of judgment by the committee, acting in accordance with the majority decisions of the Society (some of which were unlawful). However, in my view, these cannot be categorised as bad faith or giving rise to oppression of minority rights. I do accept the committee has perhaps been too much "poll-driven". So, for example, the issue of whether the Society had met its roading obligations is ultimately a legal question and not one for determination by majority vote. If the Society's legal obligations require it to commit to a particular level of funding for roading or other works, it must do so regardless of whether a majority of members are opposed to it.

[112] It is obvious that Mr Sundstrum has greater access to financial resources than the Society and used those resources to his advantage in the litigation. I accept that the plaintiffs have been outvoted on key decisions, but it is, in my view, unreal to categorise the Society's decisions as oppressive of its minority members. Mr Sundstrum and those associated with him have had particular success in advancing and securing their interests. The issue of compliance with roading obligations was raised relatively late in the arbitration process (in July 2022), clearly part of a strategy to place pressure on the Society, albeit a claim that had merit. Naturally enough, Mr Sundstrum's agenda has always been to secure and maximise his development opportunities for Lot 47, but those interests no longer enjoy special rights under the Constitution. The litigation that led to the recent Court of Appeal decision does seem to have commenced with attempts by Mr Sundstrum to assert the status as "controlling member".

[113] I reject the plaintiffs' contention that the unlawful decisions of the committee I have identified (i.e. the issuing of breach notices, imposition of penalties and calculation of levy) are symptomatic of serious dysfunction, sufficient to justify the appointment of a receiver. The impugned decisions were made in the context of hostile litigation and it is difficult to see how the plaintiffs have been substantially prejudiced by those decisions. No penalties have in fact been paid, and albeit that the breach notices were unlawful, the expectation of the Society that the plaintiffs should engage in a dispute resolution process without first resorting to court is not wholly unreasonable. The plaintiffs did have the option to pursue that process.

[114] I acknowledge my finding that the Society has essentially misdirected itself as to the nature of its road sealing obligations under the Settlement Agreement. I emphasise, that it is incumbent on the Society now to take steps to address those obligations and as a matter of priority. However, although troubling, this is not a case where the asset at issue, namely the roading network, is currently at any immediate and substantial risk of deterioration. The plaintiffs' submissions overstate the risk of deterioration to the amenity and property values. I note the agreed position of the experts that except for a section of approximately 100 metres' length in Cotton Lane and a portion of Wallbank Way in the vicinity of the main gated entrance, the roading is in serviceable condition presently. That said, the Society must now move without delay to meet its legal obligations. In doing so, it can now act with the benefit of up-to-date data and the views of the expert witnesses. This includes the view of Mr Blackburn as to the risk profile in engaging with the resealing "in a void of knowledge".[28] I note that the experts agreed that it would be prudent to undertake beam testing.

[115] For all these reasons, I conclude that a receiver should not be appointed.

Result

[116] The application by the plaintiffs for the appointment of a receiver is dismissed.

[117] I grant a declaration that the first breach notice and the second notice are ultra vires and unlawful.

[118] I grant a declaration that Lot 47 is not "developed" within the meaning of the levying provision in the Constitution.

[119] As to costs, I am of the preliminary view that, having succeeded, the defendant Society is entitled to costs, and on a 2B basis plus disbursements. It may be that there should be some minor deduction for the plaintiffs having been unsuccessful on the two declarations granted, but the Society has been successful on the main issue in dispute, namely the appointment of a receiver. If agreement cannot be reached on the question of costs, then memoranda are to be filed (no more than five pages) and served in accordance with the following timetable:

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[28] Mr Blackburn noted that this would be a mistake.

(a) The plaintiffs are to file and serve their submissions on costs by **15 November 2024**;

(b) The defendant is to file and serve its submissions on costs by **29 November 2024**.

[120] I will then determine the issue of costs on the papers.

Andrew J