COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

May 19, 2005

John A. Sergovic, Jr., Esquire
Sergovic & Ellis, P.A.
9 North Front Street
P.O. Box 566
Georgetown, DE 19947-0566

Vincent G. Robertson, Esquire
Griffin & Hackett, P.A.
116 West Market Street
P.O. Box 612
Georgetown, DE 19947-0612

Re: The Cove on Herring Creek Homeowners' Association, Inc. v. Riggs, et al.
C.A. No. 02024-S
Date Submitted: May 10, 2005

Dear Counsel:

Plaintiff, The Cove on Herring Creek Homeowners' Association, Inc., was the prevailing party, both in this Court and in the Delaware Supreme Court,[1] in its efforts to secure compliance by Defendants with the Declaration of Covenants, Easements and Restrictions (the "Declaration"),

[1] *The Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2003 WL 1903472 (Del. Ch. Apr. 9, 2003), *aff'd*, 832 A.2d 1252 (Del. 2003) (TABLE).

which governs the development known as The Cove on Herring Creek (the "Cove").[2]

The Plaintiff has submitted an application for an award of $39,937.98 as its attorneys' fees and expenses incurred in successfully pursuing this action. The Defendants have not challenged the amount sought and the Court considers that amount to be reasonable under the circumstances. The Defendants, instead, challenge the Plaintiff's entitlement to any award of fees.

The Declaration, at Section 10.5, provides in part:

> Enforcement of covenants, restrictions, conditions, obligations, reservations, rights, powers, assessments, liens and other provisions contained herein shall be by a proceeding at law or in equity against any persons or entities violating or attempting to violate same and/or against the property subject hereto to enforce any lien created by this Declaration. . . . The *cost of any such litigation* shall be borne by the Owner in violation, provided that such proceeding results in a finding that such Owner was in violation of the covenants and restrictions contained herein.[3]

[2] Defendants are Paul R. Riggs, Jr., Gale F. Riggs, William Simpkins, Margaret M. Simpkins, Robert C. Hludzinski, and Dorothy Hludzinski, all lot owners in the Cove.
[3] Emphasis added.

The only question presented for decision is whether "the cost of any such litigation" includes the fees and expenses incurred by the Plaintiff's counsel in this matter.[4]

Under the so-called American Rule, each party is responsible for its own legal fees. There are several recognized exceptions:

> (1) cases where fees are authorized by statute, (2) cases where the applicant creates a common fund or non-monetary benefit for the benefit of others, (3) cases where the underlying (pre-litigation) conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages, and (4) cases where the court finds that the litigation was brought in bad faith or that a party's bad faith conduct increased the costs of litigation. (This fourth exception is referred to as the "bad faith exception").[5]

That basic rule also may be altered through the agreement of the parties. Accordingly, as an exception to the American Rule, the burden of legal fees may be shifted by contract.[6]

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[4] The Defendants also do not dispute that, as a consequence of this action, each was found to have been in violation of the Declaration.

[5] *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997).

[6] *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *23 (Del. Ch. Oct. 23, 2002).

The rights and duties established through the valid adoption of restrictive covenants running with the land are contractual in nature. As with any contract interpreted under the laws of Delaware, a court must read a declaration of restrictions with the purpose of ascertaining how it would be understood by an objective, reasonable third party.[7] At the outset, the Court must determine whether the contract is ambiguous. A contract is ambiguous if it "can be reasonably read to have two or more meanings."[8] It is fundamental that "[w]ords in a contract are interpreted using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."[9] The question, thus, becomes one of whether the phrase, "the cost of any such litigation," includes legal fees. The word "cost" is commonly understood to mean "the amount . . . paid or . . . charged . . . for service rendered."[10] Legal fees are a foreseeable burden, or cost, regularly and routinely incurred in the successful pursuit of a claim through the

[7] *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999).
[8] *Harrah's Entertainment, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309 (Del. Ch. 2002).
[9] *Paxson Communications Corp. v. NBC Universal, Inc.*, 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005).
[10] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 515 (1993).

judicial process. Indeed, the largest component of the cost of litigation usually is the lawyers' fees.

The Defendants, however, argue that the *costs* of litigation do not regularly include attorneys' fees. In that argument, they are correct because the term "costs" is routinely limited to court costs and certain other expenses necessarily incurred in the litigation process, but excluding legal fees.[11] That argument, however, is of little moment in this dispute because the Declaration refers to the *cost* (not *costs*) of litigation.[12]

Although the terms of restrictive covenants may be construed against a homeowners' association because (1) the association "stands in the shoes" of the drafter and (2) restrictions impinge upon the free use of property and

[11] *See* 10 *Del. C.* § 5106; *Dobler v. Montgomery Cellular Holding Co.*, 2002 WL 31112195 (Del. Ch. Aug. 29, 2002).

[12] This confusion permeates Defendants' argument. At paragraphs 7, 8, 9, and 10 of their Response to Plaintiff's Motion for Attorneys' Fees, the Defendants read Section 10.5 of the Declaration as if it addressed "the costs of any such litigation." Unfortunately for the Defendants, the word which defines their obligation is cost. Thus, their citation to cases such as *In re Dougherty*, 114 A.2d 661 (Del. Orphans' Ct. 1955) (holding that an agreement to pay costs does not include attorneys' fees), does not help their cause.

thus are not favored, there is nothing ambiguous about the language chosen by the drafter of the Declaration.[13]

In sum, the Plaintiff is not limited by the terms of the Declaration to recovering its "costs." Instead, the Defendants are bound by a set of restrictions that entitles the Plaintiff, as the prevailing party in litigation such as this, to reimbursement of "the cost of . . . litigation." As the attorneys' fees and expenses sought here constitute an integral component of the cost of such litigation,[14] the Plaintiff is entitled to an award of those fees and expenses.

Accordingly, an Order awarding the Plaintiff the attorneys' fees and expenses incurred in successfully pursuing this action will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-S

[13] The prudent drafter seeking to allocate responsibility for the payment of attorneys' fees, of course, would be well-served to make express the intent to include attorneys' fees. That would, if nothing else, serve to limit disputes such as the current one.
[14] *See Sanders v. Wang*, 2001 WL 599901, at *2 (Del. Ch. May 29, 2001) (implicitly including attorneys' fees within the "cost of litigation").