

An issue that commonly arises in the context of cross-leases is that an owner will usually be required, under the terms of their cross-lease, to obtain consent from the “Lessors” to undertake alterations. In other words, even though they wish to undertake alterations to their own house in their own exclusive area, they will usually first need to obtain the agreement of the other owner(s) of the cross-leased land.

Usually the terms of cross-leases include the proviso that consent “shall not be unreasonably withheld”. The Court has recently considered the legal test for what it means for consent to be “unreasonably withheld” - we discuss the resulting change to the law below.

MARTELLI V LIOW [2024] NZHC 968

Background

This was a recent (April 2024) decision of the High Court. The background to this case was that the Appellants and Respondents owned a cross-leased property. This means they had shared ownership of the entire site but leased their own “exclusive area” on which their house was situated.

The terms of the cross-lease included a clause that the lessors were not to make structural alterations. The clause provided:

“The Lessee shall not make any structural alterations to the...said building nor erect on any part of the said land any building, structure or fence without the prior consent of the Lessors first had and obtained on each occasion PROVIDED HOWEVER that such consent shall not be unreasonable withheld”.

The Appellants sought the Respondents’ consent to proposed alterations, including:

- Increasing the size of their house, bringing it closer to their boundary with the Respondents; and
- Adding an in-ground swimming pool, 1m from the boundary with the Respondents.

The Respondents refused to provide their consent.

Old ‘Test’

The dispute was referred to Arbitration. The issue was whether the Respondents had acted “unreasonably” in refusing to provide consent.

Both parties accepted that an inquiry as to whether consent has been unreasonably withheld involves two-stages, firstly, into the actual basis for withholding consent and, secondly, as to whether that basis provides reasonable grounds for withholding consent.

The Arbitrator applied a test from an old decision called *Smallfield v Brown* (1992) 2 NZConvC 191,110. The test was that consent in respect of alterations will be unreasonably withheld only where “*the benefit to the party seeking change will be substantial and the proposed alteration would produce only trifling detriment to the cross-lessor*”.

In applying this test, the Arbitrator found that the Respondents’ withholding of consent was not unreasonable as the detriment would be more than trifling.

The Appellants appealed to the High Court.

New ‘Test’

The Judge applied current principles of interpretation and formed the view that neither the wording of the clause, nor the context and commercial purpose of the clause, suggested that reasonableness should be determined by the extent of the “detriment” which would be suffered by the party whose consent was sought.

The Judge concluded that the legal test for determining whether consent has been unreasonably withheld, should *not* use the terms:

- “Substantial”, in relation to the benefit of the party seeking the alterations; and
- “Only trifling” in relation to the detriment to the neighbour.

The Judge stated that instead “*the correct approach when considering whether the basis for withholding consent was reasonable is to consider what the reasonable landlord would do when asked to consent in the particular circumstances, and whether the conclusion was one that could be reached by a reasonable landlord*” (at paragraph 71).

The dispute was referred back to the Arbitrator to apply the new test.

CONCLUSION

The result of this judgment is greater flexibility for a Court or Arbitrator to determine whether consent to alterations has been unreasonably withheld under a cross-lease, based on the particular circumstances of the case.

In such disputes, an assessment of the circumstances will need to be undertaken. Jackson Russell has extensive experience acting for cross-lease owners. Please contact us if you would like to discuss your specific situation.

FURTHER INFORMATION

For assistance or further information about cross-leases, please contact one of the lawyers listed or your usual Jackson Russell advisor.

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