Perry Park Pty Ltd v City of Darwin [2016] NTSC 27

PARTIES:	PERRY PARK PTY LTD (ACN 062 030 826) v CITY OF DARWIN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	68 of 2015 (21539686)
DELIVERED:	25 MAY 2016
HEARING DATES:	10 DECEMBER 2015
JUDGMENT OF:	KELLY J

CATCHWORDS:

LANDLORD AND TENANT – Agreement to Lease – Terms of lease – agreement to make improvements with 'prior written consent of the Owner and on such terms, conditions and directions as the Owner may reasonably specify or give as a condition of giving its consent' – Consent withheld

LANDLORD AND TENANT – *Law of Property Act* s 134(2) covenant in lease against making improvements without consent is subject to qualification that consent not to be unreasonably withheld despite any express term to the contrary – Whether the Landlord's refusal of consent was unreasonable – Whether s 134 required Landlord to disregard terms of the Lease regarding matters to be taken into account in deciding whether to withhold consent – Held s 134 did not require Landlord to disregard provisions of the Lease except those "to the contrary" i.e. permitting consent to be unreasonably withheld – What is unreasonable is a question of fact in each case

CONSTRUCTION OF LEASE – Lease required tenant to undertake community consultation process in accordance with specified provisions in the Lease – Landlord empowered to take into account its own analysis of community consultation "amongst other relevant matters" when determining whether to withhold consent – Whether Landlord in breach of the Lease in taking into account community views expressed at council meeting – Whether Landlord took into account other irrelevant matters – Held tenant had not demonstrated that Landlord had taken into account irrelevant matters – Landlord not in breach of the lease – Consent not unreasonably withheld

Law of Property Act 2000 (NT) s 134

Ashworth Frazer Ltd v Gloucester City Council [2002] 1 All ER 377; *Bickel & Ors v Duke of Westminster & Ors* [1976] 3 All ER 801; *Brodan Pty Ltd v Clearview Industrial Estate Pty Ltd* (1986) 4 BPR 9173; *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385; *Lambert & Anor v FW Woolworth & Company Ltd (No 2)* [1938] Ch 883; *Mount Eden Land Ltd v Straudley Investments Ltd* (1996) 74 P & CR 306; *Sportoffer Ltd v Erewash Borough Council* [1999] 3 EGLR 136; referred to

In re Gibbs & Houlder Brothers & Co Ltd's Lease; *Houlder Brothers & Co Ltd v Gibbs* [1925] Ch 575*; International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513; *Iqbal & Ors v Thakrar & Anor* [2004] EWCA Civ 592; *Sargeant & Anor v Macepark (Whittlebury) Ltd* [2004] 4 All ER 662; relied on

REPRESENTATION:

Counsel:

Plaintiff:	D Robinson SC
Defendant:	D McLure SC with M Crawley

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Paul Maher

Judgment category classification:	B
Judgment ID Number:	KEL16007
Number of pages:	38

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Perry Park Pty Ltd v City of Darwin [2016] NTSC 27
No. 68 of 2015 (21539686)

BETWEEN:

PERRY PARK PTY LTD
(ACN 062 030 826)
Plaintiff

AND:

CITY OF DARWIN
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 25 May 2016)

[1] The plaintiff, Perry Park Pty Ltd ("Perry Park") operates the Gardens Park Golf Links on land adjacent to the Darwin Botanical Gardens ("the Land") which it leases from the defendant, City of Darwin ("DCC").

[2] In December 2008, DCC and Perry Park entered into a lease of the Land for a term of 10 years commencing on 1 July 2010. The lease contained an option to renew for a further 15 years.

[3] The lease contained a relatively short clause [cl 9.7] requiring Perry Park to perform certain "Upgrade Works" to a value of not less than $1 million "with the prior written consent of the Owner and on such terms, conditions

and directions as the Owner may reasonably specify or give as a condition of giving its consent". The Upgrade Works were only sketchily described in the lease. They consisted of "Lighting of" the various holes on the golf course in stages.

[4] The parties fell into dispute about what was required under this clause and in September 2013 the parties entered into a deed of variation and amendment of the lease which substituted a much longer cl 9.7 setting out in detail the obligations of Perry Park in relation to the Upgrade Works. (The lease as amended is referred to in these reasons as "the Lease".)

[5] In summary, the new cl 9.7 obliged Perry Park to perform the Upgrade Works in stages. The First Stage (defined in the Lease) was the installation of lighting to the first hole of the golf course. The Second and Third Stages (also defined in the Lease) required the installation of lighting to the other holes. The value of the works remained $1 million and the clause "with the prior written consent of the Owner and on such terms, conditions and directions as the Owner may reasonably specify or give as a condition of giving its consent" also remained.[1]

[6] The lighting to the first hole of the golf course has been installed in accordance with the First Stage.

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1 Clause 9.7(a)(iii)

[7] The Lease provides that within 90 days of completing the First Stage Perry Park must prepare and deliver to DCC a master-plan suitable for the purposes specified in the Lease showing:

(a) the lighting proposed for the second, third, fourth and ninth holes of the golf course (the Second Stage);

(b) the lighting proposed for the fifth, sixth, seventh and eighth holes of the golf course (the Third Stage); and

(c) the proposed location of all proposed connection points, power lines and other infrastructure for the Upgrade Works.[2]

[8] Clause 9.7(e) provides, that within the time specified[3] Perry Park must:

> (i) undertake a community consultation process with respect to the works proposed by the Tenant as the Second Stage and Third Stage and as described in the master-plan prepared under sub-clause 9.7(d). The consultation process will be undertaken by a professional consulting firm approved by the Owner (acting reasonably) in the manner described in Schedule 2 to this deed;
>
> (ii) promptly provide the Owner with the responses received and the outcomes and its analysis of the responses received from the community consultation process and it is agreed that the Owner may take into account, amongst other relevant matters, such responses outcomes and analysis as well as its own analysis of such matters in considering whether to consent to such works proposed by the Tenant for the Second Stage and Third Stage and the terms and conditions on which such works are to be undertaken; *[punctuation as per original]*

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2 Clause 9.7(d)

3 The time limits specified in the Lease were varied by consent and there is no issue in this proceeding regarding compliance with specified time limits.

[9] In June 2014 Perry Park delivered to DCC a master-plan showing the concept design for the lighting of the whole golf course identifying the lighting proposed for the Second Stage and the Third Stage.

[10] In June 2014, with the approval of DCC, Perry Park appointed the professional consulting firm Northern Planning Consultants ("NPC") to undertake the community consultation process.

[11] Schedule 2 to the Lease requires NPC to undertake the community consultation process to the standard of consultation category 2[4] described in the DCC community consultation policy number 025 (a copy of which is annexed to the Lease) which describes the requirements for Level 2 consultation in the following terms:

Level 2 – consult
Elected members provide community leadership and guidance, and facilitate communication between the community and the council.
Neighbourhood
• Local streetscape proposal. • Local Playground installation.
Technique – timeframe
• Minimum 3 weeks for response • Compliance with statutory requirements (if any). • Letter or survey to affected properties, or properties within 250m of site, as appropriate.

[4] It is common ground between the parties that this is intended to refer to Level 2 consultation as described in the policy document.

- Copies of major reports/plans made available in the libraries and customer service areas.
- Report to Council summarising submissions for formal Council decision.

[12] NPC prepared a community consultation strategy which it proposed to apply in performing the community consultation process and DCC endorsed the proposed strategy.

[13] NPC undertook the community consultation process between about 21 August 2014 and about 26 September 2014 in accordance with the community consultation strategy which had been endorsed by DCC.

[14] The community consultation process included:

(a) provision of an explanatory letter by letterbox drop to all properties in the immediate vicinity of the Land (approximately 640 individual residences);

(b) advertisements in the Northern Territory News and Darwin Sun newspapers;

(c) posting the concept plan and details on the Gardens Park Golf Links website; and

(d) conducting four separate public forums held at the Gardens Park Golf Links.

[15] On 20 October 2014 NPC produced a written community consultation report ("the Consultation Report") and provided a copy of the Consultation Report to DCC and Perry Park.

[16] The Consultation Report annexed the responses that had been received and reported that the key responses received and outcomes of the community consultation process were as follows.

(a) Forty one individuals provided responses that were in support of the works proposed by Perry Park for the Second Stage and the Third Stage.

(b) Of the 41 responses in support, nine individuals indicated that they were residents of The Gardens or Larrakeyah and three of those individuals further indicated that they lived in a property overlooking part of the Land.

(c) Thirty four individuals provided responses objecting to the works proposed by Perry Park for the Second Stage and the Third Stage.

(d) Of the 34 responses objecting to the works, 32 indicated that they (or the party on whose behalf they were writing) lived in, or otherwise had an interest in, property that overlooked part of the Land.

(e) Three responses neither objected to nor supported the works proposed by Perry Park for the Second Stage and the Third Stage.

(f) The majority of residents and/or landowners with views of the Land who were included in the direct consultation process did not object to the works proposed by Perry Park for the Second Stage and the Third Stage.

(g) Concerns raised by residents were being addressed by Perry Park. (No details were given.)

[17] DCC considered whether to consent to the works proposed by Perry Park for the Second and Third Stages at an ordinary council meeting on 28 October 2014 ("the Meeting").

[18] DCC held a public forum before the Meeting to obtain comments, views and opinions of members of the public in relation to the proposed Second and Third Stage works and the Consultation Report.

[19] The public forum was attended by around 15 to 20 members of the public as well as the chief executive officer of DCC and most of the councillors who later attended the Meeting. At the public forum members of the public who attended expressed comments, views and opinions. It appears from the position adopted by Perry Park (and this was not disputed by DCC) that these comments generally objected to the Second and Third Stage works.

[20] Later, at the Meeting, the Lord Mayor tabled the contents of a further lengthy letter of objection from Ms Patsy Hickey. The letter from Ms Hickey was not provided to NPC, but Ms Hickey was one of those who

had responded to the community consultation process carried out by NPC objecting to the proposal.

[21] At the Meeting DCC resolved to "not approve the installation of lights at Gardens Park Golf Links and require that alternate works be identified in accordance with the August 2013 Deed of Variation to the lease".

[22] On or about 5 November 2014 DCC notified Perry Park of the resolution.

[23] Perry Park has brought this proceeding claiming:

(a) a declaration that, in the events which have happened, DCC on 28 October 2014 unreasonably withheld its consent to the works proposed by Perry Park for the Second Stage and the Third Stage of the Upgrade Works;

(b) a declaration that Perry Park is entitled to proceed with the works proposed by Perry Park for the Second Stage and the Third Stage of the Upgrade Works without further application for the consent of DCC;

(c) a declaration that the resolution passed on 28 October 2014 whereby DCC resolved "to not approve the installation of lights at Gardens Park Golf Club Links and require that alternative works be identified in accordance with the August 2013 Deed of Variation to the lease" was not made reasonably and in conformity with the Lease and was made arbitrarily and capriciously;

(d) a declaration that by failing to consider the works proposed by Perry Park for the Second Stage and the Third Stage of the Upgrade Works reasonably and in accordance with the provisions of the Lease and by acting arbitrarily and capriciously, DCC is in breach of the Lease;

(e) a declaration that Perry Park is not liable to perform any Alternate Upgrade Works.

[24] By an order of the Master made at a case management conference on 25 September 2015 the matter was set down for trial on the preliminary point "whether the Defendant's refusal of consent to the Plaintiff to perform the upgrade works in the lease, was lawful".

[25] Perry Park puts its claim for a declaration that DCC unreasonably withheld its consent to the works proposed by Perry Park for the Second and Third Stages of the Upgrade Works on two alternative bases.

[26] First, it contends that s 134 of the *Law of Property Act* applies, and that, as a result, in determining whether or not to grant consent to the improvements, the provisions of cl 9.7 of the Lease must be ignored, DCC was not entitled to take into account anything that did not affect its property interests, and nothing that affects DCC's property interests has been identified.

[27] Alternatively, Perry Park contends that, if DCC was entitled to take into account other matters, it took into account matters which it was not entitled to take into account on the proper construction of cl 9.7 of the Lease. Perry

Park submits that, under the Lease, the only thing DCC was entitled to take into account was the consultation process referred to in cl 9.7(e) and, in particular, whether there had been "a negative response" to that consultation process. This was not entirely clear, but at the hearing counsel for Perry Park seemed to go somewhat further and contend that in assessing whether there had been "a negative response" to that consultation process, DCC was limited to the opinion expressed by the independent expert who performed the consultation and prepared the report under cl 9.7(e) of the Lease.

[28] Perry Park contends that DCC in fact took into account a range of irrelevant matters namely:

(a) the letter of objection from Ms Hickey;

(b) the comments, views and opinions from members of the public objecting to or not supporting the works raised at the public forum on 28 October 2014;

(c) assertions of a lack of transparency in the commercial arrangements previously agreed between DCC and Perry Park under the Lease;

(d) the lack of an environmental impact statement or environmental assessment in connection with the works proposed by Perry Park;

(e) the merit or appropriateness of the commercial arrangements previously agreed between DCC and Perry Park under the Lease;

(f) assertions of a lack of sufficient and relevant information upon which to make a determination; and

(g) any concerns the residents and the community had raised.

The claim based on s 134

[29] DCC admits that s 134 applies. (It also admits that the Lease contains an implied term that "DCC would act honestly, reasonably and in accordance with the terms of the Lease and not arbitrarily or capriciously in determining whether to consent to the works proposed by Perry Park for the Second Stage and the Third Stage".)[5] However, DCC contends that the application of s 134 does not have the effect that the provisions of the Lease relating to the granting or withholding of consent must be ignored.

[30] Section 134 of the *Law of Property Act* provides (relevantly):

> (2) In a lease that contains a covenant, condition or agreement against the making of improvements without a licence or consent, the covenant, condition or agreement is, despite any express term in the lease to the contrary, to be taken to be subject to the qualification that the licence or consent is not to be unreasonably withheld.

[31] Mr Robinson SC for Perry Park contended that under this section the only thing a landlord is entitled to take into account in determining whether or not to grant consent to the making of improvements, is something that

5 Amended Statement of Claim para 6(e); Defence to Amended Statement of Claim para 6

affects the landlord's property interest[6] regardless of what the parties had agreed in the Lease could (or even must) be taken into consideration by the landlord. He conceded that the landlord could take into account detriment to the landlord's trading interests on adjoining land but said that this came under the rubric of "property interest".

[32] Mr Robinson relied for that proposition on the English case of *Sargeant & Anor v Macepark (Whittlebury) Ltd.*[7] I do not think that case is authority for the narrow proposition contended for by Mr Robinson. In *Sargeant*, the issue was whether it was reasonable for the landlord to impose, as a condition of consent for extensions to a hotel on leased premises, a condition restricting the use to which the extensions could be put, designed to protect the commercial interest of the landlords in the business (a golf course) they conducted on adjoining land. Lewison J reviewed the authorities starting with the principles applicable to covenants against alienation without consent which is not to be unreasonably withheld. He

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6 Counsel for DCC re-stated this contention as meaning that under s 134 the only thing a landlord is entitled to take into account in determining whether or not to grant consent to the making of improvements, is "detriment to the actual property itself" or "diminution in value of the reversionary estate". Although it may not have been totally fair or accurate, this re-formulation was not disavowed by counsel for Perry Park in reply which points up the inherent imprecision in the term "property interests" as used in submissions on behalf of Perry Park. For example, there was no attempt to explain why (conceptually) an adverse effect on trading interests of the landlord on adjacent property should be a "property interest", but rights conferred on the landlord under the Lease to take into account a community consultation process should not. Counsel for Perry Park was content to point to Woodfall, *Landlord and Tenant'*, Vol 1 para 11.262 (Sweet & Maxwell online looseleaf service © 2015) and say, "That is an accurate statement of the law." The passage relied on was:

> 'A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests. The expression "property interests" should be widely construed, and will include the landlord's trading interests in his capacity as occupier of neighbouring property.'

7 [2004] 4 All ER 662 (a decision of Lewison J in the High Court)

referred to *Ashworth Frazer Ltd v Gloucester City Council*[8] from which three principles were distilled:[9]

(a) "[A] landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease."[10]

(b) Where the first principle is met, the question whether the landlord's refusal was reasonable is one of fact.

(c) The question is not whether the landlord's decision was right or justifiable, but whether it was reasonable.

[33] Lewison J then quoted *Iqbal & Ors v Thakrar & Anor*[11] in which these principles were adapted for the purpose of covenants against alteration in the following terms:[12]

(1) The purpose of the [covenant] is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord.

(2) A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.

(3) It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord

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8 [2002] 1 All ER 377

9 at [3] – [5] per Bingham LJ

10 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, at p 520 (Balcombe LJ) quoted in *Ashworth Frazer* at [3]

11 [2004] EWCA Civ 592

12 at [26], cited in *Sargeant* at [41]

knows whether he should refuse or give consent to the alterations or additions.

(4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable landlord in the particular circumstances.

(5) It may be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances. For example, it may be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold.

(6) While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.

(7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.

(8) In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.

[34] Lewison J went on to quote MacKinnon LJ in *Lambert & Anor v FW Woolworth & Company Ltd (No 2)*[13] to the effect that under the English equivalent of s 134 a landlord might also refuse consent "on aesthetic, artistic, or sentimental grounds". His Lordship said: "No Court, as I hope

[13] [1938] Ch 883, at p 911; cited in *Sargeant* at [44]

and believe, will ever hold that under [the statute] a landlord must consent to the hideous degradation of the front of his building by a sheet of plate glass, and be satisfied by a money payment for the loss of graceful eighteenth century windows."[14]

[35] Lewison J conducted a lengthy review of the authorities with a view to establishing whether a landlord was permitted to take into account his trading interest in the business carried on by the landlord on the adjoining land. Ultimately, he:

(a) referred to *Sportoffer Ltd v Erewash Borough Council*[15] for the proposition that "a landlord can legitimately take into account considerations relating to adjoining property of his own, whether let or not";[16]

(b) held that there is no rule of law which absolutely precludes a landlord from relying on perceived damage to his trading interests in adjoining or neighbouring property as a ground for refusing consent to an assignment or change of use;[17] and

(c) rejected a submission that a different rule applied in cases concerning alterations, and concluded that in an appropriate case a landlord is

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[14] He added, "A glance at the photograph of these premises shows that no aesthetic considerations can be involved in this case."

[15] [1999] 3 EGLR 136

[16] at p 142, quoted in *Sargeant* at [53]

[17] *Sargeant* at [55]

> entitled to object to an alteration on the ground that he has a reasonable objection to the use which the tenant proposes to make of the altered property whether that is the same as or different from the use being made of the rest of the property.[18]

[36] In relation to this final conclusion, Lewison J said:[19] "To hold otherwise would be to fall into the trap identified by Lord Denning MR in *Bickel & Ors v Duke of Westminster & Ors*[20] … (and approved in the *Ashworth Frazer* case):[21]

> The words of the contract are perfectly clear English words: 'such licence shall not be unreasonably withheld'. When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him.

[37] In that case, Lord Denning continued after the words: "Nor should the courts limit him":

> Not even under the guise of construing the words. The landlord has to exercise his judgment in all sorts of circumstances. It is impossible for him, or for the courts, to envisage them all.[22]

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18 at [56]

19 at [57]

20 [1976] 3 All ER 801 at p 804

21 at [4]

22 at p 804-5

Lord Denning went on to specifically disavow the kind of doctrinaire approach taken by Mr Robinson in this case:

> … Seeing that the circumstances are infinitely various, it is impossible to formulate strict rules as to how a landlord should exercise his power of refusal. The utmost that the courts can do is to give guidance to those who have to consider the problem. As one decision follows another, people will get to know the likely result in any given set of circumstances. But no one decision will be a binding precedent as a strict rule of law. The reasons given by the judges are to be treated as propositions of good sense – in relation to the particular case – rather than propositions of law applicable to all cases.[23]

[38] It seems to me that the same common sense approach should be applied to the construction of s 134. There is nothing in s 134 which would require the parties (or the Court) to ignore the express terms of the Lease as to what a landlord can (or indeed must) take into account in determining whether to grant or withhold consent where those matters are not themselves unreasonable, or such as to lead to an unreasonable decision. It is only an express term in the Lease "to the contrary" – (ie to the effect that consent may be unreasonably withheld) that must be ignored by virtue of s 134.

[39] *Sargeant* is certainly not authority for the approach contended for by Perry Park, that the provisions of the Lease must be ignored. In *Sargeant*, one of the factors which influenced Lewison J in holding that it was not unreasonable for the landlord to take into account the effect on the landlord's business, was that that business had been expressly referred to in

[23] *Bickel v Duke of Westminster* at p 805

the lease.[24] Further, Lewison J referred to *Mount Eden Land Ltd v Straudley Investments Ltd*[25] for these two propositions:

> (1) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his contractual rights under the [lease] from being prejudiced by the proposed assignment or sublease.
>
> (2) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the [lease].

[40] Mr Robinson contended that the authorities make a distinction between the principles to be applied where the Lease provides that consent shall not be unreasonably withheld and cases where the statutory proviso applies.[26] I see no reason in logic why that should be so. Section 134 simply provides that in a lease that contains a covenant, condition or agreement against the making of improvements without a licence or consent, the covenant, condition or agreement is, despite any express term in the lease to the contrary, to be taken to be subject to the qualification that the licence or consent is not to be unreasonably withheld. Why should an implied/ imputed term of the lease be construed differently from an express term of the lease in the same terms?

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[24] *Sargeant* at [58] The lease expressly prohibited the landlord's adjoining business from engaging in certain activities in competition with the tenant's business.

[25] (1996) 74 P & CR 306 at p 310, quoted in *Sargeant* at [47]

[26] Again he relied on *Sargeant* for that proposition, specifically [39] where Lewison J said: "The question whether consent to alterations has been unreasonably withheld must be considered under two heads: the common law and the [English equivalent of s 134]".

[41] In any event, *Sargeant* does not stand for that proposition either. In *Sargeant*, Lewison J held that if the statutory scheme is more favourable to the tenant than the contractual provision in the lease, the lease must yield to the statute. (That, with respect, is logical since such an express contractual provision would be "to the contrary" of the term implied by the statute to the extent of any inconsistency.) Lewison J therefore decided the case on the principles applicable under the statute, although *Sargeant* concerned an express clause prohibiting the making of improvements without consent and providing that consent must not be unreasonably withheld.[27]

[42] In *Cathedral Place Pty Ltd v Hyatt of Australia Ltd*,[28] which concerned a covenant against alienation in which consent was not to be unreasonably withheld, Nettle J (then in the Supreme Court of Victoria) quoted from the remarks of Lord Denning in *Bickel & Ors v Duke of Westminster* (some of which are set out above) and went on to emphasise the importance of "the intention

of the parties as manifested by the contract itself".[29] Nettle J concluded:[30]

> It also seems to me that whatever the differences between the English and Australian decisions, the English cases do not imply any lessening of the significance which is to be attributed to the terms of the contract. Neither *Bickel* nor *Ashworth* directly questions the

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27 at [45] and [46]

28 [2003] VSC 385

29 *Cathedral Place* at [25] quoting observations of Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, at p 608

30 at [26]

rectitude of the proposition that "the outstanding circumstances to be considered are the nature of the contract to be construed, and the relations between the parties resulting from it." To the contrary, in *West Layton Ltd v Ford* Roskill LJ said:

> *"… the right approach is to look first of all at the covenant and construe the covenant in order to see what its purpose was when the parties entered into it; what each party, one the holder of the reversion, the other the assignee of the benefit of the relevant term, must be taken to have understood when they acquired the relevant interest on either side."*

And his Lordship made those observations in the context of expressing approval for what Lord Denning had said in *Bickel*. *[citations omitted]*

[43] If further support were needed for the proposition that English authority does not support the contention that the terms of the contract must be ignored in determining whether a landlord is acting reasonably, reference can be made to the review of the English authorities by Nettle J in *Cathedral Place.*[31] The authorities there referred to emphasise that whether or not withholding consent was reasonable or unreasonable in the circumstances depends on the facts of the particular case, and also emphasise the primacy of the contract between the parties.

[44] The only Australian authority to which I was referred on the question of what amounts to unreasonably withholding consent to the making of improvements (as distinct from assignment) was *Brodan Pty Ltd v Clearview*

[31] at [19] to [21]

Industrial Estate Pty Ltd[32] and it does not support the proposition contended for by counsel for Perry Park either; quite the reverse. In that case, Young J in the New South Wales Supreme Court emphasised that the question of whether a landlord's refusal to consent to improvements was unreasonable is a question of fact. He said:

> In *Lambert's Case (No 2)* it was held by the majority … that where the landlord wishes to object to the improvements sought to be effected by the tenant on the ground that such may damage or cause a diminution in value of the premises, the landlord must consent subject to reasonable compensation. If he does not take this course, but rather refuses consent outright, then he will be almost certainly held to have acted unreasonably. I say "almost certainly" because really the question of unreasonableness is a question of fact, but because the legislature has specifically provided for the case where the landlord says the premises will suffer a diminution in value, a landlord can either take the course offered by the statute, but no other course, if he is to act reasonably.[33]
>
> …
>
> The only other guide that a court has as to what has been considered in the past to be legitimate matters for a landlord to have in mind in this sort of case is the analogous situation of a landlord's refusal to consent to an assignment. There is, of course, a vital difference between the two cases because in assignment cases there is a concern about the new tenant's capacity and capability to comply with the terms of the lease and pay the rent; whereas in the improvement cases the landlord has already made the decision to make a contract with the tenant and the tenant's capability and capacity will normally not vary because of the improvements. I say "normally" because there might be the situation where the tenant's improvements lead to a change of user, which the landlord might reasonably think would

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32 (1986) 4 BPR 9173

33 at [8]

decrease the capacity to pay the rent, but that is not this case.[34] *[emphasis added]*

[45] Counsel for DCC submitted that while the decided cases provide useful guidance and refer to factors that may be relevant to the evaluative judgement to be made under s 134, none of those factors represent strict rules by which the Court is bound when making the judgement required by s 134(2). He contended that:

(a) the range of considerations that a landlord may permissibly take into account without offending s 134 are not confined to 'property interests', but are simply to be determined by all of the circumstances of the case; and

(b) the circumstances that a landlord may permissibly take into account need only be relevant and the question of relevance is governed by principally two factors:

(i) the objects of s 134; and

(ii) the contract as a whole but especially the parts of the contract that confer the discretionary power on the landlord to refuse consent and the object of the conferral of that power.

[46] I broadly agree although the decided cases also point to matters which, in general, will almost certainly be found to be unreasonable – for example

[34] Ibid at [10]

trying to obtain an advantage which has nothing to do with the relationship of landlord and tenant established by the lease or trying to improve the position of the landlord *vis a vis* the tenant under the lease.[35]

[47] In short the doctrinaire position adopted by counsel for Perry Park that the terms of the Lease must be ignored and that the only matter that DCC was entitled to take into account was its (undefined) "property interests" is not supported by either English or Australian authority. Nor, it seems to me, is it supported by reason. The approach is in no way warranted by the plain words of s 134.

[48] There is nothing in the authorities to support the proposition that in determining whether to give or withhold consent to the making of improvements by a tenant, the landlord will be acting unreasonably unless it ignores the matters which the parties have expressly agreed the landlord may take into account in reaching that decision.[36] Of course, there may be a case in which the matters which the parties have agreed may be taken into account are so broad as to effectively amount to a license to the landlord to arbitrarily withhold consent. In that case s 134 would apply and the landlord would not be permitted to unreasonably withhold consent notwithstanding that express term to the contrary. This is not such a case.

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[35] This is the position adopted by Young J in *Brodan Pty Ltd v Clearview Industrial Estate Pty Ltd* referred to at [44] above, *Mount Eden Land Ltd v Straudley Investments Ltd* and *Sargeant* at [47], see also [39] above.

[36] None of the authorities to which I was referred involved a situation where the parties had expressly agreed in advance matters which it would be relevant for the landlord to take into account in determining whether to grant or withhold consent to the making of specified improvements.

[49] Counsel for DCC contended that even if the landlord were confined to a consideration of its property interests in deciding whether to withhold consent, the property interests of the parties and in particular the landlord are defined by the contract. So to the extent that the contract (the Lease) confers powers on the landlord, then those are property interests. Counsel for DCC also submitted that the starting point in assessing whether a landlord has acted unreasonably in withholding consent in any given circumstances is to look at the purpose for which the power to withhold consent was conferred. I agree with both contentions.

[50] What is the purpose for which the provisions in the Lease under which DCC is entitled to withhold consent to the Second and Third Stages were inserted? The Land is public land surrounded by residential development and DCC is a municipal authority. It seems clear from the provisions of cl 9.7 that the purpose for which the power to withhold consent from the Second and Third Stages of the Works was to ensure that DCC retained the right to take into account the views of the public in accordance with its public consultation policy which was annexed to the Lease. This can be inferred from the requirement for community consultation in accordance with that policy, the specification that such consultation be in accordance with Level 2 consultation as specified in that policy, and the fact that under cl 9.7 DCC reserved the right to take into account its own analysis of the consultation in determining whether to grant or withhold consent to the Second and Third Stages.

The claim under the Lease

[51] In the alternative to its claim based on s 134, Perry Park submits that, under the Lease, the only thing DCC was entitled to take into account was the consultation process referred to in cl 9.7(e) and, in particular, whether there had been "a negative response" to that consultation process. (Mr Robinson initially contended that the only thing DCC could take into account was the report produced by the third party consultant pursuant to cl 9.7(e), but later apparently resiled from that position in the face of the clear words in cl 9.7(e)(ii) that DCC could take into account its own analysis of responses received during that process.)

[52] Perry Park contended that cl 9.7(e) should be construed in the context of the other provisions in the Lease, specifically cl 9.7(g). On the face of it, cl 9.7(g) provides that Perry Park's obligation to undertake "alternate capital upgrading works" or pay a capital sum in lieu, only arises "[i]f the Tenant is unable to undertake all of the works to be performed under sub-cl 9.7(f) or any part of those works ("the Un-performed Works"), due to the refusal on the part of the Owner to provide consent to the Un-performed Works following a negative response to the community consultation process provided for under sub-cl 9.7(e)". On the assumption that DCC would want to retain the value of the alternate capital upgrading works or their monetary equivalent, Perry Park contended that it can be inferred that the parties contemplated that the only circumstance in which DCC would refuse to provide consent to the Un-performed Works would be "following a negative

response to the community consultation process provided for under sub-clause 9.7(e)" and, hence, that the only matter which DCC could legitimately take into account in deciding whether to consent was that community consultation process (ie the one provided for in cl 9.7(e) and no other).

[53] Perry Park complained that DCC effectively undertook a parallel process of community consultation and took into account a range of concerns expressed by objectors, essentially behaving as though it was the Development Consent Authority rather than the landlord. It particularly objected that taking into account the representations made by a number of objectors in the consultation meeting which took place immediately before the Meeting was unreasonable.

[54] In my view, this argument fails at the first hurdle. DCC does not admit that, under the Lease, the only thing DCC was entitled to take into account was the consultation process referred to in cl 9.7(e). It relies on the plain words of cl 9.7(e)(ii):

> The Tenant must … promptly provide the Owner with the responses received and the outcomes and its analysis of the responses received from the community consultation process and it is agreed that the Owner may take into account, amongst other relevant matters, such responses outcomes and analysis as well as its own analysis of such matters in considering whether to consent to such works proposed by the Tenant for the Second Stage and Third Stage and the terms and conditions on which such works are to be undertaken;

[55] I agree. This is unambiguous. DCC may take "other relevant matters" into account in addition to the community consultation process.

[56] Counsel for Perry Park submitted that this was limited to "other matters relevant to the community consultation process". No attempt was made to suggest what such other matters might be and there is nothing in cl 9.7(e)(ii) which would warrant so limiting the phrase "other relevant matters". The aspects of the community consultation process which DCC is entitled to take into account are listed in the sub-clause (ie the responses received, the outcomes, the Tenant's analysis, and DCC's own analysis of such matters). It is difficult to see what other matters relevant to the community consultation process there might be. It seems to me that the phrase "other relevant matters" is most apt, in context, to refer to something <u>other</u> than the community consultation process, for example the types of matters referred to in *Sargeant* – aesthetic or artistic matters or the possible effect on adjoining or neighbouring property owned by DCC: there may be more.

[57] Counsel for DCC submitted that even if the Lease did restrict DCC to a consideration of "the community consultation process provided for under sub-clause 9.7(e)", that process contemplated that there would be input from the elected Council members of the kind which occurred. Clause 9.7(e)(i) provides that the consultation process will be undertaken in the manner described in Schedule 2. Schedule 2 provides that the consultation process will be conducted "[t]o the standard of consultation category 2 described in the City of Darwin Community Consultation Policy" which is attached to the

Schedule to the Lease. It is common ground that the intention was to refer to a "level 2 consultation" which is described in the policy document (set out above).

[58] Counsel for DCC relied on general policy statements in the Policy Document attached to the Lease, and it should be noted that the table setting out the levels of consultation is followed by a statement that: "City of Darwin's public consultation process will be complemented by [a range of matters including] open forum public question times immediately prior to 2nd Ordinary Council Meeting".

[59] Perry Park's position seemed to be that it was only the actual process of Level 2 consultation set out in the table that was incorporated into the Lease. However, even if that were so, the first box under "Level 2 – consult" states: "***Elected members*** provide community leadership and guidance, and facilitate communication between the community and the council."

[60] I conclude that on its true construction, cl 9.7(e) of the Lease does not limit DCC to a consideration of only those responses received as a result of the letters sent out by NPC and the meetings held by NPC in determining whether to grant consent to the Second and Third Stages. The elected members were entitled to play an independent role in the consultation process, including by visiting affected properties, by responding to questions and by listening to objectors before the Meeting. Whether these

activities strictly formed part of the Level 2 community consultation process or were "other relevant matters" is not necessary to determine.

[61] I have determined that DCC was entitled to take into account the community consultation process including the consultations that occurred in addition to the consultations by the professional consulting firm appointed in accordance with 9.7(e)(i). However, that does not mean that everything said by every person who took part in the community consultation process was necessarily relevant to the decision to be made by DCC and proper for DCC to take into account.

[62] Perry Park complains that DCC took into account:

(i) assertions of a lack of transparency in the commercial arrangements previously agreed between DCC and Perry Park under the Lease;

(ii) the lack of an environmental impact statement or environmental assessment in connection with the works proposed by Perry Park;

(iii) the merit or appropriateness of the commercial arrangements previously agreed between DCC and Perry Park under the Lease; and

(iv) assertions of a lack of sufficient and relevant information upon which to make a determination;[37]

and that these matters were not relevant to its determination of whether to grant or withhold consent to the Second and Third Stages.

[37] Amended Statement of Claim [28](c) to (f)

[63] It seems to me that it would not have been unreasonable to withhold consent (for the time being at least) on the ground that DCC did not have adequate information upon which to base a decision. Did DCC take the other matters into account? The onus is on Perry Park to establish that DCC acted unreasonably.

[64] In *re Gibbs & Houlder Brothers & Co Ltd's Lease; Houlder Brothers & Co Ltd v Gibbs* Warrington LJ observed:[38]

> The question whether a particular act is reasonable or unreasonable is obviously one that cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed, and when the question arises on the construction of a contract the outstanding circumstances to be considered are the nature of the contract to be construed, and the relations between the parties resulting from it.
>
> …
>
> The first question that arises is: What is the inference to be drawn as to the intention of the parties in inserting in the lease a provision of this kind? What was the danger which the lessor contemplated, and against which the lessee was content to allow the lessor to protect himself?

[65] In the present case:

(a) DCC is a municipal authority which has leased public land to Perry Park.

(b) It therefore has a legitimate concern to ensure that developments occurring on that land are not of such a nature as to incur public

[38] [1925] Ch 575 at p 584-5

disapproval, in particular from residents of the municipality directly affected by any such developments.

(c) To protect against that risk, it has provided in the Lease that Perry Park must undertake the same kind of public consultation process which DCC has committed itself to undertake on public land directly controlled by it.

(d) In entering into the variation of the lease which spells out that obligation in detail, Perry Park was content to allow DCC to protect itself against that risk in that manner.

[66] Accordingly, a fairly wide scope should be given to the range of responses to the community consultation process which DCC could legitimately have regard to. These would clearly include:

(a) those supportive responses which favoured the extension of use of the public facility into the hours of darkness by the provision of lights; and

(b) those objections on the grounds of nuisance to neighbouring properties as a result of glare, excessive light, noise and drunkenness.

[67] Perry Park contended that the purpose of cl 9.7(e) was to protect the interest of Perry Park by ensuring that the public consultation process would be conducted by an independent third party and that DCC would be bound by the results of that independent process. However, that interpretation is contrary to the plain words of cl 9.7(e)(ii) which provides that DCC may

take into account its own analysis of the responses to the community consultation process "among other relevant matters".

[68] A transcript of the Meeting was tendered by Perry Park. According to that transcript, the motion put was not to approve the installation of the lights (ie to withhold consent to the Second and Third Stages). That motion was carried eight to three. Aldermen Galton, Mitchell and Lambrinidis voted against the motion (ie in favour of granting consent). Aldermen Want de Rowe, Worden, Elix, Haslett, Anictomatis, Niblock and Knox voted in favour of the motion as did Lord Mayor Fong Lim. Following is a summary of their expressed reasons for opposing the lighting extracted from the transcript of the Meeting tendered by Perry Park.

> **Want de Rowe:** opposed because people don't like the lighting, it will affect their ability to live outside and on their balconies and affect their enjoyment of the Territory lifestyle.
>
> **Worden:** opposed because of insufficient information re the impact of the lights, the effect of noise and the impact on property values. (Also had concerns re whether the owners of rented properties were consulted.)
>
> **Elix:** opposed because "the people have spoken".
>
> **Haslett:** opposed. No reason stated except that, "This lease was entered into … without any public consultation"… "So really from the start we haven't had transparency and I think that the people that live in that area would have wanted" (sic). He did refer back to comments by Alderman Galton to the effect that "the NPC Report should have been available for all to read".
>
> **Anictomatis:** opposed "because I think it's a waste of money".

Niblock: opposed because of "the passion and the depth of concern that the people who were opposing the development of the lighting made, contrasting with the responses of people supporting the proposal which seemed to be very … light in terms of, we think it's a great idea good luck to you, or it'd be great for tourism, or I'll come and play golf some more." Also because it will affect a lot more people negatively than positively, mainly because, "if you moved into a suburb with certain amenity, you expect to keep something like that so the last thing you'd want is to move into an area and to find significant change in your neighbourhood". [He developed this theme in some detail.]

Knox: opposed because "this is a community bit of land surrounded by residential. For that reason … the residential people around that area need to be listened to. Regarding the numbers, … I think the content of the letters (referring to relevance) is much more important than the quantity". "I can't see the degree of benefit outweighing the problems that benefit will cause. So, therefore I cannot support it."

Lord Mayor Fong Lim: opposed – no reason given.

[69] The reasons expressed by Aldermen Want de Rowe, Elix, Niblock and Knox all concerned the fact that residents who were directly affected by the proposal were against the installation of the lights. Alderman Worden's reason for opposing consent was also directly related to the community consultation process. Among the comments of those opposed were that greater weight should be given to the responses of those directly affected, and less weight to those who did not live nearby or own property nearby; that more weight should be given to reasoned responses than to brief, general statements of approval; and the depth of feeling of those residents who were opposed. All of these matters, it seems to me, they were entitled

to take into account. The Lease expressly empowers DCC to pay regard to its own analysis of the responses to the community consultation process.

[70] Perry Park has not shown that the councillors as a body were motivated by or took into account the lack of an environmental impact statement or environmental assessment in connection with the works proposed by Perry Park (as pleaded in the amended statement of claim). Some of the objections annexed to the Consultation Report mentioned such matters, but it is not this aspect of the objections that seems to have been the focus of the councillors' concerns.

(a) Alderman Anictomatis mentioned environmental matters, but it does not seem to have influenced her vote. She said (after stating that some of the lights from peoples' verandahs were worse than the lighting from the golf course): "So there are things I agree with, but I disagree with it in terms of wasting the money on this and of course all the environmental things, I agree. I'd like to see those [environmental reports] all of that – so I'm quite happy with what they've done but I'm not supporting."

(b) Alderman Mitchell made some mention of environmental issues but appears to have considered them to be "furphies". In any event, he voted in favour of giving consent to the Second and Third Stages.

(c) Alderman Galton said (just before the vote was taken), "Well Lord Mayor we don't have an environmental impact statement and to me

that's one of the most critical things we should have to make a decision," but she too voted in favour of granting consent.

[71] The other irrelevant matters Perry Park contends DCC took into account were the merit or appropriateness of the commercial arrangements previously agreed between DCC and Perry Park under the Lease, and assertions of lack of transparency in earlier dealings. However, I do not think Perry Park has established that concerns about these matters led to the decision to withhold consent.

(a) It is true that Alderman Haslett expressed concern about transparency. He did so partly by reference to the granting of the original lease without public consultation. If this is what motivated his opposition to granting consent it was clearly an irrelevant consideration. A decision to withhold consent for that reason would be plainly unreasonable. However, it is not clear that that is what Alderman Haslett was saying. It is possible that his comments about transparency were directed at the adequacy of the community consultation process that occurred. If that was a comment about the adequacy of the process that had been approved by DCC, as distinct from the way it was carried out, it seems to me that that, too, would have been an irrelevant consideration. It would be unreasonable for DCC to approve the process and then withhold consent because that process was inadequate, but again it is not clear that that is what Alderman Haslett was saying.

(b) If consent had been withheld for the reason expressed by Alderman Anictomatis that "it's too expensive", it seems to me that would have been unreasonable.[39] The Lease requires Perry Park to install the lighting in the Second and Third Stages, perform other development works to the same value ($1 million) or make a payment in lieu to DCC. The statement that the lights are "too expensive" is, in reality, a statement that it would be preferable for DCC to have the payment in lieu. However, Perry Park would receive a significant commercial advantage from the installation of the lights in the ability to trade for longer hours. It seems to me that to withhold consent to the Second and Third Stages on the ground that it would be better for DCC to have a monetary payment would be unreasonable, particularly in light of the provisions in the Lease that oblige Perry Park to conduct a community consultation process and which oblige both parties to negotiate in good faith in relation to alternative development works if consent is withheld following a negative response to that community consultation process. The decision had already been made to grant Perry Park the opportunity, by following the processes outlined in cl 9.7, to install the development works it wanted and that would give it a commercial advantage. To withhold consent on the ground that DCC would rather have the money, would be to deprive Perry Park of a significant commercial advantage (ie that opportunity) that it had contracted to

[39] This is not intended to be a criticism of Alderman Anictomatis who was no doubt expressing her honest opinion, is not a lawyer, and had not had drawn to her attention any of the legal issues that have arisen and have been extensively argued in this case.

receive.[40] However, Alderman Anictomatis is only one councillor. The motion was carried by eight to three and there is no indication that any other councillor shared her views or cast their votes for that illegitimate reason.

[72] Accordingly, even if the two councillors with irrelevant (or arguably irrelevant) reasons voted against granting consent for those reasons only, and would otherwise have voted in favour of consent, the result would still have been six to five against. (The onus being on Perry Park to establish that the decision was unreasonable,[41] and DCC being under no obligation to provide reasons for its decision, one cannot impute an illegitimate reason to Lord Mayor Fong Lim in the absence of her articulating her reasons.)

[73] The majority of councillors voted against granting consent to the Second and Third Stages for reasons that had to do with the responses to the consultation process including the depth of feeling of those against, the more detailed and reasoned content of the objections as distinct from those supporting, and the effect on the amenity of directly affected neighbouring properties. In those circumstances I do not think it can be said that DCC acted unreasonably in withholding consent.

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[40] It will not normally be reasonable for a landlord to withhold consent (or impose a condition of consent) in order to enhance the rights the landlord enjoys under the lease – or diminish those of the tenant. See *Mount Eden Land Ltd v Strandley Investments Ltd* and *Sargeant v Macepark (Whittlebury) Ltd* referred to at [39] above.

[41] *Iqbal v Thakrar & Anor* cited at [33] above; see also *International Drilling Fluids Ltd v Louisville Investments*, quoted at [32] above

[74] Accordingly, I find that the Defendant did not unreasonably withhold consent to the Upgrade Works and the Defendant's refusal of consent to the Plaintiff performing the Upgrade Works in the Lease was lawful.