IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA459/2024
[2026] NZCA 101

BETWEEN	SUE LYNN LIOW AND SAI HOE TAN Appellants
AND	BRETT MARTELLI AND SUSANNAH KEITH Respondents

Hearing:	27 November 2025
Court:	Mallon, Thomas and Whata JJ
Counsel:	A R B Barker KC for Appellants C T Walker KC for Respondents
Judgment:	16 April 2026 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents one set of costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] Cross-lease titles are a relatively common form of residential property ownership in New Zealand, accounting for approximately 18 per cent of all residential property titles in Auckland as of March 2016. They were, at that time, the second most popular title type after freehold.[1] Cross-leases commonly provide that no structural alterations can be made (or new structures erected) without the prior consent of the lessors with the proviso that consent is not to be unreasonably withheld. This case concerns the interpretation of that type of clause and in particular whether the dicta in a 1991 High Court decision, *Smallfield v Brown*, is, or is not, wrong in law.[2] The High Court held in the judgment under appeal that it is,[3] and whether the High Court erred in that respect is the primary issue addressed in this judgment.

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1 Craig Fredrickson *Arrested (re)development? A study of cross lease and unit titles in Auckland* (Auckland Council | Te Kaunihera o Tāmaki Makaurau, Technical Report 2017/025, October 2017) [Auckland Council Report] at ii.

2 *Smallfield v Brown* (1991) 2 NZ ConvC 191,110 (HC) at 191,118.

3 *Martelli v Liow* [2024] NZHC 968, (2024) 25 NZCPR 289 [judgment under appeal] at [67].

[2] Specifically, the question is whether consent 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, as held in *Smallfield v Brown*.[4]

[3] In summary, we agree with the High Court that what is commonly regarded as the test in *Smallfield v Brown* for when consent to alterations to a cross-leased property will be unreasonably withheld is wrong in law. The words of the alterations covenant do not contain the constraints that test imposes and nor are those constraints appropriate in light of the covenant's context and purpose.[5] In a cross-lease development, the lessors are all of the owners as tenants in common of the estate in fee simple (or other underlying estate). They together grant the cross-leases of each and every flat in the cross-lease development to the respective lessees. It is the lessors jointly who must consent or reasonably withhold consent.[6] Most cross-leases have a term of around 999 years. Inevitably, structures will require rebuilding a number of times. In that context, it cannot be right that the intention of the alterations covenant is to preserve structures in the same overall configuration as at the beginning of the cross-lease.[7] The starting point must be that alterations will not only be desired but necessary over the term of the cross-lease.[8] Whether the lessors, acting reasonably, can withhold consent in a particular case is ultimately a question of fact. It can be approached by asking whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent.[9] Nevertheless, and without intending to create rigid rules, we provide further guidance below at [107]–[112].

[4] Before addressing the background facts and judgment under appeal, it is useful to explain the history, legal structure, and advantages and disadvantages of

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4 *Martelli v Liow* [2023] NZHC 1678 at [5] and [13]. Leave to appeal to the High Court on a question of law was granted on this basis. We note that *Smallfield v Brown*, above n 2, uses the slightly different phrasing "only trifling detriment *to the neighbour*" (emphasis added).

5 See below at [78].

6 See below at [80]–[87].

7 See below at [102].

8 See below at [110].

9 See below at [107].

cross-leases, as well as the typical lease provisions and associated case law concerning alterations or additions in the cross-lease context.

Overview of cross-leases

History

[5] Until the end of the 1950s, home ownership in New Zealand was typically confined to owning a house built on its own separate section, usually about one-quarter or one-fifth of an acre. Ordinarily one house only could be built on each section and local authority rules would not allow the subdivision of land into sections small enough to enable high density development.[10]

[6] In 1958, the Municipal Corporations Act 1954 and the Land Subdivision in Counties Act 1946 were amended to provide that a lease of part of a building was not a subdivision of land. Local authorities began to allow more than one residential unit in one building. The cross-lease scheme was then created. It was a device to provide separate titles to two or more flats in one building on one section without there being a subdivision of the land. This allowed individual flats to be separately owned.[11]

[7] In 1971, amendments to the Municipal Corporations Act and the Counties Amendment Act 1961 made it possible for separate buildings on the same section to be cross-leased. The result was that any kind of dwelling could be cross-leased, whether a flat in part of a building, a semi-detached townhouse or a free-standing house. The Local Government Act 1974 replaced the Municipal Corporations Act and the Counties Amendment Act but the provisions meaning that cross-leases did not constitute a subdivision of land remained. The Resource Management Act 1991 fundamentally changed the position, however, and the grant of a cross-lease is now a subdivision of land meaning a subdivision consent is required.[12] One of the incentives for the creation of cross-leases has therefore come to an end.

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10 DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [14.085].

11 At [14.085].

12 At [14.085].

Legal structure

[8] Under a cross-lease scheme, the fee simple or other underlying estate in the land is owned by the owners of the flats as tenants in common, and all the tenants in common join in leasing each flat to its owner, normally for 999 years.[13]

[9] This means that each purchaser of a "flat" becomes the registered owner of:[14]

(a) a proportionate undivided share in the fee simple (or other underlying estate) as a tenant in common with the "owners" of the other flats; and

(b) an estate of leasehold in their particular flat.

[10] As the learned authors of *Hinde McMorland & Sim Land Law in New Zealand* explain, purchasers of cross-leased flats have two distinct roles. As tenants in common of the estate in fee simple (or other underlying estate), they are the lessors under the cross-leases to themselves and lessors under the cross-leases to the other lessees.[15] As individual lessees, they acquire the right to the exclusive possession of their particular flats. That part of the property that is not cross-leased remains common property in the possession of the "flat owners" as tenants in common. The common property is either common areas or restricted use areas appurtenant to a particular flat.[16] Restricted use areas are also sometimes called "exclusive use areas" or "exclusive occupation areas".

[11] The cross-lease confers the right to exclusive possession of the flat, whereas the ownership of a share in the underlying estate gives the right to use areas that are not part of the flat (subject to any restricted use covenants) and any other residual rights such as the ability to grant an easement in respect of a restricted use area.[17]

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13 For convenience, we use "flat" to describe all kinds of cross-leased dwelling.
14 At [14.086].
15 At [14.086]. Where the underlying estate is in leasehold, the underlying estate of leasehold is held by the owners as tenants in common and the cross-leases are subleases.
16 At [14.086].
17 At [14.086] and [14.090].

[12] The common areas are generally those required for access. In contrast, restricted use areas typically provide each lessee with a private area for use as a courtyard or garden appurtenant to their flat. The rights a lessee enjoys over a restricted use area depend upon the terms of the cross-leases. The form of a cross-lease is not prescribed by statute or regulation.[18]

[13] Previously, a purchaser of a flat would receive two certificates of title, one for the undivided share in the fee simple and the other for the estate of leasehold created by the cross-lease. The practice has now changed so that a composite record of title including both the undivided share in the fee simple and the estate of leasehold is generally issued.[19]

[14] Unless the cross-lease specifically provides otherwise, the cross-lease is of the physical building (or part of the building) comprising the flat and not the land on which it sits. The land on which the flat sits and the airspace above are both common property. Nevertheless, there is no requirement in law or a cross-lease itself that all buildings and improvements must be contained in the leasehold estate. Some may be built or constructed on a restricted use area appurtenant to the flat. However, if alterations or additions have been made which have changed the flat's dimensions — whether horizontally or vertically (outside the leasehold title boundary) and whether the alterations were made with or without consent — those alterations or additions encroach onto either a common area or a restricted area, so the lessee has no leasehold title to them. The cross-lease title has to be amended by the deposit of a new cross-lease plan and a new cross-lease, otherwise there is a defect in title. Conversely, improvements within the leasehold space defined by the cross-lease and improvements on a restricted use area which do not alter the floor plan of the leasehold property but are independent of it, do not affect the cross-lease title and are not defects in that title.[20]

Advantages and disadvantages of cross-leases

[15] The advantages of cross-lease titles include that they: can (and certainly historically did) allow for greater housing density; mean that certain requirements of

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18 At [14.086].
19 At [14.087].
20 At [14.095].

a district plan for subdivision approval such as height to boundary ratios may not be applicable; and, while many cross-lease developments today could be created as fee simple subdivisions, cross-lease terms provide "ready-made" covenants between neighbours. They also avoid the need to create easements of right of way and for services. Relevantly, from the point of view of a purchaser, a cross-lease has the advantage that some measure of control can be exercised over the making of alterations and additions to the other flats in the development.[21]

[16] There are, however, disadvantages because the rights of the lessees are different from those of owners and are governed by the terms of the cross-leases. Because the majority of cross-lease developments involve the lessees living in close proximity to one another, the possibility of disputes is increased, often concerning alterations or additions to the flats.[22]

[17] In what might be considered a prescient observation in 1994, the learned author DW McMorland said:[23]

> The great disservice which local authorities have done to the general public for a large number of years by refusing to allow fee simple subdivisions ... and forcing the use of the cross-lease mechanism is only now beginning to surface in litigation. However, the flow has begun, the problems are constantly arising, and they will continue to do so for a long time into the future.

[18] In 1999, the Law Commission published its *Shared Ownership of Land* report.[24] The report included a discussion on the shortcomings of cross-leases, in which it was said:[25]

> Common sense suggests ... that with the passing of time and as buildings age or uses permitted in particular neighbourhoods change, the essentially unsatisfactory nature of this form of tenure will become more and more apparent.

[19] The Law Commission recommended the phasing out of cross-leases and their replacement with either fee simple or unit title subdivisions.[26] The Commission saw

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21 At [14.102].
22 At [14.102].
23 DW McMorland "Cross-leases: Staged development — Power of attorney from other lessors" (1994) 6 BCB 253 at 254.
24 Law Commission *Shared Ownership of Land* (NZLC R59, 1999).
25 At [8].
26 At [14].

particular difficulty where a cross-lease has been used to enable in-fill housing so that one flat is considerably older than the other, considering that the owner of the older flat would be left owning a lease of a dwelling which was unusable without uneconomic expenditure.[27] However, the Law Commission's proposals relating to cross-lease titles were not proceeded with when unit title reforms were put in place.[28]

[20] A 2017 report by Auckland Council | Te Kaunihera o Tāmaki Makaurau entitled *Arrested (re)development? A study of cross lease and unit titles in Auckland* states that in March 2016 there were 215,958 cross-lease titles in New Zealand, of which 47 per cent were in Auckland. At that time, approximately 44 per cent of cross-lease or unit titles in Auckland had dwellings that were built in the 1970s or earlier. Many of those dwellings could be nearing the end of their physical or economic life but the ability of many of them to be redeveloped is described in the report as "severely restricted, primarily due to the complicated nature of their ownership".[29]

[21] It is self-evident that issues are likely to arise when dwellings and other buildings on cross-lease properties are of different ages and an older dwelling reaches the end of its economic or physical life and needs to be refurbished or rebuilt.

[22] What we can take from this is that, not only are there a considerable number of cross-leased properties, but redevelopment pressures, including as a result of the aging housing stock, are a looming problem.[30]

Alterations or additions in the cross-lease context

[23] Because cross-leased flats are generally in close proximity to one another, even when in separate buildings, cross-leases normally contain a covenant by the lessee not to make any alterations or additions without the prior written consent (not to be unreasonably withheld) of the lessors. This consent requirement generally applies both to alterations to the structure of the flat itself and to alterations or additions within

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27 At [27].
28 Auckland Council Report, above n 1, at 21.
29 At ii.
30 The perceived and actual disadvantages of cross-lease titles mean such properties generally sell for a lower median price compared to similar freehold title properties in the same location: Auckland Council Report, above n 1, at 18.

restricted use areas. While the precise wording may vary from cross-lease to cross-lease, such covenants do, in accordance with their specific terms, generally give lessors a degree of control over what a lessee may do.

[24] *Hinde McMorland & Sim* notes that a current standard clause reads:[31]

> The lessee covenants:
>
> 9(a) Not to erect on any part of the land any building, structure or fence, nor to alter, add to or extend any existing building on the land without the prior written consent of the Lessors. Such consent shall not be unreasonably withheld.

[25] There have been a number of cases discussing the meaning of the term "structural" in this context, a topic we do not need to address in the circumstances of the present case.[32] While most cross-leases provide that consent must not be unreasonably withheld, some cross-leases contain an unqualified covenant, such as in the case of *French v Bickerton*, where the clause was construed literally and the Court declined to read into it the qualification that consent would not be unreasonably withheld.[33] This is now likely answered by s 224 of the Property Law Act 2007 which provides that, in a lease, unless the context otherwise requires, a covenant of the lessee not to do a thing without the lessor's consent requires the lessor not unreasonably to withhold consent to the doing of that thing.

[26] Cross-leases also commonly contain a lessee's covenant as to use in terms such as:

> 3. RESTRICTIONS ON USE
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> The Lessee shall use the Flat for residential purposes only and will not do or suffer to be done any act, matter or thing which is or may be an annoyance, nuisance grievance or disturbance to the other lessees or occupants of any building on the said land and shall not bring into or keep in the Flat any cat, dog, bird or other pet which may unreasonably interfere with the quiet enjoyment of the other lessees or occupants of any building on the said land or which may create a nuisance.

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31 DW McMorland and others, above n 10, at [14.095].

32 See for example: *Smallfield v Brown*, above n 2; and *Estate of Ferguson v Walsh* (1999) 4 NZ ConvC 193,032 (HC).

33 *French v Bickerton* HC Auckland A1646/85, 14 April 1986 at 5.

[27] The lessors in turn covenant:

> 16. QUIET ENJOYMENT
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> The Lessee performing and observing all and singular the covenants and conditions on his part herein contained and implied shall quietly hold and enjoy the Flat without any interruption by the Lessors or any person claiming under them.
>
> …
>
> 18. LEASES OF OTHER FLATS
>
> The Lessors shall lease the other flats on the said land only on terms similar to those set forth in this Lease and whenever called upon by the Lessee so to do to enforce the due performance and observance by the lessees named in such other leases of all obligations as by such other leases are cast on such lessees and for the purposes of aforesaid the Lessors do irrevocably hereby appoint the Lessee hereunder for the time being as the Attorney and in the name of the Lessors to do all such acts and in particular but not in limitation to serve such notices and institute such proceedings as may be necessary for the proper compliance by the Lessors of the obligations cast on them by this Clause.

[28] A lessee who makes an alteration or addition in breach of the covenant not to do so without consent may be ordered to restore the building and land to its original condition,[34] reverse the alterations in part,[35] and/or pay damages.[36] They may also be injuncted from beginning or continuing the work.[37]

[29] The Court has the power to order the division of a cross-leased site into separate fee simple titles for each flat.[38] As the learned authors of *Hinde McMorland & Sim* note, appropriate land covenants can then be notified against the fee simple titles if necessary.[39]

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34 See for example *Smallfield v Brown*, above n 2, at 191,120.

35 See for example *Estate of Ferguson v Walsh*, above n 32, at 193,039–192,040, where Potter J considered that consent could not reasonably be withheld in respect of some aspects of the alterations.

36 See for example *Smallfield v Brown*, above n 2, at 191,120.

37 See for example *Cavit v Deng* [2025] NZHC 286, (2025) 26 NZCPR 524 at [45].

38 Property Law Act 2007, s 339. See below at [36]–[39], where *Turner v Goldsbury* [2024] NZCA 292, (2024) 25 NZCPR 656 is discussed.

39 DW McMorland and others, above n 10, at [14.102].

Relevant case law

[30] *Smallfield v Brown* concerned an application for an injunction in a dispute between two lessees of a cross-leased residential property. One lessee had made interior changes to their house, as well as building a deck accessible through french doors that were substituted for an existing smaller window. The deck and french doors faced the other separate dwelling on the cross-leased site.[40]

[31] In an oral decision, Fisher J addressed the argument that the alterations clause in the lease was never intended to play a role with respect to buildings which are fully detached. Fisher J pointed out that, in the case before him and at that time, normal subdivisional limitations and bulk and location requirements did not apply. Therefore, the buildings and other structures could be closer to one another than normal. He noted that alterations to a lessee's house could affect light and air, view and appearance, all of which could affect the enjoyment of the neighbouring property. He concluded, therefore, that the clause restricting alterations was not patently inappropriate.[41]

[32] Fisher J then made the following often-quoted observation:[42]

> Whether or not consent has been unreasonably withheld requires first that some proposition is put to the relevant lessee for the purpose of triggering an obligation not to unreasonably withhold consent and secondly that after due balance of the interests of the two parties the withholding of the consent is found to be unreasonable. Although the latter involves a comparison between the interests of both parties I think that a consent 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 neighbour.

[33] It is the last sentence of that quote which has, it seems, been adopted as the "rule" to be applied in interpreting alterations covenants in cross-leases.

[34] Fisher J distinguished between the activities in flat 1 which would have occurred in any event without the deck and french doors and those which he described as having a "causative connection" with the french doors and the deck. He said for

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40 *Smallfield v Brown*, above n 2, at 191,112–191,113.
41 At 191,115–191,116.
42 At 191,118.

the purpose of the alterations clause, the reasonableness had to relate exclusively to the physical alterations and any activities which would foreseeably flow from them. He accepted that the particular deck and associated french doors were likely to result in some loss of privacy, some increased noise and a strong sense of visual intrusion. He concluded that constituted a sufficient detriment to outweigh the corresponding benefits to the lessee of flat 1 and did not consider that consent was unreasonably withheld.[43] He described the lessee of flat 1's proposed erection of a trellis around the edge of the deck as bringing the situation "a good deal closer to a situation where it would be unreasonable to withhold consent".[44] However, he accepted the argument that the very presence of the deck and french doors leading through to it would inevitably attract human presence onto the deck, with consequent noise and associated effects for the occupants of flat 2.[45] He granted the lessees of flat 2 an injunction requiring reinstatement of the property and awarded damages attributable to the presence of the deck and doors.[46]

[35] However, Fisher J did qualify his view somewhat by saying that the neighbours had no right to reject out of hand a proposition which would involve a deck of some sort or some form of outdoor living in the area of flat 1, along with some form of direct access from the house to that area.[47]

[36] Although it post-dates the judgment under appeal, this Court's decision in *Turner v Goldsbury* is of some relevance and is perhaps an indication of some of the problems likely to arise in the future in cross-lease schemes as the housing ages and deteriorates.[48] In that case, a site which had originally contained one wooden dwelling (built in the 1920s) was developed by relocating the original dwelling to the front of the site. A cross-lease was then created with three freestanding townhouses built at the back.[49] The Turners were the lessees of the original wooden dwelling (flat 1) and wanted to demolish the house and replace it with a new build because of the run-down

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43 At 191,118.
44 At 191,119.
45 At 191,119.
46 At 191,120.
47 At 191,119.
48 *Turner v Goldsbury*, above n 38.
49 At [6].

state of the upper part of the house and the risk of flooding downstairs.[50] Consent under the terms of the cross-lease was needed but consent was not to be unreasonably withheld.[51] One of the other lessors, the Goldsburys, who leased flat 2, refused consent, contending the Turners were obliged to maintain their house rather than demolishing and rebuilding it and, if they did rebuild, the new house would need to have the same or close to the same footprint as the existing house, as well as the same roof height and profile (even though it would be necessary for the floor of the house to be raised to deal with the risk of flooding).[52] The dispute had been referred to arbitration and the arbitrator, relying on *Smallfield v Brown*, was left in "no doubt" that the refusal to consent was not unreasonable or arbitrary.[53]

[37] When the matter was referred back to the same arbitrator, he observed that, because the dwelling was not uninhabitable, it would be difficult to say a refusal to allow a demolition and rebuild was necessarily unreasonable. More importantly, the Turners wished to do more than rebuild the dwelling because they wished to extend its existing footprint.[54] Relevantly, the arbitrator commented in conclusion:[55]

> [63] I understand that relations between the parties are difficult. At the same time, I cannot imagine that the respondents really want to see a decrepit flat in front of theirs, much less one that floods on some king tides. That cannot be good for the values of any of the flats in the cross-lease. Furthermore, there will come a time when the respondents (or their successors in title) will want to do work to their flats. They might be unwise to approach discussion on the basis that refusal to anything the claimants propose is in their long-term interests either.

[38] The Turners undertook a re-design but the Goldsburys continued to withhold consent.[56] The Turners then applied to the High Court for a partition order in respect of the cross-lease under s 339 of the Property Law Act. Their application was dismissed and the Turners appealed to this Court.[57] This Court observed that the High Court Judge had placed too much weight on the fact all parties purchased their properties in the knowledge of the cross-lease restrictions and the arbitration clause

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50 At [7] and [15].
51 At [1].
52 At [2].
53 At [23].
54 At [33].
55 At [37].
56 At [38].
57 *Turner v Goldsbury* [2023] NZHC 179 at [65].

providing the mechanism for resolution of disputes.[58] It noted that the judgment under appeal in the present case, which rejected the test in *Smallfield v Brown*, had been issued subsequent to the High Court judgment dismissing the Turners' application.[59]

[39] This Court considered that the Judge had placed insufficient weight on the breakdown of neighbourly relations. It referred to "the Goldsburys' intransigence in relation to anything other than a replacement with the same or close to the same existing footprint and height dimensions as the existing flat", despite the Turners needing to raise the level of the first floor due to flooding risk.[60] It referred to "[c]ooperation — or at least some give and take" being needed to inform a viable cross-lease arrangement.[61] This Court granted a partition order, saying:[62]

> [87] Standing back, we consider this is a situation where the mechanism in the cross-lease for resolving this dispute has failed. We accept that, with a partition without conditions, the Goldsburys will lose the protections they have under the cross-lease to control development of the dwellings going forward. We also accept that the Goldsburys' conduct and evidence have shown that this is a right to which they attribute significant value. Against that, the evidence of Mr Priest is that the value of the Goldsburys' titles will be higher as a freehold title if appropriate covenants in relation to development on the front title are in place. The Property Law Act confers a broad discretion in appropriate cases to affect property rights, including the existing rights under a cross-lease. We consider that the parties "are locked into an ownership position which they cannot resolve because of the positions they have taken". We consider the "most just and practical way through the impasse" is a partition order subject to conditions.

[40] We have also considered various other cross-lease cases predating the judgment under appeal that were referred to by Mr Barker KC for the appellants.[63] Overall, the case law is relatively limited, most of it being in the context of applications for interim injunctions.

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58 *Turner v Goldsbury*, above n 38 at [79].
59 At [82].
60 At [83]–[84].
61 At [84], citing *Kid Country Te Atatu Ltd v Hoy* [2019] NZHC 988, (2019) 20 NZCPR 882 at [61].
62 *Turner v Goldsbury*, above n 38 (footnotes omitted).
63 *Estate of Ferguson v Walsh*, above n 32; *Roe v Stevenson* HC Auckland CP1356/92, 16 February 1993; *Wood v Elrick* (1978) 1 NZCPR 19 (SC); *Hogg v Edwards* HC Rotorua CP142/86, 19 April 1989; and *Walsh v Studd* (2003) 5 NZCPR 1 (HC).

The present case

Facts

[41] The respondents, (Brett Martelli and Susannah Keith, the Martelli/Keiths), purchased 80 Waiatarua Road, Remuera in 2011. The appellants, (Sue Liow and Sai Tan, the Liow/Tans), purchased 80A Waiatarua Road in 2017. The properties are on the same cross-leased fee simple title. The Martelli/Keiths have an exclusive occupation area of approximately 430 m^2 and a residential dwelling of 114.5 m^2 (flat 1). The dwelling is a single-storey weatherboard house and there is also a separate double garage. The Liow/Tans have an exclusive occupation area of approximately 307 m^2 and a residential dwelling of 127 m^2 (flat 2). The dwelling is a single-storey brick house with an internal garage.

[42] Each cross-lease includes the following clause:[64]

> 10. NOT TO MAKE STRUCTURAL ALTERATIONS
>
> The Lessee shall not make any structural alterations to the said [Flat which shall have the effect of altering the external dimensions thereof] 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 unreasonably withheld.

[43] The cross-leases also contain the standard lessee covenant as to use and lessor covenant as to quiet enjoyment, together with the clause providing that leases of other flats will be on similar terms and will be enforced, as set out above.[65]

[44] Neither the Liow/Tans nor the Martelli/Keiths were the original lessors/cross-lessees.[66]

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64 The words in square brackets were added into the clause for flat 1 in substitution for "building". A materially identical adjustment was made to the clause for flat 2.

65 See above at [26]–[27].

66 The original lessor was also the original lessee of flat 2. We do not know if she was also the original lessee of flat 1. At some point a new lease was entered into in respect of flat 1 for a term of 976 years commencing on 1 December 2011. This is not uncommon, for example if alterations have been carried out and a flat's dimensions have changed.

[45] The Liow/Tans refused to consent to the Martelli/Keith's proposal to develop flat 1 by:[67]

> (a) increasing the size of the existing 114.5 m^2 house by 54 m^2 to 169 m^2, bringing it closer to the boundary with flat 2 (1.4 m rather than over 6 m from the boundary);[68]
>
> (b) adding an in-ground swimming pool of 27.2 m^2 1 m from the boundary;
>
> (c) adding new decking of 28.8 m^2 to connect the house to the swimming pool;[69] and
>
> (d) removing the separate garage (in order to avoid taking what might be regarded as the [Liow/Tans'] site coverage).

[46] All of the proposed alterations were to take place at the back of the Martelli/Keith's exclusive occupation area, in the area between their house and the boundary with the Liow/Tans' exclusive occupation area.[70]

Arbitral award

[47] Given the Liow/Tans' refusal of consent, the Martelli/Keiths referred the dispute to arbitration. The issue at arbitration was whether the Liow/Tans had been unreasonable in refusing consent. The arbitrator applied *Smallfield v Brown*, saying it was "[t]he starting point".

[48] The arbitrator discussed the observations by Associate Professor Thomas that the *Smallfield* test is too restrictive,[71] but concluded:

> [42] In the end, *Smallfield* is still the leading authority in this area of the law. Even acknowledging that it calls for a balancing of interests, the inescapable reality is that it places the fulcrum of the balancing exercise considerably closer to an objecting owner's end of the scales than it does to the perspective of a cross-lease owner who wants to make changes.

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67 Judgment under appeal, above n 3, at [8].

68 The proposed alteration envisages the side of flat 1 that is facing flat 2 being approximately 6.7m wide and around 4m high (although the roofline will be "hipped" at a height of 2.7m). The extended area will convert what was once a kitchen, laundry and dining area into the main living space for the house. The old living room will become a fourth bedroom. The new lounge and dining area will open into the backyard through large sliding doors.

69 This decking would cover most of the remaining backyard area.

70 At [9].

71 Rod Thomas "Cross Leases" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at 1181.

> [43] Nor is that surprising. There are good reasons to prioritise the perspectives of a cross-lease owner who objects to changes. After all, cross-lease owners buy their properties in a known condition, and on the understanding that the characteristics, amenities and value of what they are buying will not be vulnerable to the unwanted unilateral actions of a co-owner — no matter how desirable the proposed work might be from the co-owners' point of view. If the law were otherwise, cross lease ownership would be far less attractive.[72]

[49] The arbitrator said he approached the evidence with the following points in mind:

> (a) the assessment I am asked to make is a comparative exercise, in which the perspectives of both parties are to be considered;
>
> (b) there are no hard and fast rules: for example, the fact that a proposal will increase the size of a dwelling is of itself unlikely to be sufficient to justify withholding of consent. Everything will depend on the details of what is proposed;
>
> (c) at the same time, the assessment of reasonableness requires a particular focus on the impact of the proposed alterations for the objecting party;
>
> (d) consent can reasonably be withheld where, objectively viewed, the detriment(s) to the objecting party are more than 'trifling'. That is so even if the benefits to the other party may be significant;
>
> (e) the factors to be taken into account in making the assessment will always depend on the facts of each case, and may include things like interference with light and air, appearance, domination of one flat over another, impact on views, privacy, noise, visual intrusion, changes in use, likely 'before and after' property values, possible restrictions on options for future development, nuisance in construction, uncertainty of impact, and no doubt many other factors besides.[73]

[50] The arbitrator found that there would be very substantial benefit to the Martelli/Keiths in carrying out the proposed work and what they wanted to achieve

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72 This footnote reads: "To make the same point in a different way: if Parliament were to legislate in this area it is difficult to imagine that any new test would be altogether different from the *Smallfield* test. It would, for example, be untenable if a cross-lease co-owner could unilaterally impose changes on another co-owner simply on the basis that the benefit to the former outweighs the detriment to the latter."

73 This footnote reads: "I add that different considerations may possibly apply in the case of a dwelling that has become dilapidated to the point of requiring replacement, but that is not the situation here."

would represent a far better use of their exclusive occupation area. However, as to the detriment to the Liow/Tans, the arbitrator found:[74]

> (a) The proposed alterations will bring the bulk of the appellants' property significantly towards the respondents' house and create a "tunnel-like feeling" in the common area.[75] The respondents' concerns about the bulk and location of the proposed alterations were "legitimate" and could not be characterised as "trivial, or mere trifles", as what is proposed "would be a substantial development on the fee simple title".
>
> (b) The redevelopment of the appellants' property, including the new outdoor areas, would involve a "real change in the way the areas are used" and would "become the focal area for socialising". The respondents were entitled to raise this concern, as what was proposed was not "in any sense a minor alteration or adjustment".
>
> (c) The concerns the respondents had for the possible loss of value of their property could not be dismissed as being unfounded and/or based on purely subjective fears that have no real basis. The respondents' concerns about the impact of the proposed work on the value of their property "[fell] beyond the *Smallfield* threshold of that which is 'trifling', and by a reasonably clear margin".
>
> (d) Concerns about the potential impact of alterations on the respondents' ability to develop their own property, the impacts of construction, and concerns around the building plans changing as construction took place were concerns that were not [necessarily] sufficient in themselves to justify a withholding of consent but were nevertheless factors that could be added to the overall mix of concerns.

[51] In summarising the situation, the arbitrator said he had sympathy for the Martelli/Keiths, whose proposals made perfect sense from their point of view and were highly desirable. He said:

> [111] If the law placed the fulcrum of assessment in the middle between the two competing sets of interests and concerns, I would have had no hesitation in finding in their favour.
>
> [112] But that is not the test. The law places the fulcrum of assessment a long way towards the respondent's [sic] perspective. While I am ambivalent about some of the aspects of the respondents' concerns, in combination I am not persuaded that they can be dismissed as being mere trifles.

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74 As summarised by the High Court using the submissions of Mr Barker KC: judgment under appeal, above n 3, at [13] (pinpoints to arbitral award omitted). We have made two minor adjustments in square brackets based on our reading of the arbitral award.

75 This footnote reads: "I add that, in the preceding paragraph the arbitrator said that when he stood in the driveway and looked at the properties to try to visualise what would be in place, he found himself unable to reach a confident conclusion that the respondents' concerns in respect of the bulk and location of the extensions to flat 1 could fairly be described as trifling."

> [113] I conclude that the balance ultimately falls in favour of the respondents.

[52] For those reasons, the arbitrator concluded that the Liow/Tans' withholding of consent was not unreasonable.

Judgment under appeal

[53] The case came to Gault J as an appeal on a question of law from the arbitral award. The question of law was:[76]

> … whether, in the context of cross-leases for residential properties, 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, as held in *Smallfield v Brown* …

[54] The Judge discussed the two-stage inquiry as to reasonableness generally involved in a contractual setting: first into the actual basis for withholding consent and secondly into whether that basis provides reasonable grounds for withholding consent.[77] The Judge then discussed *Smallfield v Brown* and the parties' competing contentions.[78]

[55] The Judge observed that the lease term at issue was a contractual provision and needed to be interpreted according to the principles of contractual interpretation.[79] He referred to the Privy Council's decision in *Melanesian Mission Trust Board v Australian Mutual Provident Society*, a case concerning a deed of lease, where the Privy Council said:[80]

> The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have

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76 *Martelli v Liow*, above n 4, at [5] and [13]. We repeat that *Smallfield v Brown*, above n 2, uses the slightly different phrasing "only trifling detriment *to the neighbour*" (emphasis added).

77 Judgment under appeal, above n 3, at [15], citing: *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd* [2010] NZSC 117, [2011] 1 NZLR 289 at [10]–[11]; and *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd* (2004) 5 NZ ConvC 194,073 (HC) at [30].

78 Judgment under appeal, above n 3, at [16]–[28], citing *Smallfield v Brown*, above n 2.

79 Judgment under appeal, above n 3, at [29]–[30], citing: *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; and *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2020] NZSC 115, [2020] 1 NZLR 714 at [24].

80 Judgment under appeal, above n 3, at [31], citing: *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391 (PC) at 394–395; and *Walsh v Studd*, above n 63, at [86] (as applying *Melanesian Mission Trust Board* in the cross-lease context).

> been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the Court, when construing a document, to search for an ambiguity. Nor should rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.

[56] The Judge also referred to the comment in the High Court decision of Winkelmann J in *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd* that, in considering whether a landlord's refusal of consent (to a change of use) was unreasonable, the Court should look first at the covenant in the context of the lease and ascertain the purpose of the covenant in that context.[81]

[57] The Judge approached the question on the basis that the clause in the lease was essentially a prohibition on structural alterations "without the consent of *the lessor (the other lessee)*".[82]

[58] The Judge concluded that neither the text of the alterations covenant, nor its context and commercial purpose, suggested that reasonableness should be determined by the extent of detriment to the other lessee — whether such bar would be "only trifling", "insubstantial", "no more than minor" or otherwise. He observed that such terms would be a gloss on the clause.[83] The Judge commented that the so-called test in *Smallfield* had received little substantive attention in the courts, although he accepted Mr Barker's submission that it would have been applied in numerous arbitrations. Mr Barker's submission in the High Court, as it was before us, was to the effect that people had purchased houses on the basis that *Smallfield* sets out the

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81 Judgment under appeal, above n 3, at [32], citing *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd*, above n 77, at [37(1)].

82 Judgment under appeal, above n 3, at [33] (emphasis added).

83 At [40].

correct test. The Judge accepted that a cautious approach was to be taken in concluding that the so-called test should be abandoned.[84]

[59] The Judge referred to Associate Professor Thomas' commentary to the effect that the test in *Smallfield* is unduly restrictive.[85] He agreed with the academic commentary that, if the expression "trifling" were used as the test, any balancing exercise of the respective rights of the parties would almost invariably result in consent being withheld for anything having more than an insignificant detrimental effect on neighbouring owners. In his view, the weighting of any concern should be assessed in the circumstances of each case.[86]

[60] The Judge discussed a number of cases involving commercial leases, which we discuss below. The Judge noted the emphasis on fact and degree in those cases which, in his view, told against the use of *Smallfield*'s reference to substantial benefit and only trifling detriment as a legal test against which the reasonableness of withholding consent is to be assessed.[87]

[61] Having considered the text, context and purpose of the alterations clause, *Smallfield* and the other cases referred to, the Judge concluded that the terms "substantial" in relation to the benefit to the party seeking change and "only trifling" in relation to the detriment to the neighbour should not be used as a legal test for determining whether the "cross-lessor" has unreasonably withheld consent.[88]

[62] The Judge therefore answered "no" to the question of law, adding:

> [71] I add that 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,[89] and whether the conclusion was one that could be reached by a reasonable landlord.[90] As Winkelmann J said in the change of use context in *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd*, if the landlord

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84 At [43] and [49].
85 At [50], quoting Thomas, above n 71, at 1181–1182.
86 Judgment under appeal, above n 3, at [54].
87 At [60].
88 At [67].
89 *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2001] 1 WLR 2180 at [69] per Lord Rodger.
90 *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd*, above n 77, at [69]–[70] per Winkelmann J.

> reasonably believes that the proposed use would injure its interest, then the landlord may refuse its consent.[91]

[63] The Judge therefore concluded that "the arbitrator erred in considering himself bound to apply an only trifling detriment test".[92] He considered whether he should set aside the award or remit it back to the arbitrator.[93] He accepted that the arbitrator's findings of fact could not be challenged on the appeal.[94] However, in his view, the specific findings needed to be read in the context of the arbitrator's approach to the test and that it was clear from his summary that what was determinative was that he could not dismiss the Liow/Tans' concerns as being "mere trifles".[95] He was not sufficiently confident that the arbitrator's result would be the same and remitted the award for further consideration by the arbitrator in light of his judgment.[96]

The appeal

[64] The Liow/Tans frame the appeal as raising the following questions:

> (a) Did Gault J err in law by overturning the test established by Fisher J in *Smallfield v Brown* … that consent 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 neighbour, and in determining that the terms "substantial" in relation to the benefit to the party seeking change and "only trifling" in relation to the detriment to the neighbour should not be used as a legal test for determining whether the cross-lessor has unreasonably withheld consent?
>
> (b) Did Gault J err in law in holding that the correct approach when considering whether the basis for withholding consent in a cross-lease 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?
>
> (c) Did Gault J err in remitting the arbitral award to the arbitrator for further consideration, in circumstances where the factual findings that had been made by the arbitrator (and which could not be challenged on appeal) meant that the same outcome was likely to be confirmed by the arbitrator?

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91 At [37(2)].
92 Judgment under appeal, above n 3, at [72].
93 At [73]–[79].
94 At [76].
95 At [77].
96 At [77] and [79].

[65] They ask this Court to set aside the High Court's order remitting the arbitral award to the arbitrator for further consideration and instead confirm the arbitral award's finding that the Liow/Tans did not unreasonably withhold consent to the proposed development by the Martelli/Keiths.

[66] Mr Barker clarifies that the Liow/Tans are somewhat neutral on the question of whether the High Court was correct to reject the test in *Smallfield v Brown* to the extent that it describes the *only* situation in which it is reasonable for "a lessee" to refuse consent, accepting that it may be that a lessee is entitled to refuse consent in a broader range of situations. They say, however, that *Smallfield v Brown* provides an example of a situation where a lessee *must* be entitled to refuse consent: where the proposed alterations would cause substantial as opposed to trifling detriment to the lessee. They therefore say the answer to the question of law should be: "[T]hat a consent may be reasonably withheld where the proposed alteration would produce a more than trifling detriment to the neighbour."

[67] The Martelli/Keiths support the judgment under the appeal. Their position is:

(a) to the extent that *Smallfield* sets out a test, the test is wrong in law and should not be followed, including by the arbitrator; and

(b) the Judge correctly determined that the dispute is best decided by the arbitrator in light of the judgment under appeal and to remit the matter accordingly.

Submissions

[68] In Mr Barker's submission, the dicta of Fisher J in *Smallfield v Brown* was not a "gloss" on the reasonableness inquiry but simply described it.[97] In his submission:

> A consenting party can only have regard to the additional impact that the alterations will have on their use and enjoyment of their property. If that effect is more than trifling or minor — ie is substantial — it is entitled to withhold its consent.

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97 Referring to the dicta set out above at [32].

> To put the point positively, a lessee must be entitled to refuse to consent to a structural alteration where, after an objective assessment of the impact of that alteration on their use and enjoyment of their own property, the conclusion is that it will have a substantial detrimental impact on them. That must be correct. How can a lessee be required to consent to an alteration to their neighbours Flat when it has such an effect on their own?

[69] Mr Barker suggests the phrase "more than trifling or minor" may be better described as "substantial". He referred to a discussion of what is meant by "substantial injury" in the context of applications to vary or remove easements under s 317 of the Property Law Act in *Synlait Milk Ltd v New Zealand Industrial Park Ltd*: "It was common ground that for the injury to be 'substantial', it must be 'real, considerable, significant, as against insignificant, unreal or trifling'."[98]

[70] And Mr Barker submits that, at the heart of the test in *Smallfield v Brown,* is the idea that "a lessee" is entitled to refuse to consent if the alterations will have a substantial impact on its use and enjoyment of its property.

[71] Mr Barker accepts that the requirement the proposed alteration provides a substantial benefit to the requesting party may be too restrictive but, in his submission, it is something of a concession to that party to have regard to their situation at all.

[72] In Mr Barker's submission, it is not helpful to have a test that simply asks whether refusing consent is reasonable in all the circumstances and clear guidance is required. He emphasises there is a body of case law represented by the decision in *Smallfield v Brown* that has stood for the last 25 years. He suggests parties will have transacted the sale and development of their properties on the basis of that case law.

[73] In the submission of Mr Walker KC, for the Martelli/Keiths, the *Smallfield* "test" runs counter to judicial warnings against raising any case into a proposition of law because that would lead to inappropriate rigidity. This was the risk identified in a number of cases, including *Ashworth Frazer Ltd v Gloucester City Council*, *Bickel v Duke of Westminster* and *Sequent Nominees Ltd v Hautford Ltd*.[99]

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98 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 at [103]–[104].

99 *Ashworth Frazer Ltd v Gloucester City Council*, above n 89, at [4] per Lord Bingham and [67] per Lord Rodger; *Bickel v Duke of Westminster* [1977] QB 517 (CA) at 524 per Lord Denning MR; and *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47, [2020] AC 28 at [32] per Lord Briggs,

Analysis

[74] We consider we should approach the interpretation of the alterations covenant from first principles, rather than deferring to the dicta in *Smallfield v Brown*.[100] This is for three reasons.

[75] First, we very much doubt that Fisher J intended that his words, in an oral judgment on an application for an injunction, be adopted as the definitive test as to what constitutes the reasonableness of withholding consent to alterations in a cross-lease context. Indeed, his later observations — to the effect that some change of access arrangements for the dwelling, leading to some form of outdoor living in the area facing the neighbour's flat, could not be rejected out of hand — appear inconsistent with the so-called test.[101]

[76] Secondly, we do not accept the submission that we should be loath to interfere with the *Smallfield* test because it has been in place for a long time, has been relied upon and provides certainty. Whereas *Smallfield* was decided just under 35 years ago, the typical cross-lease has well over 900 years left to run. If the *Smallfield* test is wrong in principle, then that position should be corrected. That is especially so if the *Smallfield* test is unduly restrictive: we refer to our discussion above about the history of cross-leases and the problems already experienced and which will only grow in the future. As the Law Commission's *Shared Ownership of Land* report noted, as buildings age, the problems associated with the cross-lease form of tenure will become more and more apparent.[102]

[77] Further, the *Smallfield* test does not in fact provide much certainty at all, given the dearth of publicly available case law shining light on what "substantial" and "trifling" mean. It is clearly for that reason that in *Turner v Goldsbury*, the Turners initiated a second arbitration in an attempt to obtain certainty as to what they might actually be able to build under the *Smallfield* test.[103] At best, the certainty the *Smallfield* test provides — as the Turners eventually found out in *Turner v Goldsbury*

Lord Carnwath and Lord Hodge SCJJ.

100 *Smallfield v Brown*, above n 2, at 191,118.

101 At 191,119.

102 Law Commission, above n 24, at [8].

103 See *Turner v Goldsbury*, above n 38, at [27]–[31].

— is that major alterations will almost invariably be able to be vetoed by one's neighbours.

[78] Thirdly, for the reasons that follow, we are satisfied that the *Smallfield* test is materially incorrect. The words of the alterations covenant do not contain the constraints that test imposes and nor are those constraints appropriate in light of the covenant's context and purpose. Contrary to Mr Barker's submissions, there is a real difference between the *Smallfield* test and the approach that should be taken to the alterations covenant in the present case. That difference has the potential to affect the outcome.

[79] Many of the issues associated with the interpretation and application of the alterations covenant arise because of a misunderstanding of the legal structure of cross-leases, who it is who must give consent and in what capacity, and consequently how unreasonableness is to be considered in the context of cross-leases. Our analysis addresses the following questions:

(a) Who must give consent and in what capacity?

(b) What is the process for obtaining consent?

(c) When will consent be unreasonably withheld?

Who must give consent and in what capacity?

[80] The analysis needs to begin by ascertaining whose consent is required and in what capacity. We set out the text of the alterations covenant again for convenience:[104]

> 10. NOT TO MAKE STRUCTURAL ALTERATIONS
>
> The Lessee shall not make any structural alterations to the said [Flat which shall have the effect of altering the external dimensions thereof] 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 unreasonably withheld.

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[104] The words in square brackets were added into the clause for flat 1 in substitution for "building". A materially identical adjustment was made to the clause for flat 2.

[81] The alterations covenant requires consent by "the Lessors". The Lessors are all of the owners of the estate in fee simple (or other underlying estate) who together grant the cross-leases of each and every flat in the cross-lease scheme to the respective lessees. So, in the present case, the Lessors of *both* properties, 80 and 80A Waiatarua Road, are the Liow/Tans *and* the Martelli/Keiths.

[82] It may be tempting to read "the Lessors" in the alterations covenant as meaning "the Lessors other than the Lessee". However, where "the Lessors" are intended to exclude the Lessee, the cross-lease expressly says so. Clause 23, which concerns the Lessors performing the Lessee's covenants when the Lessee fails to do so, ends: "PROVIDED HOWEVER that for the purposes of this [clause] the word 'Lessors' shall be deemed to mean Lessors other than the Lessee". Clause 24, which concerns the Lessors' power of sale in respect of the Lessee's flat, ends in similar terms. The alterations covenant, cl 10, has no such proviso.

[83] It is the Lessors as a whole who must consent rather than each Lessor individually. We say that for three main reasons.

[84] First, the Lessors are those who as tenants in common together own all the (undivided) shares in the fee simple or underlying estate.

[85] Secondly, the joint nature of "the Lessors" is reinforced by the wording of various clauses in the cross-lease, such as cl 18:

> 18. LEASES OF OTHER FLATS
>
> The Lessors shall lease the other flats on the said land only on terms similar to those set forth in this Lease and whenever called upon by the Lessee so to do to enforce the due performance and observance by the lessees named in such other leases of all obligations as by such other leases are cast on such lessees and for the purposes of aforesaid the Lessors do irrevocably hereby appoint the Lessee hereunder for the time being as the Attorney and in the name of the Lessors to do all such acts and in particular but not in limitation to serve such notices and institute such proceedings as may be necessary for

the proper compliance by the Lessors of the obligations cast on them by this Clause.

[86] Thirdly, the cross-lease provides machinery for "the Lessors" as a whole to take action even though those who together comprise the Lessors are at odds as to what should occur:

> 27. PROCEDURE FOR DECISIONS
>
> That in the event of the Lessee or any Lessor requiring any matter or thing to be done by the Lessors which the Lessors are empowered to do pursuant to the terms of this Lease or pursuant to their rights and powers as owners of the said land and the buildings thereon or which may be desirable for efficient and harmonious administration of the said land and the buildings thereon the following procedure shall be carried out:—
>
> (a) Such Lessee or Lessor shall give notice thereof in writing setting out the proposed action and shall cause the same to be served upon all the other Lessors either personally or by leaving the same at or posting the same to the last known respective place of abode or address of the other Lessors and in the event of such notice being effected by post the same shall be sent by registered letter and service shall be deemed to have been effected on the day after posting thereof.
>
> (b) If the proposed action is not agreed to unanimously within fourteen days after the last date of service of the said notices that matter shall deemed to be a question to be arbitrated pursuant to Clause 26 hereof.
>
> (c) The parties hereto shall be bound by any decision arrived at in accordance with the provisions of this Clause and the parties hereto shall give all reasonable assistance in the carrying out and implementation of such decision.

[87] In conclusion, then, it is all the owners of the estate in fee simple (or other underlying estate) in their joint capacity as the Lessors of the flats who must consent (or reasonably withhold consent) under the alterations covenant.

What is the process for obtaining consent?

[88] The preceding conclusion has implications for the procedure that should be followed when consent is sought but those who comprise the Lessors disagree on whether to grant consent.

[89] In our view, if a lessee seeking the Lessors' consent is not able to obtain the written consent of each of the owners of the estate in fee simple or other underlying

estate (together comprising the Lessors), the lessee should formally attempt to procure the Lessors' consent using the procedure in cl 27 (set out above at [86]).

[90] In *Smallfield v Brown*, Fisher J concluded that cl 27 is of limited application:[105]

> It seems to me that when cl 27 refers to a lessee or lessor "requiring any matter or thing to be done by the lessors which the lessors are empowered to do pursuant to the terms of this lease or pursuant to their rights and powers as owners" the clause was addressed to physical or administrative steps for the purpose of improvements, maintenance or other steps of a like nature to protect the common interests of the lessors. I do not think it was ever intended to have any bearing upon the vindication of the rights of one individual cross-lessee against the other.

[91] With respect, we see no reason to read down the clear terms of cl 27:

> That in the event of the Lessee or any Lessor *requiring any matter or thing to be done by the Lessors which the Lessors are empowered to do pursuant to the terms of this Lease* or pursuant to their rights and powers as owners of the said land and the buildings thereon or which may be desirable for the efficient and harmonious administration of the said land and the buildings thereon the following procedure shall be carried out:
>
> …

The emphasised passage clearly encompasses the Lessors giving consent (or withholding consent) under the alterations covenant.[106]

[92] The reason why the cl 27 procedure should be invoked is that "the Lessors" cannot be said to have withheld consent under the alterations covenant merely because one Lessor has indicated they do not consent. The Lessors must speak with one voice. When those comprising the Lessors do not agree, cl 27 provides the mechanism through which a joint answer from the Lessors (either the approval of consent or the withholding of consent) can be obtained. If the position were otherwise, and a single Lessor indicating they would not consent amounted to a refusal of consent by the

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105 *Smallfield v Brown*, above n 2, at 191,115.

106 Nevertheless, we agree with Fisher J's conclusion in *Smallfield v Brown*, above n 2, at 191,113–191,115 that the cl 27 procedure does not need to be invoked for an individual lessee to commence proceedings for a breach of covenant — at least based on the cross-leases in the present case. That is because cl 18 of the cross-leases, set out above at [85], effectively allows each lessee to institute proceedings on behalf of the Lessors for the purposes of enforcing covenants. Further, s 301(3) of the Property Law Act might similarly allow individual lessees to enforce covenants in favour of the Lessors: see *Hicks v 89 Holland Park (Management) Ltd* [2020] EWCA Civ 758, [2021] Ch 105 at [9], citing *89 Holland Park (Management) Ltd v Hicks* [2013] EWHC 391 (Ch).

Lessors, it would conceivably follow that all the Lessors could be jointly and severally liable for the unreasonable withholding of consent by a single Lessor.

[93] If the cl 27 machinery is triggered and the granting of consent by the Lessors is not unanimously agreed, the question to be arbitrated will be whether the Lessors ought to consent. That question will boil down to whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent. If the answer is yes, the Lessors should not be compelled to consent, notwithstanding that one or more of the persons comprising the Lessors think otherwise. If the answer is no, it follows that the Lessors must consent.

When will consent be unreasonably withheld?

Law in respect of commercial leases

[94] The Judge referred to a number of commercial lease cases for the purpose of obtaining guidance as to how the alterations covenant should be interpreted. We set out the key aspects of that case law.

[95] It is well-established that, in the context of a commercial lease, whether consent has been unreasonably withheld involves a two-stage inquiry. *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd* concerned a contract which contained a provision that, if a party wished to assign its interest, the consent of the other was required and that consent was not to be unreasonably withheld where it was established that the assignee had sufficient financial capability to meet the obligations under the contract.[107] GXL refused consent but Greymouth (the assignee) alleged that GXL did so for collateral purposes unrelated to Greymouth's financial capability.[108] Relevantly, the Supreme Court said:[109]

> [10] … Where the entitlement to withhold consent to an assignment is subject to a general reasonableness limitation, there can be inquiry into why the consent was withheld. This requires a two-stage inquiry, first into the actual basis for withholding consent and secondly as to whether that basis provides reasonable grounds for withholding consent. …

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107 *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd*, above n 77, at [1].
108 At [3].
109 At [10] (footnote omitted).

[96] Focusing on the second stage of the inquiry, in *Ashworth Frazer Ltd v Gloucester City Council*, Lord Bingham set out the overriding principles to be applied when there is a difference between a landlord and tenant as to the reasonableness of the landlord withholding consent.[110] He said:[111]

> [3] When a difference is to be resolved between landlord and tenant following … a withholding of consent, effect must be given to three overriding principles. The first, as expressed by Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* is that
>
> > 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 …
>
> The same principle was earlier expressed by Sargant LJ in *Houlder Bros & Co Ltd v Gibbs*:
>
> > in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and … it must not be something wholly extraneous and completely dissociated from the subject matter of the contract.
>
> While difficult borderline questions are bound to arise, the principle to be applied is clear.
>
> [4] Secondly, in any case where the requirements of the first principle are met, the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases. … These cases are of illustrative value. But in each the decision rested on the facts of the particular case and care must be taken not to elevate a decision made on the facts of a particular case into a principle of law. The correct approach was very clearly laid down by Lord Denning MR in *Bickel v Duke of Westminster*.
>
> [5] Thirdly, the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in *Pimms Ltd v Tallow Chandlers Company*: "it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances …" Subject always to the first principle outlined above, I would respectfully endorse the observation of Viscount Dunedin in *Viscount Tredegar v Harwood* that one "should read reasonableness in the general sense". There are few expressions more routinely used by British lawyers than "reasonable", and the expression should be given a broad, common sense meaning in this context as in others.

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110 *Ashworth Frazer Ltd v Gloucester City Council*, above n 89.

111 Citations omitted.

[97] Similarly, Lord Rodger said:

> [67] The test of reasonableness is to be found in many areas of the law and the concept has been found useful precisely because it prevents the law becoming unduly rigid. In effect, it allows the law to respond appropriately to different situations as they arise. This has to be remembered when a court is considering whether a landlord has "unreasonably withheld" consent to the assignment of a lease. …

[98] Lord Rodger went on to say that the correct approach in considering whether or not it is reasonable for a landlord to withhold consent is to consider what the reasonable landlord would do when asked to consent in the particular circumstances. He rejected any rule which would introduce rigidity and thus make it impossible to apply that approach.[112]

Does the context of cross-leases affect the approach?

[99] We consider that the starting point should be the two-stage inquiry approved by the Supreme Court in *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd*.[113] In the context of a cross-lease, the first stage of the inquiry requires the various concerns of the persons comprising the Lessors to be identified. The second stage requires determination of whether, in light of those concerns, the Lessors (acting jointly) could reasonably withhold consent. This can be approached by asking whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent.

[100] As to the assessment of reasonableness under the second stage, the observations in those commercial lease cases are of general assistance, emphasising as they do the need to focus on the facts and that the assessment of reasonableness should not be fettered by strict rules. What is reasonable in each case is a question of fact, depending on all the circumstances.[114] The flexible approach to the test of reasonableness reflects the need to allow the law to respond as circumstances change.

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112 At [69].
113 *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd*, above n 77, at [10].
114 *Louis Vuitton New Zealand Ltd v Prince's Wharf Property Fund Ltd*, above n 77, at [36] and [38].

[101] The flexible approach to assessing reasonableness was explained by Lord Denning MR in *Bickel v Duke of Westminster*.[115] In that case, the Grosvenor Belgravia Estate had refused to consent to the assignment of the head lease of a house to a woman who, if she had become tenant under the head lease and had remained so for five years, would have been entitled to buy the freehold from the Estate.[116] Having referred to a number of earlier cases, Lord Denning MR said:[117]

> If those cases can properly be regarded as laying down propositions of law, I would agree that we ought to hold the landlords' refusal to be unreasonable. But I do not think they do lay down any propositions of law, and for this reason. 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. 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. When this lease was granted in 1947 no one could have foreseen that 20 years later Parliament would give a tenant a right to buy up the freehold. 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. It is rather like the cases where a statute gives the court a discretion. It has always been held that this discretion is not to be fettered by strict rules: and that all that can be properly done is to indicate the chief considerations which help to arrive at a just conclusion: see *Blunt v Blunt*; [and] *Ward v James*.

[102] Those observations are particularly appropriate to cross-leases. Context is crucial. Cross-leases are generally for around 999 years. Inevitably structures on them will require rebuilding a number of times. There will be changes in planning laws and building controls, and societal changes in how people live in and use residential properties. It cannot be right, given the context of cross-leases, that the intention of the alterations covenant is to preserve structures in the same overall configuration as they were at the time of the grant of the cross-lease. The alterations covenant must be applied by taking into account this context.

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115 *Bickel v Duke of Westminster*, above n 99, at 524.
116 At 522–523.
117 At 524 (citations omitted).

[103] Cross-leases are different from commercial leases. Commercially transacted leases usually involve parties at arm's length with independent interests and negotiating powers. Importantly, many commercial leases are of the interior of a landlord-owned building and for relatively short terms. Rent payable under commercial leases is normally market rent rather than peppercorn rent. This emphasises the significant interest the landlord has in the leased premises. This is in contrast to cross-lease schemes, where the leases are generally for 999 years and the rent payable is nominal, meaning the lessees effectively own their residences and the lessors' interest in the reversion verges on the academic.

[104] We agree with Mr Walker's submission that the cross-lease context raises quite different considerations from those discussed in cases involving commercial leases. Imposing broad commercial lease doctrines into cross-leases fails to account for the temporal and residential peculiarities of cross-leases. The approach in commercial lease cases requires some adjustment to reflect the cross-lease context.

[105] This is a convenient point to address Mr Barker's submission, focusing on *Ashworth Frazer Ltd*, that the essential question is whether it is reasonable for the lessor to hold the view they do, not whether it is right for them to do so.[118] In other words, if a party *thinks* their interests will be harmed on reasonable grounds, they are entitled to withhold consent. In his submission, that approach is also supported by *Louis Vuitton* and is all *Smallfield* says. To that extent, he says, the test of reasonableness is subjective.

[106] The answer to that submission is to return to the point that it is all the owners of the fee simple in their joint capacity as "the Lessors" of the flats who must consent (or reasonably withhold consent) under the alterations covenant. If an individual lessee thinks their interests will be harmed, even if they do so on reasonable grounds, that is not determinative. It is merely a factor to be weighed in considering whether, acting jointly, the Lessors can reasonably withhold consent. That weighing exercise is an inevitable consequence of the reasonableness assessment being from the

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[118] Referring to *Ashworth Frazer Ltd v Gloucester City Council*, above n 89, at [5].

perspective of "the Lessors" jointly, together with the fact the individuals comprising the Lessors might well have conflicting interests.

When can the Lessors, acting reasonably, withhold consent?

[107] Whether the Lessors, acting reasonably, can withhold consent in a particular case is ultimately a question of fact. It can be approached by asking whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent. Nevertheless, by way of further guidance and without intending to create rigid rules, we expect that such a reasonable lessor will normally:

(a) Have regard to the interests of each lessee. To interpret the alterations covenant otherwise — for example, as requiring only the effects of the proposed alterations on the reversion to be considered — would not give due weight to the reality under a cross-lease scheme that each of those comprising the Lessors is also a lessee. However, collateral interests insufficiently connected with the cross-lease scheme and the proposed alterations, such as personal animosity or an unrelated dispute between the lessees, are not a proper basis to refuse consent.[119]

(b) Seek to maintain good relations between all the lessees rather than preferring the interests of certain lessees over others. They are concerned to ensure even-handedness of treatment and a degree of proportionality. This is emphasised by the standard cross-lease lessor covenant that all leases will be on similar terms and conditions and that the Lessors will take such action as may be required to enforce the due performance and observance by the lessees of their obligations.

(c) Recognise that, given the many alterations and even rebuilds that will need to occur over the 999 year or thereabouts duration of a cross-lease, it is necessary (and in everyone's interests) to be a good neighbour —

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[119] See *Ashworth Frazer Ltd v Gloucester City Council*, above n 89, at [3]; *Turner v Goldsbury*, above n 38, at [91]–[92]; and *Roe v Stevenson*, above n 63, at 7.

to "give and take, live and let live".[120] The starting point is that alterations will be not just desired but necessary over that time period. If a lessee wishes to make alterations that are common and ordinary in the locality, it may well be unreasonable to refuse consent to make those alterations even if the alterations would cause a more than trifling detriment to another lessee.

(d) Respect entitlements allocated by any other relevant terms of the cross-leases, notwithstanding the general "give and take, live and let live" principle. For example, if the cross-leases in the present case had contained a covenant restricting the lessees from interfering with a particular view shaft, the reasonable lessor could refuse to consent to alterations that interfere with that view shaft.

(e) Expect lessees making alterations to avoid needless detriment to their neighbours. If a lessee proposing to make alterations is obstinate, refusing to make minor adjustments to their plans that would significantly alleviate detriment to their neighbours, that points against the reasonableness of the proposed alterations in their unadjusted form.

(f) Conversely, expect lessees to engage with proposals to make alterations. The concerns of a lessee who has refused to engage constructively with another lessee proposing to make common and ordinary alterations — or has refused to do so until a late stage — may well be attributed less weight.

[108] Associate Professor Thomas makes similar points in *New Zealand Land Law* in a slightly different way.[121] He discusses the criteria set out in *Smallfield*, consisting of the effect of changes on light, air, view and appearance.[122] Acknowledging these issues may be relevant to many disputes, he suggests the criteria do not justify

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120 *Bamford v Turnley* (1862) 3 B&S 62 at 84, 122 ER 25 at 33, which lays down this principle in the context of the tort of private nuisance. See also *Kid Country Te Atatu Ltd v Hoy*, above n 61, at [61].

121 Thomas, above n 71, at 1180–1182.

122 At 1181, citing *Smallfield v Brown*, above n 2, at 191,116.

exclusion of more general concerns. He suggests that matters within a larger compass, such as the nature of comparable developments in the neighbourhood, and the reasonable expectations of the owner seeking consent, must also be relevant.[123] He says:[124]

> The weighting given to each concern should sensibly also vary from case to case. A likely increase in value to the improving owner resulting from the proposed development proceeding may be given weight where it is common for alterations of the envisaged nature to be undertaken in the locality, or where a reasonable cross lease neighbour would consider the proposed changes acceptable. On the other hand, consent may be reasonably withheld where the changes will result in a tangible diminution of property values or a reduction in the disaffected owner's physical enjoyment of the property in a manner not reasonably acceptable.

We agree.

[109] Associate Professor Thomas also discusses whether a refusal of consent could legitimately be on the basis of the proposed development taking up unutilised site coverage.[125] In our view, the reasonable lessor would typically consider that each lessee has a legitimate expectation that the remaining site coverage should be shared in the same proportion as the amount of site coverage each flat enjoyed when the development was first completed. As Associate Professor Thomas says, such a principle would allow a sense of scale to be maintained in the development, so that smaller dwellings cannot be increased out of scale with larger dwellings.[126]

[110] We repeat that, given the context of cross-leases, the starting point must be that alterations will not only be desired but necessary over the term of the lease. It is untenable to suggest that the *Smallfield* test could be applied over the whole life of cross-leases. Similarly, it is untenable to suggest that lessees could not take advantage of changes in architectural and building practices to change and optimise residential dwellings.

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123 Thomas, above n 71, at 1181.
124 At 1181–1182.
125 At 1182–1184.
126 At 1184. Associate Professor Thomas makes similar observations in Rod Thomas "Consent to cross-lease alterations — a new test?" (2024) 21 BCB 59.

[111] While not an exhaustive list and one which we expect will evolve over time as circumstances change, the following are matters which the reasonable lessor could take into account:

(a) the degree of physical intrusion into the privacy and other amenities, such as light and view, of other lessees;

(b) the impact on the possibility of future development of another lessee's flat (and any appurtenant restricted use areas), for example by reducing the overall site coverage available for such development;

(c) whether the proposed alterations or additions have a material impact on the use or amenities of the other lessees;

(d) the impact on the market value of the other lessees' flats;

(e) the reasonable expectations of the lessee seeking to make alterations in respect of the enjoyment of their flat;[127]

(f) the current planning laws applicable to the area;

(g) changes in societal expectations in respect of the use of residential properties;

(h) the counterfactual — that is, the use that could in any event be made of the lessee's flat and restricted use area, for example by placing a freestanding swimming pool on the restricted area as opposed to building an in-ground one, or being able to use the restricted area for socialising even without building a deck; and

(i) whether the alterations or additions will create an additional household unit.

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[127] We take items (d) and (e) from Thomas, above n 71, at 1180–1181.

[112] We end this discussion by reiterating, in line with the commercial lease case law referred to above, that the ultimate test is one of reasonableness. As long as that is remembered — and it is also remembered that it is "the Lessors" in a joint capacity, not individual Lessors, who must consent or reasonably withhold consent — we would hope cross-lease neighbours will be able to reach sensible decisions on particular alterations proposals. Whether consent has been reasonably withheld is ultimately a question of fact.

Conclusion on the law

[113] We answer the first two questions raised by the appeal as follows:[128]

(a) No, Gault J did not err in law by overturning the test in *Smallfield v Brown*; and

(b) No, Gault J did not err in law in holding that the correct test, when considering whether the basis for withholding consent in a cross-lease was reasonable, is to consider what the reasonable landlord would do when asked to consent in the particular circumstances. In our view, however, the second part of Gault J's answer should be reworded to say that the conclusion must be one that could be reached by a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease.

Should the case be remitted to the arbitrator?

[114] The final question for us to consider is whether Gault J erred in remitting the arbitral award to the arbitrator for further consideration.

[115] In Mr Barker's submission, the High Court erred in remitting the case to the arbitrator because, even with any amended direction on the law, the result would be the same.

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[128] See above at [64].

[116] Mr Barker emphasises the arbitrator's findings that: the proposed alterations would bring the bulk of the Martelli/Keiths' property significantly towards that of the Liow/Tans, creating a "tunnel-like feeling" in the common area; the concerns about bulk and location were legitimate; the new outdoor area would involve a "real change" in the way the areas are used, becoming "the focal area for socialising"; and the Liow/Tans' concerns about the possible loss of value could not be dismissed, falling beyond the *Smallfield* threshold of trifling by a reasonably clear margin. The arbitrator also referred to the potential impacts of the proposed works on the Liow/Tans' ability to develop their own property, the impacts of construction and the concerns that building plans may change as construction takes place.

[117] In Mr Barker's submission, none of the arbitrator's findings were impacted by the alleged error of law. They were findings of fact and the test in *Smallfield v Brown* did not affect their determination.

[118] As Gilbert J said in *Lipp v Chaney*:[129]

> [35] The Court has a discretion whether or not to interfere with an award, even if an error of law is established. This is made clear by Article 5(4) of Schedule 2 of the Act, which provides that the Court *may* confirm, vary or set aside the award; or remit the award for further consideration by the arbitrator. The Court will not interfere if the error of law is immaterial and is unlikely to remit an award where it appears that the same outcome is likely to be confirmed by the arbitrator.

[119] We agree with Mr Walker's submissions. While remittal will not usually be appropriate if the error of law is immaterial and the same outcome is likely to result, in the present case the arbitrator himself indicated he may well have reached a different result were he not constrained by *Smallfield*. He said if the proper test instead "placed the fulcrum of assessment in the middle between the two competing sets of interests and concerns", he "would have had no hesitation" finding for the Martelli/Keiths.

[120] We accept Mr Walker's submission that the whole of the arbitrator's decision was predicated on the *Smallfield* test. We cannot be satisfied that, notwithstanding the error in law, the result would be the same. We note that the arbitrator used the word

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[129] *Lipp v Chaney* [2012] NZHC 1761. See also David AR Williams and Amokura Kawharu (eds) *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at [18.9.4].

"trifling" repeatedly in his assessments. We consider the arbitrator might well have approached the valuation evidence somewhat differently. The arbitrator said that the Liow/Tans should not be exposed to the risk of any loss of value. We consider he took that approach on the basis of the *Smallfield* test. In our assessment, the *Smallfield* test permeates the arbitrator's factual analysis.

[121] We therefore answer the third question: no, Gault J did not err in remitting the arbitral award to the arbitrator for further consideration.

Result

[122] The appeal is dismissed.

[123] The appellants must pay the respondents one set of costs for a standard appeal on a band A basis with usual disbursements.

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