

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 52/2026
[2026] NZSC 130

BETWEEN SUE LYNN LIOW AND SAI HOE TAN
Applicants

AND BRETT MARTELLI AND SUSANNAH
KEITH
Respondents

Court: Ellen France, Williams and Cooke JJ

Counsel: A R B Barker KC and T M McGoldrick for Applicants
C T Walker KC for Respondents

Judgment: 11 September 2026

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondents costs of \$4,850.

REASONS

[1] The applicants seek leave to appeal from a decision of the Court of Appeal upholding the High Court's interpretation of a clause in a cross lease between them and the respondents.¹ The disputed clause relates to when a party to a cross lease may withhold consent to structural alterations to buildings subject to the cross lease, or to the erection of new structures within the cross-leased area.

¹ *Liow v Martelli* [2026] NZCA 101 (Mallon, Thomas and Whata JJ) [CA judgment]; and *Martelli v Liow* [2024] NZHC 968, (2024) 25 NZCPR 289 (Gault J) [HC judgment].

Background

[2] The applicants and respondents each occupy residential properties on the same cross-leased fee simple title. Each cross lease contains the following standard term:

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.

[3] The respondents wanted to make alterations to their property by increasing the size of the house by some 54 m², adding a swimming pool and decking, and removing a separate garage. All proposed alterations were within the area of the respondents' exclusive occupation area under the terms of the lease. They sought and were declined consent by the applicants.

[4] The matter proceeded to arbitration, with the arbitrator concluding that consent had not been unreasonably withheld. When doing so the arbitrator relied on the dicta of Fisher J in *Smallfield v Brown* that:²

... 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.

[5] The arbitrator considered that the proposed alterations would be of substantial benefit to the respondents, but he was not prepared to find that the adverse effects on the applicants were trifling.

[6] On appeal to the High Court, Gault J found that the words "substantial" and "only trifling" referred to in *Smallfield* should no longer be taken as the legal test for determining whether consent has been unreasonably withheld. The arbitrator had therefore erred in considering himself bound to apply an "only trifling detriment" test.³ Gault J remitted the matter to the arbitrator to consider in light of the Court's judgment.⁴

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

³ HC judgment, above n 1, at [67] and [72].

⁴ At [81].

[7] The applicants appealed unsuccessfully to the Court of Appeal. The Court upheld the High Court judgment for a number of reasons, including because it doubted that Fisher J had intended to formulate a definitive test,⁵ and because, even if he had, the test was materially incorrect.⁶

[8] In support of the application for leave to appeal, the applicants say that the approach articulated in *Smallfield* has applied to cross leases in New Zealand for more than 30 years. They submit that it was wrong for the Courts below to change the law, and that the Court of Appeal's alternative approach was erroneous in a number of respects. They contend that, as there are over 200,000 properties in New Zealand subject to such cross leases, the proposed appeal involves a matter of general or public importance, and of general commercial significance, such that it is in the interests of justice for this Court to hear the appeal.⁷ The respondents oppose the application.

Analysis

[9] The Court of Appeal concluded that the decision in *Smallfield* should not be taken to have articulated a test to be applied to the standard terms in cross leases. It considered that the question whether consent has been unreasonably withheld is ultimately a question of fact, and that it can be approached by asking whether a reasonable lessor, having regard to the interest of all the lessees in the context of the cross lease, could have withheld consent.⁸ We accept that the question of whether the so-called "*Smallfield* gloss" should be applied to determine whether consent has been unreasonably withheld under the standard terms raises a question of general commercial significance and public importance, including because of the prevalence of cross leases in New Zealand. We do not accept, however, that the applicants have a sufficiently arguable case on this question to warrant the grant of leave.

[10] The Court of Appeal also found that all persons who are lessors must give consent collectively, and that the reasonableness of withholding consent by a lessor because of their interests as a lessee is a factor to be weighed in considering whether,

⁵ CA judgment, above n 1, at [75].

⁶ At [78].

⁷ Senior Courts Act 2016, s 74(1) and (2)(a) and (c).

⁸ CA judgment, above n 1, at [107].

acting jointly, the lessors have reasonably withheld consent.⁹ We accept that the question of whether the Court of Appeal was correct to find that the reasonableness of consent is to be considered from the perspective of the lessors collectively raises a point of wider importance. But again, we do not consider the applicants' prospects of success on this question are sufficient to warrant the grant of leave.

[11] We also do not accept the applicants' further submission that remittal to the arbitrator was inappropriate given that the arbitrator found the impact on the value of the appellants' property was more than trifling and that no owner of a cross-leased property should be required to consent to structural alterations with such an effect. It will be for the arbitrator to determine whether the withholding of consent by the lessors jointly was unreasonable applying the test identified by the Court of Appeal.

[12] The applicants argue that the Court of Appeal's judgment created a presumption in favour of development through its reference to the fact that cross leases are generally for around 999 years, and its comment that the clause cannot have been intended to preserve structures in the same overall configuration as at the time of the grant.¹⁰ We consider that the Court was doing no more than making an observation relevant to its conclusion that the reasonableness of consent depends on the facts and circumstances of the case. More generally, the list of factors referred to by the Court as relevant to the reasonableness assessment were expressly identified as providing guidance without intending to create rigid rules, and the Court indicated these would likely evolve over time as circumstances changed.¹¹ As is also apparent, the relevance of such considerations will depend on the particular circumstances of the case. We therefore do not accept that the proposed challenge to the considerations referred to by the Court of Appeal involves questions of wider importance.

Result

[13] The application for leave to appeal is dismissed.

⁹ At [106].

¹⁰ At [102].

¹¹ At [107] and [111].

[14] The applicants must pay the respondents costs of \$4,850.

Solicitors:

Loo & Koo, Auckland for Applicants

Martelli Yaqub Lawyers Ltd, Auckland for Respondents