CITATION:	*Perry Park v City of Darwin* [2018] NTCA 5
PARTIES:	PERRY PARK PTY LTD v CITY OF DARWIN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 9 of 2016 (21539686)
DELIVERED:	7 June 2018
HEARING DATES:	24 November 2017
JUDGMENT OF:	Grant CJ, Blokland and Hiley JJ

CATCHWORDS:

LANDLORD AND TENANT – COVENANTS – USE AND OCCUPATION

Requirement in a lease for the landlord to consent to the carrying out of works contemplated under the lease – statutory proviso under s 134(2) of the *Law of Property Act* that consent not be unreasonably withheld – whether particular contractual provisions regarding matters for landlord to consider inconsistent with statutory proviso – whether grounds for refusal must pertain to landlord's "property interests" – whether refusal of consent "unreasonable" assessed by reference to subject matter of the Lease and the contractual arrangement between the parties – whether landlord as local government authority could take into account community responses – Lease contemplated landlord could conduct its own analysis of community consultation – whether the landlord took into account irrelevant considerations when refusing consent – appeal dismissed.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS

Whether tenant required to undertake alternate works on refusal of consent – whether refusal followed "negative response" to community consultation process – construction of contract as a whole in determining the purpose of a particular provision within it – need to take into account the particular characteristics of the parties known to each other when they entered into the contract – commercial purpose of contract – the assessment of "negative response" required an objective appraisal of result of community consultation process – appeal allowed.

Law of Property Act (NT), s 134

Ashworth Frazer Ltd v Gloucester City Council [2001] UKHL 59, *Bickel v Duke of Westminster* [1976] 3 All ER 801, *Bromley Park Garden Estates Ltd v Moss* [1982] WLR 1019, *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385, *Creer v P&O Lines of Australia Ltd Ltd* (1971) 125 CLR 84, *Electricity Generation Corporation v Woodside Energy Ltd* [2014] 251 CLR 640, *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513, *Iqbal v Thakrar* [2004] 3 EGLR 21, *JA McBeath Nominees Pty Ltd v Jenkins Development Corporation Pty Ltd* [1992] 2 Qd R 121, *Lambert & Anor v FW Woolworth & Company Ltd (No 2)* [1938] Ch 883, *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, *Mount Eden Land Ltd v Straudley Investments Ltd* (1996) 74 P & CR 306, *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, *Sargeant & Anor v Macepark (Whittlebury Ltd* [2004] 4 All ER 662, *Sportoffer Limited v Erewash Borough Council* [1999] 3 EGLR 136, *Whiteminster Estates Ltd v Hodges Menswear Ltd* [1974] EGD 324, *Wilkie v Gordian Runoff Ltd* (2005) 222 CLR 522, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Robinson SC
Respondent:	D McLure SC

Solicitors:

Appellant:	Clayton Utz
Respondent:	Paul Maher

Judgment category classification:	A
Number of pages:	73

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

Perry Park v City of Darwin [2018] NTCA 5
No. AP 9 of 2016 (21539686)

BETWEEN:

PERRY PARK PTY LTD
Appellant

AND:

CITY OF DARWIN
Respondent

CORAM: GRANT CJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 June 2018)

THE COURT:

Introduction

[1] The appellant, Perry Park Pty Ltd (**Perry Park**), operates the Gardens Park Golf Links on land adjacent to the Darwin Botanical Gardens (**the Land**) which it leases from the respondent, the City of Darwin (**DCC**). In December 2008, DCC and Perry Park entered into a lease of the Land for a term of 10 years commencing on 1 July 2010.[1]

[2] The lease contained a relatively short clause, cl 9.7, which required Perry Park to perform certain **Upgrade Works** to a value of not less than $1 million "with the prior written consent of the Owner and on such terms, conditions and directions as the Owner may reasonably specify or give as a condition of giving its consent". The Upgrade Works were only sketchily described in the original lease. They consisted of "Lighting of" the various holes on the golf course in stages.

1 The lease contained an option to renew for a further 15 years.

[3] In September 2013, the parties entered into a deed of variation of the lease. This substituted a more expansive cl 9.7 setting out in detail the obligations of Perry Park in relation to the Upgrade Works. (The lease as varied is referred to in these reasons as **the Lease**.)

[4] In summary, the new cl 9.7 obliged Perry Park to perform the Upgrade Works in stages. The First Stage (defined in the Lease) was the installation of lighting to the first hole of the golf course. The Second and Third Stages (also defined in the Lease) required the installation of lighting to the other holes. The value of the works remained $1 million and the clause "with the prior written consent of the Owner and on such terms, conditions and directions as the Owner may reasonably specify or give as a condition of giving its consent" also remained.[2]

[5] The lighting to the first hole of the golf course was installed in accordance with the First Stage. Within 90 days of completing the First Stage the tenant, Perry Park, was required to, and did, prepare and deliver to DCC a master plan, undertake a "community consultation process" and provide DCC with "the responses received and the outcomes and its analysis of the responses received from [that] process".[3] In compliance with that requirement, on 20 October 2014 the consultant engaged by Perry Park to perform the community

2 Clause 9.7(a)(iii).

3 Clause 9.7(e).

consultation process provided a written community consultation report (the **Consultation Report**) to DCC and Perry Park.

[6] During the course of a meeting conducted on 28 October 2014 (**the Meeting**), the councillors constituting DCC resolved to "not approve the installation of lights at Gardens Park Golf Links and require that alternate works be identified in accordance with the August [sic] 2013 Deed of Variation to the lease" (**the Resolution**). The Meeting was immediately preceded by the conduct of a public forum in relation to the works proposed in the Second and Third Stages (**the public forum**), during which the councillors in attendance gauged the comments, views and opinions of some members of the public concerning the proposed works.

[7] It is common ground that the Resolution was in effect a refusal to give consent under cl 9.7(a)(iii) of the Lease, and a requirement, purportedly under cl 9.7(g), that Perry Park carry out other works described in the Lease as the **Alternate Upgrade Works**.

[8] Perry Park commenced proceedings in the Supreme Court seeking declaratory relief in the following terms:

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

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

(c) a declaration that the Resolution was not made reasonably and in conformity with the Lease and was made arbitrarily and capriciously;

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

(e) a declaration that Perry Park is not liable to perform any Alternate Upgrade Works.[4]

[9] The matter was set down for trial on the preliminary point "whether the Defendant's refusal of consent to the Plaintiff to perform the upgrade works in the lease, was lawful". The trial judge found that DCC did not unreasonably withhold consent to the Upgrade Works and that DCC's refusal of consent to Perry Park performing the Upgrade Works in the lease was lawful.[5] That determination involved the operation of

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4 *Perry Park Pty Ltd v City of Darwin* [2016] NTSC 27 (***Perry Park (No 1)***) at [24].

5 *Perry Park (No 1)* at [74].

s 134(2) of the *Law of Property Act* (NT) (**the Act**) and cl 9.7(e) of the Lease.

[10] That determination led to the remaining question as to whether, on the true construction of the Lease, Perry Park is obliged to perform Alternate Upgrade Works. The trial judge held that cl 9.7(g) of the Lease was engaged, as a result of which Perry Park is obliged to perform those works in accordance with the provisions of that clause.[6]

Amended grounds of appeal and relief sought

[11] The appellant contends that the trial judge erred in law:

(a) in concluding in *Perry Park (No 1)* that the respondent's refusal of consent to the appellant to perform the Upgrade Works in the Lease was lawful; and

(b) in finding in *Perry Park (No 2)* that the appellant was obliged to perform the Alternate Upgrade Works under cl 9.7(g) of the Lease.[7]

[12] The appellant seeks that both judgments be set aside and in lieu thereof:

(a) a declaration that the appellant is entitled to proceed with the works proposed by the appellant for the Second Stage and Third

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6 *Perry Park Pty Ltd v City of Darwin (No 2)* [2017] NTSC 37 (***Perry Park (No 2)***) at [33]–[34].

7 Appeal Book (**AB**) 655-6.

Stage of the Upgrade Works (as defined in the Lease) without further application for the consent of the respondent; alternatively

(b) a declaration that the appellant is not liable to perform the Alternate Upgrade Works.

[13] The appellant makes three challenges to the decision in *Perry Park (No 1), viz*:

(a) The provisions of cl 9.7(e) of the Lease must give way to s 134 of the Act where the terms of the clause and its application are inconsistent with that section.[8] In effect, this would mean that the provisions of cl 9.7 must be ignored in these circumstances.[9]

(b) Alternatively, if cl 9.7(e) applies, the only matters properly taken into consideration by DCC for the purposes of granting or withholding consent are the responses received by the professional consulting firm referred to in cl 9.7(e)(i), and the outcomes and analysis by that consulting firm of the responses received from the community consultation process contemplated under cl 9.7(e)(i);[10]

(c) In any event, it is apparent from the various reasons given by the councillors that they, and hence DCC, took into account irrelevant

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8 Appellant's Summary of Submissions filed 16 November 2017, [4(d)].

9 See, too, *Perry Park (No 1)* at [26] and [29]-[50].

10 See, too, *Perry Park (No 1)* at [27].

considerations and thus unlawfully or unreasonably withheld consent.[11]

[14] In the event that the appeal in relation to *Perry Park (No 1)* is unsuccessful, the appellant contends that cl 9.7(g) was not engaged, as its inability to undertake the works was not "due to the refusal on the part of the Owner to provide consent … following a negative response to the community consultation process provided for under subclause 9.7(e)".

The Resolution

[15] The trial judge made the following findings of fact concerning the passing of the Resolution at paragraphs [9] to [22] of the reasons in *Perry Park (No 1).* Those findings are not in contest.

[16] Clause 9.7(d) of the Lease required Perry Park to deliver a master plan suitable for the purposes of the community consultation process referred to in cl 9.7(e) which showed the design for the lighting of the golf course "in such form and containing such detail as the Owner may reasonably require". Perry Park did this in June 2014.

[17] With the approval of DCC, Perry Park appointed the professional consulting firm Northern Planning Consultants (**NPC**) to undertake the community consultation process, as required by cl 9.7(e).

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11 See, too, *Perry Park (No 1)* at [28].

[18] NPC prepared a community consultation strategy which it proposed to apply in performing the community consultation process. It was designed to satisfy the requirements of a Level 2 consultation under the DCC Community Consultation Policy (**the Policy**). DCC endorsed the proposed strategy on or about 20 June 2014.[12]

[19] NPC undertook the community consultation process between 21 August and 26 September 2014 in accordance with the consultation strategy. In accordance with the consultation strategy, people were asked whether they supported or opposed the installation of lighting on holes 2 to 9 of the golf course for the purpose of facilitating night golf. On 20 October 2014, NPC produced the Consultation Report[13] and provided a copy of it to DCC and Perry Park.

[20] As described above, DCC considered whether to consent to the works proposed by Perry Park for the Second and Third Stages at the Meeting on 28 October 2014, and DCC conducted the public forum prior to the Meeting to obtain comments, views and opinions of members of the public in relation to the proposed Second and Third Stage works. The public forum was attended by approximately 15 to 20 members of the public, as well as the chief executive officer of DCC and most of the councillors who later attended the Meeting. During the course of the public forum, members of the public who attended expressed

12 AB 157.

13 AB 188-213.

comments, views and opinions. It appears that these people were generally opposed to the Second and Third Stage works.

[21] Later, at the Meeting, the Lord Mayor tabled the contents of a further lengthy letter of objection from Ms Patsy Hickey. The letter from Ms Hickey was not provided to NPC, but Ms Hickey was one of those who had responded to the community consultation process carried out by NPC objecting to the proposal.

[22] It was during the course of the Meeting that DCC resolved to "not approve the installation of lights at Gardens Park Golf Links and require that alternate works be identified in accordance with the August 2013 Deed of Variation to the lease". DCC notified Perry Park of the Resolution on or about 5 November 2014.

[23] It is common ground that had DCC given its consent other compliance processes were required to be undertaken before the work could be done. In particular, relevant development applications would need to be lodged and approvals obtained from the Development Consent Authority.[14]

The content and operation of cl 9.7 of the Lease

[24] When the Lease was first registered, cl 9.7 provided in its relevant part:

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14 Such a process had previously been undergone in relation to the First Stage.

Upgrade Works

During the Term, the Lessee shall carry out the Upgrade Works:

(a) in a good, proper and workmanlike manner;

(b) in compliance and conformity with all Applicable Laws and Authorisations;

(c) with the prior written consent of the Owner and on such terms, conditions and directions as the Owner may reasonably specify or give as a condition of giving its consent; and

(d) to a value of not less than one million dollars ($1,000,000). If the parties are unable to agree the value of the Upgrade Works undertaken by the Lessee in accordance with the preceding paragraphs, either party may request … to appoint a suitably qualified valuer to assess and determine the value of such works.

[25] It is clear that at that time the parties intended and contemplated that the only works to be carried out by Perry Park were the Upgrade Works.[15] The Upgrade Works were defined to mean "the works listed in Schedule Two, as may be varied by agreement in writing between the parties from time to time".[16] The works identified in Schedule Two involved the lighting of all nine holes, starting with the "9th hole" in 2010, the "back holes 5th, 6th, 7th & 8th holes" in 2011, and the "1st, 2nd, 3rd and 4th holes" in 2012, at an estimated cost of $1 million.

[26] There was no explication, in cl 9.7 at least, as to what was intended by the reference to "prior written consent of the Owner" and what would happen if such consent was withheld. Consent was only required once,

15 Clause 9.7.

16 Clause 1.1 at AB 83.

prior to carrying out the Upgrade Works. The works were presumably to be carried out at the expense of the Lessee.

[27] It is apparent that circumstances changed between then and September 2013 when the Deed of Variation of Lease was registered. Clause 9.7 was altered and substantially expanded.[17] Relevantly:

(a) The definition of Upgrade Works was altered to mean "the works described in clause 9.7 and to be undertaken by the Tenant", instead of "the works listed in Schedule Two …" (which was deleted).

(b) Although the works still involved the lighting of all nine holes, the sequence of that work changed. Instead of the work beginning with the lighting of the 9th hole, cl 9.7(b) of the Lease required that lighting first be installed on the 1st hole. This was defined as the "First Stage". Lighting of the other eight holes was to occur in two stages – the lighting of the 2nd, 3rd, 4th and 9th holes, being the "Second Stage", and the remaining 5th, 6th, 7th and 8th holes, being the "Third Stage". The subsequent stages were specified in detail in new cll 9.7(d) and (f).

(c) The opening words of cl 9.7 (now cl 9.7(a)) were changed to: "The Tenant must carry out the Upgrade Works". Otherwise, the

17 AB 116.

original wording of cll 9.7(a), (b) and (c) was replicated in new cll 9.7(a)(i), (ii) and (iii).

(d) Clauses 9.7(a)(iv) and (v) provided that the Tenant was to carry out the works "at a total cost to the Tenant of $1 million" and otherwise in accordance with the provisions of the Lease, including but not limited to cl 9.7.

(e) Consent under cl 9.7(a)(iii) was required on two occasions: prior to the installation of the lighting of the 1st hole (the First Stage); and prior to the installation the lighting of the remaining holes (the Second and Third Stages). Although the Tenant was required to provide plans and similar documentation prior to seeking consent in relation both to the First Stage and to the Second and Third Stages, cll 9.7(d) and (e) imposed additional requirements upon the Tenant in relation to the Second and Third Stages.

[28] Clause 9.7(d) required the Tenant to:

> … prepare and deliver to the Owner a master-plan suitable for the purposes of the community consultation process referred to in subclause (e), showing the concept design for the lighting of the entire golf course … showing, amongst other things … the lighting proposed for [the remaining eight holes] and the proposed location of all proposed connection points, power lines and other infrastructure for the Upgrade Works, in such form and containing such detail as the Owner may reasonably require.

[29] Clause 9.7(e) provided:

Within 90 days of completing the First Stage as referred to in subclause 9.7(b) and in any event prior to 28 February 2014, the Tenant must:

(i) undertake a community consultation process with respect to the works proposed by the Tenant as the Second Stage and Third Stage and as described in the master plan prepared under subclause 9.7(d). The consultation process will be undertaken by a professional consulting firm approved by the Owner (acting reasonably) in the manner described in Schedule 2 to this deed;

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

[30] Schedule 2 to the Lease required that the community consultation process be "to the standard of consultation category 2"[18] described in the Policy (a copy of which was annexed to the Lease).[19] As its name implies, the Policy provides for consultation of members of the community on a wide range of matters in which DCC is involved in carrying out its functions.

[31] Clause 9.7(f) of the Lease provides that "subject to the consent of the Owner under sub-clause 9.7(a)(iii), the Tenant must install lighting as described in the master plan provided under sub-clause 9.7(d)" to each of the Second and Third Stages by particular dates.

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

19 AB 145-151.

[32] Clause 9.7(g) of the Lease provides that:

> If the Tenant is unable to undertake all of the works to be performed under sub-clause 9.7(f) or any part of those works ("the Un-performed Works"), due to the refusal on the part of the Owner to provide consent to the Un-performed Works following a negative response to the community consultation process provided for under subclause 9.7(e):
>
> (i) the Tenant must undertake alternate capital upgrading works to the Premises ('the Alternate Upgrade Works') at a cost to the Tenant [and negotiate with the Owner as to the nature, description and timing of those works].

[33] Clause 10 of the Lease remained unchanged, and contained a prohibition on transfers and other dealings without the Owner's prior written consent. It was subject to the express condition that consent must not be unreasonably withheld. Clause 10 is an example of a common form of covenant restricting alienation. Other common forms include covenants restricting use and covenants restricting alterations (or improvements).

[34] These covenants may be absolute, in the sense of making no provision for the landlord's consent, or qualified, in the sense of making such a provision. Where provision for consent is made, that provision may contain no express fetter on the landlord's decision-making process, or may provide a general statement of the factors or circumstances which may be considered by the landlord (as in cl 10.2 of the Lease), and/or may provide expressly that consent is not to be unreasonably withheld (as in cl 10.3 of the Lease).

[35] The operation of the standard form of covenant restricting alienation or alteration may be contrasted with the more bespoke provisions of cl 9.7(e)(ii). That distinction notwithstanding, it is accepted by both parties in this matter that s 134(2) of the Act has application in relation to the consent required by cll 9.7(a)(iii) and 9.7(e)(ii)of the Lease.

Section 134 of the *Law of Property Act*

[36] Section 134(2) of the Act provides:

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

[37] Section 134(5) provides that the qualification does not preclude the right of the lessor to require, as a condition of the licence or consent, the payment of a reasonable sum in respect of certain legal or other expenses, the payment of a reasonable sum for damage or diminution in value of premises, or an undertaking for reinstatement of the premises.

[38] As is discussed further below, s 134(2) of the Act operates in two ways. The first is to imply, in leases which contain a restriction on the making of improvements qualified by provision for consent, a statutory proviso that consent is not to be unreasonably withheld. The effect of the proviso is to afford the landlord the opportunity of giving consent or reasonably withholding it. If consent is refused unreasonably, the

covenant ceases to operate in relation to the tenant's proposed alterations or improvements.[20] The tenant will have two options in those circumstances. One is to proceed with the alterations. The more secure option is to apply to the court for a declaration that consent has been unreasonably withheld (as Perry Park did by the proceedings below).

[39] It is also the case that the proviso does not create a contractual obligation on the part of the landlord to give consent unless it is reasonable to withhold it. Accordingly, there is no cause of action in contract for damages against a landlord who unreasonably withholds consent to alterations.

[40] The second operation of the provision, in leases which contain a restriction on the making of improvements qualified by provision for consent, is to invalidate any clause which purports to exclude the oversight as to reasonableness which the statutory implication vests in the courts.

[41] Section 134(1) of the Act is a similar provision that relates to assigning, underletting, charging or parting with the possession of premises. It provides that such a covenant, condition or agreement is to be taken to be subject to "a qualification *that has the effect* that the licence or consent is not to be unreasonably withheld." It would

20 *Treloar v Bigge* (1874) LR 9 Ex 151.

clearly apply to a qualified covenant restricting alienation such as cl 10 of the Lease, if that clause did not already provide expressly that consent is not to be unreasonably withheld.

The decision in *Perry Park (No 1)*

[42] The first issue for determination in *Perry Park (No 1)* was whether s 134 of the Act restricted the matters that DCC was entitled to take into account in determining whether or not to grant the consent under cl 9.7(a)(iii) to those affecting the landlord's "property interests", regardless of what the parties had agreed in the Lease can (or even must) be taken into consideration by the landlord.[21] The counter-proposition was that although s 134 of the Act had application, it did not have the effect that the provisions of the Lease relating to the granting or withholding of consent, and particularly the community consultation process, can or must be ignored.[22]

[43] The trial judge commenced with a consideration of *Sargeant & Anor v Macepark (Whittlebury) Ltd*[23], in which Lewison J concluded that a landlord was entitled to refuse consent for the construction of improvements for the reason that its commercial interests in a business conducted on adjoining land might be detrimentally affected.

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21 *Perry Park (No 1)* at [31].

22 *Perry Park (No 1)* at [29].

23 [2004] 4 All ER 662.

Lewison J referred to other cases, including *Iqbal v Thakrar*[24], where it was said that a landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests. Lewison J also quoted MacKinnon LJ in *Lambert & Anor v FW Woolworth & Company Ltd (No 2)*[25] to the effect that under the English equivalent of s 134 a landlord might also refuse consent "on aesthetic, artistic, or sentimental grounds".

[44] Lewison J concluded[26] that in an appropriate case a landlord is entitled to object to an alteration on the ground that he has a reasonable objection to the use which the tenant proposes to make of the altered property, whether that is the same as or different from the use being made of the rest of the property.[27] The trial judge observed in that respect:

> In relation to this final conclusion, Lewison J said [at [57]]: "To hold otherwise would be to fall into the trap identified by Lord Denning MR in *Bickel & Ors v Duke of Westminster & Ors* [[1976] 3 All ER 801 at 804] … (and approved in the *Ashworth Frazer* case [at [4]]):
>
> > 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.

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24 [2004] 3 EGLR 21.

25 [1938] Ch 883 at 911; cited in *Sargeant* at [44].

26 [2004] 4 All ER 662 at [56].

27 [2004] 4 All ER 662 at [35].

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

> Not even under the guise of construing the words. The landlord has to exercise his judgment in all sorts of circumstances. It is impossible for him, or for the courts, to envisage them all. [At 804-5]

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

> … Seeing that the circumstances are infinitely various, it is impossible to formulate strict rules as to how a landlord should exercise his power of refusal. The utmost that the courts can do is to give guidance to those who have to consider the problem. As one decision follows another, people will get to know the likely result in any given set of circumstances. But no one decision will be a binding precedent as a strict rule of law. The reasons given by the judges are to be treated as propositions of good sense – in relation to the particular case – rather than propositions of law applicable to all cases. [*Bickel v Duke of Westminster* at p 805.]

It seems to me that the same common sense approach should be applied to the construction of s 134. There is nothing in s 134 which would require the parties (or the Court) to ignore the express terms of the Lease as to what a landlord can (or indeed must) take into account in determining whether to grant or withhold consent where those matters are not themselves unreasonable, or such as to lead to an unreasonable decision. It is only an express term in the Lease "to the contrary" – (ie to the effect that consent <u>may</u> be unreasonably withheld) that must be ignored by virtue of s 134.[28]

[45] The trial judge also noted that, in *Sargeant*, Lewison J referred to *Mount Eden Land Ltd v Straudley Investments Ltd*[29] for these two propositions:

(1) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his

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28 *Perry Park (No 1)* at [36]-[38].

29 (1996) 74 P & CR 306 at p 310, cited in *Sargeant* at [47].

contractual rights under the [lease] from being prejudiced by the proposed assignment or sublease.

(2) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the [lease].

[46] The trial judge then referred to the decision of the Supreme Court of Victoria in *Cathedral Place Pty Ltd v Hyatt of Australia Ltd*[30], which concerned a covenant against alienation by which consent was not to be unreasonably withheld. Nettle J quoted from the remarks of Lord Denning in *Bickel & Ors v Duke of Westminster* and emphasised the importance of "the intention of the parties as manifested by the contract itself".[31] Nettle J concluded:

> It also seems to me that whatever the differences between the English and Australian decisions, the English cases do not imply any lessening of the significance which is to be attributed to the terms of the contract. Neither *Bickel* nor *Ashworth* directly questions the rectitude of the proposition that "the outstanding circumstances to be considered are the nature of the contract to be construed, and the relations between the parties resulting from it." To the contrary, in *West Layton Ltd v Ford* Roskill LJ said:
>
> > *"… the right approach is to look first of all at the covenant and construe the covenant in order to see what its purpose was when the parties entered into it; what each party, one the holder of the reversion, the other the assignee of the benefit of the relevant term, must be taken to have understood when they acquired the relevant interest on either side."* [32]

30 [2003] VSC 385.

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

32 [2003] VSC 385 at [26].

[47] The trial judge observed that the English authorities reviewed by Nettle J in *Cathedral Place*[33] emphasise that whether withholding consent was reasonable or unreasonable in the circumstances depends on the facts of the particular case. Further, the authorities emphasise the primacy of the contract between the parties.[34] Against the background of those authorities, the trial judge expressed broad agreement[35] with the respondent's contentions that:

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

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

(i) the objects of s 134 of the Act; and

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

[48] The trial judge then observed by way of conclusion:

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33 [2003] VSC 385 at [19]-[21].

34 *Perry Park (No 1)* at [43].

35 *Perry Park (No 1)* at [45]-[46].

> In short the doctrinaire position adopted by counsel for Perry Park that the terms of the Lease must be ignored and that the only matter that DCC was entitled to take into account was its (undefined) "property interests" is not supported by either English or Australian authority. Nor, it seems to me, is it supported by reason. The approach is in no way warranted by the plain words of s 134.
>
> There is nothing in the authorities to support the proposition that in determining whether to give or withhold consent to the making of improvements by a tenant, the landlord will be acting unreasonably unless it ignores the matters which the parties have expressly agreed the landlord may take into account in reaching that decision. [Footnote: None of the authorities to which I was referred involved a situation where the parties had expressly agreed in advance matters which it would be relevant for the landlord to take into account in determining whether to grant or withhold consent to the making of specified improvements.] Of course, there may be a case in which the matters which the parties have agreed may be taken into account are so broad as to effectively amount to a license to the landlord to arbitrarily withhold consent. In that case s 134 would apply and the landlord would not be permitted to unreasonably withhold consent notwithstanding that express term to the contrary. This is not such a case.[36]

[49] The trial judge then moved on to consider an alternative position advanced behalf of DCC:

> Counsel for DCC contended that even if the landlord were confined to a consideration of its property interests in deciding whether to withhold consent, the property interests of the parties and in particular the landlord are defined by the contract. So to the extent that the contract (the Lease) confers powers on the landlord, then those are property interests. Counsel for DCC also submitted that the starting point in assessing whether a landlord has acted unreasonably in withholding consent in any given circumstances is to look at the purpose for which the power to withhold consent was conferred. I agree with both contentions.[37]

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36 *Perry Park (No 1)* at [47]-[48].

37 *Perry Park (No 1)* at [49].

[50] In the result, the trial judge concluded (at [50]) that the purpose of the power to withhold consent to the Second and Third Stages of the Upgrade Works was to ensure that DCC retained the right to take into account public opinion in accordance with its Policy. That was a matter properly taken into account by DCC in determining whether or not to grant consent, and in the context of the contractual arrangement between the parties the withholding of consent on that basis did not infringe upon the provisions of s 134 of the Act.

[51] The second issue for determination in *Perry Park (No 1)* was whether, in determining whether or not to grant consent to the Second and Third Stages of the Upgrade Works, DCC was restricted under the terms of the Lease to a consideration of whether there had been a "negative response" to the public consultation process conducted under cl 9.7(e).

[52] In consideration of that issue, the trial judge made note of the fact that cl 9.7(e)(ii) of the Lease expressly permitted DCC to take into account the responses and outcomes of the community consultation process "amongst other relevant matters";[38] and that although some councillors took into account issues of transparency in the commercial arrangements and environmental impact, it had not been established that the Resolution was ultimately influenced by those considerations.[39]

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38 *Perry Park (No 1)* at [54]-[60].

39 *Perry Park (No 1)* at [62]-[72].

[53] In the result, the trial judge found that the Resolution was directed by a consideration of the opposition to the Upgrade Works and the effect on the amenity of neighbouring properties; and that acting on those considerations was not unreasonable.[40]

Reasonableness and "property interests"

[54] The appellant's first ground of challenge to the decision in *Perry Park (No 1)* is a contention that by statutory implication DCC may only refuse consent on grounds concerning its "property interests", and cl 9.7(e) is invalid to the extent it comprehends the withholding of consent on any other basis. There is nothing in the text of s 134(2) of the Act, or its context in the Act, which would require that construction. However, there is a body of authority concerned with the construction of cognate provisions in England and other Australian jurisdictions. *Woodfall: Landlord and Tenant* makes the following statement:

> A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests. The expression "property interests" should be widely construed, and will include the landlord's trading interests, in his capacity as occupier of neighbouring property: *Sargent v Macepark (Whittlebury)* [2004] 4 All ER 662.[41]

[55] In its appeal on this ground, Perry Park relies heavily on that statement and the principle it is said to encapsulate. That principle is said to be

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40 *Perry Park (No 1)* at [73].

41 *Woodfall*: *Landlord and Tenant*, 2017, Sweet & Maxwell, [11.262].

that "property interests" are limited to the landlord's reversionary interest in the leased land or interest in adjoining land, which might extend to "aesthetic, artistic or sentimental" interests. The argument follows that such interests do not include "third party interests of a financial, environmental or political nature", particularly in the context of a commercial arrangement which obliged the tenant to perform works and use the land in a manner that would necessarily interfere with third party interests of that nature. In those circumstances, it is said, the inclusion of public consultation criteria in the Lease cannot operate to define the landlord's "property interests".[42]

[56] As already described, s 134(2) of the Act implies a statutory proviso that consent to the making of improvements is not to be unreasonably withheld. The parent provision is s 19(2) of the *Landlord and Tenant Act 1927* (UK). Similar provisions have also been enacted in New South Wales and Queensland.[43] *Butt's Land Law* contains the following statement concerning the operation of s 133B of the *Conveyancing Act 1919* (NSW):

> Under these provisions, where a lease prohibits the making of "improvements" without the landlord's consent, the landlord cannot withhold consent unreasonably. The effect has been described as converting the lease provision from a shield for the landlord to a sword for the tenant. By "improvements" in s 133B(2) is meant alterations that are improvements from the

42 Appellant's Summary of Submissions filed 16 November 2017, [4].

43 *Conveyancing Act 1919* (NSW), s 133B; and *Property Law Act 1974* (Qld), s 121.

> tenant's point of view. They include the extending of the building beyond the confines of the leased premises. …
>
> By an analogy with cases decided under s 133B(1) of the *Conveyancing Act 1919* (which imposes an obligation not to unreasonably withhold consent to an assignment or sublease), the landlord cannot use the requirement for consent as a lever to extract concessions from the tenant on matters unrelated to protecting the landlord's property interests.[44]

[57] This statement reflects, albeit at a high level of generality, the body of case law which has developed in relation to the interpretation of these provisions, predominantly in the United Kingdom. Although most of those cases relate to qualified covenants restricting alienation, in *Iqbal v Thakrar*[45] the Court of Appeal formulated general principles concerning alterations based on those applicable to alienation as laid down in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*[46]. Lord Justice Peter Gibson, (Longmore LJ concurring), said:

> Before I go through those various points raised by the parties respectively, let me set out what I believe to be the relevant considerations to be taken into account by the court when considering the question whether a landlord's refusal of consent to proposed structural alterations or additions is unreasonable. I should make it clear that no case has been drawn to our attention which deals with that type of consent. The principles laid down in other cases, such as cases relating to consent by the landlord to an assignment of the tenant's lease, such as *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 can be applied with necessary changes.

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44 *Butt's Land Law*, 7th ed, 2017, [7.880]; citing *Brodan Pty Ltd v Clearview Industrial Estate Pty Ltd* (1986) 4 BPR 9173 at 9179; *Iqbal v Thakrar* [2004] EWCA Civ 592 at [26].

45 [2004] 3 EGLR 21.

46 [1986] 1 Ch 513.

1. The purpose of the consent[47] is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord.

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

3. It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward …

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

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

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

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

8. In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.[48]

[58] As the first of those principles would indicate, the assessment of reasonableness must commence by identifying the purpose of the covenant restricting alienation or alteration, as the case might be.

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47 *Woodfall* suggest this word "consent" is a misprint and should be "covenant".

48 *Iqbal v Thakrar* [2004] 3 EGLR 21 at [26].

Most covenants of that sort will be directed obviously and exclusively to the property interests of the landlord. However, the various statements of principle that have emerged in the cases are driven by a consideration of the particular facts and circumstances of the case at hand.

[59] The propositions derived by Balcombe LJ in *International Drilling*[49] were informed by the particular facts of earlier cases concerning covenants against alienation without consent. His Lordship stated the first proposition by first identifying the purpose of that particular covenant. He said that its purpose was "to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee". His Lordship then stated the second proposition in the following terms:

> As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatsoever to do with the relationship of landlord and tenant in regard to the subject matter of the lease. … A recent example of a case where the landlord's consent was unreasonably withheld because the refusal was designed to achieve a collateral purpose unconnected with the terms of the lease is *Bromley Park Garden Estates Ltd v Moss* [[1982] WLR 1019].[50]

[60] Thus stated, the principle is not a rigidly applied injunction against the refusal of consent for any reason other than the protection of "property

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49 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513 at 519-20.

50 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513 at 519-20.

interests" narrowly defined. It is that a refusal will be adjudged unreasonable by a court in circumstances where its purpose is unconnected with the subject matter and terms of the lease.

[61] Moving back then to *Iqbal*, Peter Gibson LJ also commenced by identifying the purpose of the particular covenant and consent required in that case.[51] The factual context in *Iqbal* involved a request for consent to structural alterations necessary to convert the ground floor of the demised premises for use as an Indian restaurant. Again, the purpose of the covenant was said to be to protect the landlord from the tenant effecting alterations and additions which damaged the property interests of the landlord. It was in this context, and having regard to that purpose, that Peter Gibson LJ then said that a landlord is "not entitled to refuse consent on grounds which have nothing to do with his property interests".

[62] Before *Iqbal*, but after the decision in *International Drilling*, the question of reasonableness in this general context was considered, first, by the High Court of England and Wales in *Sportoffer Limited v Erewash Borough Council*[52], and subsequently by the House of Lords in *Ashworth Frazer Ltd v Gloucester City Council*[53].

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51 *Iqbal v Thakrar* [2004] 3 EGLR 21 at [26].

52 [1999] 3 EGLR 136.

53 [2002] 1 All ER 377.

[63] In *Sportoffer*, the landlord had refused to consent to a proposed change of use from squash club to leisure centre on the basis, not of its "relationship of landlord and tenant in regard to the subject matter of the lease" (cf Balcombe LJ in *International Drilling*), but because of the effect the new use might have upon its two leisure centres nearby. The council gave two reasons for refusing consent: first, that the change of use would result in the tenant carrying on business in direct competition with the landlord's own business of operating leisure facilities; and, secondly, that the implementation of the proposal would generate an increase in traffic and considerable pressure on parking on its land adjoining the subject land and thus discourage potential customers of the council's own adjoining leisure facility. The High Court declined to declare the refusal of consent unreasonable.

[64] In doing so, Lloyd J considered the first two propositions identified by Balcombe LJ in *International Drilling*. Justice Lloyd observed that the first proposition, that the purpose of the covenant requiring consent to an assignment was "to protect the lessor from having his premises used or occupied in an undesirable way", applied equally to a covenant against change of use without consent. Counsel for the tenant relied upon the second proposition stated by Balcombe LJ in *International Drilling* for the contention that a landlord cannot reasonably refuse consent on grounds relating to property other than that demised. Justice Lloyd rejected that contention and said:

> I would find it surprising if a landlord could not reasonably take into account the circumstances of other property of his own, whether let or in hand, when considering an application for a consent to change of use under a lease. A shopping centre is an obvious example, but not the only case, where estate management considerations may suggest that one type of use be allowed under a lease but others not, because of the circumstances of other adjoining property.
>
> I find nothing in Lord Justice Balcombe's judgment, nor in the case cited by him in relation to the proposition which I have mentioned, which suggests that this is not legitimate .... I therefore hold that ... a landlord can legitimately take into account considerations relating to adjoining property of his own, whether let or not.[54]

[65] In reaching that conclusion, Lloyd J had regard to the decision in *Whiteminster Estates Ltd v Hodges Menswear Ltd* (1974) 232 EG 324. There, Sir John Pennycuick V-C upheld a refusal of consent to assign premises to a menswear business in competition with the menswear business conducted by the landlord in different premises. The court in *Whiteminster Estates* observed: "Once it was accepted, as now it must be, that a landlord was entitled to take into account his own interests, as well as his interests as a landlord, that was really an end of the matter".[55]

[66] The result in that case is consistent with the statement extracted above from *Woodfall: Landlord and Tenant* to the effect that "property interests" will include the landlord's trading interests in his capacity as occupier of neighbouring property; but the significance of the principle

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54 *Sportoffer Limited v Erewash Borough Council* [1999] 3 EGLR 136 at 142.

55 Extracted in *Sportoffer Limited v Erewash Borough Council* [1999] 3 EGLR 136 at 142.

upon which it was decided is broader than that. That is, in determining whether to grant consent a landlord may reasonably consider interests other than those deriving strictly from its capacity as a landlord in respect of the demised premises.

[67] In the same passage containing that statement from *Woodfall: Landlord and Tenant*, it is noted that most cases dealing with this issue are concerned with the reasonableness of the sum required by the landlord as compensation for the consent; and that there is little authority as to the reasonableness of other grounds for refusing consent. However, the authors conclude that the legitimate scope of the landlord's right to objection may extend to "grounds based on aesthetic, artistic, historic or sentimental considerations". That conclusion would appear to be based on the following passage in *Lambert v Woolworth & Co*:

> The wider the connotation given to the area of improvement, the more necessary it may be that the landlord should have his protection.[56]

[68] The decision of the House of Lords in *Ashworth Frazer* concerned consent to the assignment of a lease. Lord Bingham enunciated three overriding principles. The first concerned Balcombe LJ's second proposition in *International Drilling*, of which Lord Bingham said:

> The same principle was earlier expressed by Sargant LJ in *Re Gobbs & Houlder Brothers v Gibbs* [[1925] Ch 575 at 587:

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56 *Lambert v Woolworth & Co* [1938] Ch 883 at 907 per Slesser LJ.

> … 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 disassociated from the subject matter of the contract.[57]

[69] The second principle expressed by Lord Bingham was that:

> … 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's* case [[1976] 3 All ER 801 at 804-805, [1977] QB 517 at 524].[58]

[70] The third principle expressed by Lord Bingham was that:

> … the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in the *Pimms'* case [1964] 2 All ER 145 at 151, [1964] 2 QB 547 at 564:
>
> > … 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 …[59]

[71] Although Lord Bingham was in the minority in the result, which turned on whether the lease did in fact restrict the use for which consent had been sought, their Lordships expressed agreement with Lord Bingham concerning the assessment of reasonableness. The case is taken as

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57 *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 at 380 [3].

58 *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 at 380 [4].

59 *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 at 380 [4].

authority for the proposition that the governing principles are: (a) that a landlord is not entitled to refuse consent on a ground that is wholly extraneous and completely disassociated from the subject matter of the lease; (b) that the landlord need only show that the conclusions leading to the refusal might be reached by a reasonable person in the circumstances, but not necessarily that they were justified in fact; and (c) that the assessment of reasonableness is a question of fact depending on all the circumstances in each case.

[72] Both Lord Bingham and Lord Rodger expressly endorsed the observations made by Lord Denning MR in *Bickel's* case[60], which were considered and applied by the trial judge in this matter as extracted earlier in these reasons.[61] The import of those observations is that, at least in circumstances where the contract does not limit the grounds upon which consent might be refused, the matter falls to the judgement of the landlord having regard to the circumstances, and the assessment of reasonableness by the courts is not amenable to the formulation and application of strict rules.

[73] The decision in *Sargeant & Anor v Macepark (Whittlebury) Ltd*[62] was delivered by Lewison J approximately two months after the decision in *Iqbal*. Justice Lewison, who before his appointment to the High Court

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60 *Bickel & Ors v Duke of Westminster & Ors* [1976] 3 All ER 801 at 804-5.

61 *Perry Park (No 1)* at [36]-[38].

62 [2004] 4 All ER 662.

had appeared as counsel for the tenant in *Ashworth Frazer,* reviewed the earlier cases and noted that the Court in *Iqbal* may not have been aware of the decision in *Ashworth Frazer.* As the trial judge in this matter noted[63], Lewison J also expressly endorsed the caution by Lord Denning MR in *Bickel's* case against the application of strict rules in the determination of whether a landlord may reasonably refuse consent where there is no contractual limitation on the grounds which might be taken into account for that purpose.

[74] This is only to say that a landlord is not limited by strict formulations which advert to "property interests" and "interests as a landlord". It is not to say that the terms of the contract are to be disregarded, and it would no doubt be impermissible for a landlord to take into account something wholly disassociated from the contract. It was to this point which Nettle J came in *Cathedral Place Pty Ltd v Hyatt of Australia Ltd*[64], where his Honour concluded:

> As a matter of principle, the question is one of contract and therefore the terms of the contract must always be determinative. It is just that while in one set of circumstances fear of a particular consequence may be seen as falling short of the sort of danger against which the lessee contracted to allow the lessor to protect, in another set of circumstances fear of a similar danger may well be a reasonable basis for the lessor to withhold consent.[65]

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63 *Perry Park (No 1)* at [36].

64 [2003] VSC 385.

65 *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385 at [27].

[75] Before moving on to consider the application of those principles to the present circumstances, one further matter needs to be addressed concerning the operation of the contractual arrangements between the parties in matters such as these. The question whether recourse may be had to the contractual arrangements for the purpose of informing the objective enquiry concerning reasonableness was considered by two members of the High Court in *Creer v P&O Lines of Australia Ltd*[66]. In that case, the tenant sought the landlord's consent to the assignment of the lease to a respectable, solvent and responsible assignee. In the particular circumstances of that matter, the landlord refused to give such consent because the lease required that the lessee should first offer the landlord a surrender of the lease, the lessee had failed to do so, and there could be no unreasonable refusal in those circumstances.

[76] Although that was the result, Menzies and Windeyer JJ each made observations concerning the operation of s 133B(1) of the *Conveyancing Act 1919* (NSW), which implied a statutory proviso concerning consent to alienation in terms similar to s 134(1) of the Act. Menzies J observed in that respect:

> [S]uch a covenant, notwithstanding express provision to the contrary, is deemed to be subject to a proviso to the effect that consent is not to be unreasonably withheld. It is well established that the question to which this provision gives rise in an appropriate case is objective and is whether consent has been unreasonably withheld. Furthermore, it is settled that the parties

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66 (1971) 125 CLR 84.

> cannot, by other terms in the lease, fix what is reasonable or otherwise modify the simple requirement that consent is not to be unreasonably withheld.[67]

[77] Similarly, Windeyer J observed:

> This proviso prevails notwithstanding any express provision to the contrary. And the parties cannot restrict its operation by a stipulation as to what shall be deemed reasonable or unreasonable.[68]

[78] This was no more than an expression of the already well-established principle that the parties may not by contract seek to exclude the oversight as to reasonableness which the statutory implication vests in the courts. By way of earlier example, in *Creery v Summersell Flowerdew & Co Ltd*[69] the court ruled that a provision restricting subletting without consent was invalid to the extent that it provided "the lessor reserves the right not to give his consent if in his opinion the proposed … sublessee is for any reason in his discretion undesirable as an occupant".

[79] By that provision the covenant sought to appropriate to the landlord the ultimate assessment of reasonableness. The statutory implication operated to render the provision invalid. It is quite a different matter to say that the contractual relationship between the parties, and the terms of the contract, may inform the objective enquiry concerning

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67 *Creer v P&O Lines of Australia Ltd* (1971) 125 CLR 84 at 89.

68 *Creer v P&O Lines of Australia Ltd* (1971) 125 CLR 84 at 91.

69 [1949] Ch 751.

reasonableness. The principle also does not preclude a landlord from taking into account subjective considerations in determining whether or not to grant consent, so long as the covenant does not purport to close off an objective enquiry by the courts.

[80] So it can be seen that the concept of reasonableness within the meaning of s 134 of the Act is, as counsel for the respondent submitted, protean in its application[70]; and the contract between the parties is a strong, if not determinative, factor in the assessment of what is reasonable.[71]

[81] In the application of those principles to the present case, it may be observed that cl 9.7(a)(iii) of the Lease is not a standard covenant restricting improvements (or alterations). It forms part of a detailed agreement, the purpose of which is to require the tenant to do the Upgrade Works under the terms of the Lease. This is clear from the language used in cl 9.7, and in particular the opening words of cl 9.7(a) that "[t]he Tenant must carry out the Upgrade Works", and similar imperatives in the following cll 9.7(b) to (f). In effect, cl 9.7 is a contract within the Lease for the performance of works on the demised premises.

[82] All leases identify the lessee and the premises, and most specify the permitted uses. It is only when the lessee wishes to alter those

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70 Respondent's Summary of Submissions filed 22 November 2017, [2]

71 *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385 at [25], [27].

specifications, by assigning or sub-letting the lease, altering or adding to the premises or changing the use of the premises, that a covenant restricting alienation, alteration or change in use will come into play. In the ordinary course, as the authorities well establish, the main purpose of such a covenant is to protect the landlord's interests in relation to any alienation, alteration and change in use which was not in contemplation at the time the lease arrangement was formed.[72]

[83] In the present circumstances, however, when the Lease commenced on 1 July 2010 both parties intended that there would be significant improvements constructed on the land by the installation of the lights at an estimated cost of $1 million. In effect, DCC had already agreed, and indeed required, that Perry Park carry out that work. Understandably however, DCC reserved the right to consent to the works on reasonable terms, conditions and directions. That mutual intention for the carrying out of those works continued following the variation in 2013.

[84] This was not simply a matter concerning a tenant wishing to alter the premises by constructing improvements to suit its own interests. Rather, Perry Park wishes and is obliged to spend $1 million on works which the contractual arrangement assumed, subject to the contingency of consent, would be the lighting of the whole golf course. Moreover,

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72 See, for example paragraphs numbered 1 and 6 of the principles identified by Lord Justice Peter Gibson in *Iqbal v Thakrar* [2004] 3 EGLR 21 at [26].

Perry Park spent money performing part of its obligations under cl 9.7 of the Lease by completing the First Stage of the works on or about 30 April 2014. Perry Park no doubt hoped and expected that consent would be given to the other two stages, albeit subject to reasonable conditions and directions.

[85] However, by agreeing to the substantial variation to cl 9.7, Perry Park submitted to the more detailed processes and requirements set out in that clause, including:

(a) the requirement for consent by DCC under cl 9.7(a)(iii) prior to carrying out the Second and Third Stages;

(b) for the purpose of obtaining that consent, the requirement to provide DCC with a master plan "suitable for the purposes of the community consultation process referred to in cl 9.7(e)"; and

(c) the requirement to undertake the community consultation process stipulated in cl 9.7(e)(i).

[86] Perry Park also submitted to a process under which DCC was entitled to take into account the responses, outcomes and analysis of the responses received from the community consultation process, as well as its own analysis of such matters, in considering whether to provide consent under cl 9.7(a)(iii) to the works proposed for the Second and

Third Stages.[73] Moreover, those variations annexed DCC's Policy, which further described the manner in which DCC would consider community consultation and reinforced "the decision-making role of Council".

[87] The provisions of cll 9.7(a) to (d) and (f) are similar to the provisions one might find in a contract between owner and builder for the construction of works, or between contractor and subcontractor. Such a contract would ordinarily contain preconditions and requirements for certain approvals and consents to be given at various stages by or on behalf of the owner or head contractor. Where the owner or head contractor is a government body or statutory authority, the contract may contain additional provisions reflecting the need for adherence to standards and policies consistent with the broader functions and responsibilities of such a body. The operation of cl 9.7 of the Lease and s 134 of the Act must be considered in that context.

[88] DCC was, and remains, the local government authority in respect of the area that included the Land. Under its constituting legislation, DCC is a statutory corporation required to act as a representative, informed and responsible decision-maker in the interests of its constituency.[74] The Land is in effect a public park on which a golf course has been formed. The Land adjoins residential land. It is unsurprising in those

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73 Lease, cl 9.7(e)(ii).

74 *Local Government Act* (NT), s 11(a).

circumstances that the Lease should incorporate a provision allowing DCC to refuse consent to the further stages of the works in the face of public objection following construction of the First Stage. The characteristics of DCC and the surrounding circumstances were well known to Perry Park when it first entered into the Lease, and at the time of the variation.[75]

[89] DCC's subjective reason for refusing to grant consent was, in broad compass, the objections of some neighbouring landholders concerned about the adverse effect of the lighting on the amenity of their own properties. In doing so, it took into account the views and interests of third parties, some of whom had responded to the community consultation. The various councillors who participated in that decision-making process no doubt took into account their representative function and political interests. These were matters which the contractual arrangements between the parties contemplated might be taken into account by the landlord in determining whether or not to grant consent.

[90] In order to give effect to Perry Park's contention in this respect it would be necessary to accept that the sole operation of cl 9.7(a)(iii) of the Lease is to protect the landlord from alterations detrimental to its property interests in the demised land; and that DCC's subjective

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75 *Electricity Generation Corporation v Woodside Energy Ltd* [2014] 251 CLR 640.

analysis of the community consultation process and "other relevant matters" under cl 9.7(e)(ii), because they did not concern "property interests", are not considerations properly taken into account in the objective enquiry as to whether consent was reasonably or unreasonably withheld. In other words, the relevant operation of s 134(2) of the Act is to read down or disapply cl 9.7(e)(ii) of the Lease for the purpose of assessing reasonableness. That contention should be rejected.

[91] First, the operation of s 134(2) of the Act does not invalidate or otherwise displace cl 9.7(e) because it is concerned with something other than "property interests" narrowly defined. Its operation in this case is to imply a proviso that consent to making the improvements may not be unreasonably withheld. That calls up a consideration of the subject matter of the Lease and the contractual arrangement between the parties in that respect. Secondly, the community consultation process and DCC's analysis of public opinion under cl 9.7(e)(ii) were inextricably linked to the subject matter of the Lease and the contractual arrangements between the parties in relation to that subject matter. It was certainly not wholly disassociated from those contractual arrangements. Thirdly, the additional requirement for consent from the Development Consent Authority does not bear on that assessment of reasonableness. While it may be accepted that the development consent process would afford objectors another forum in

which to claim adverse impact on their amenities, that process is for a different purpose and does not displace DCC's representative function or, to adopt the formulation by Lewison J in *Sargeant*, its "real and legitimate concerns" under the Lease arrangement.

The community consultation process

[92] The appellant's second ground of challenge to the decision in *Perry Park (No 1)* concerns the construction and operation of cl 9.7(e)(ii) of the Lease, which provides that the Tenant must, following completion of the consultation process undertaken by a professional consulting firm:

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

[93] The essence of the contention is that the only considerations properly taken into account by DCC for the purpose of determining whether to grant or withhold consent are the responses received by the professional consulting firm referred to in cl 9.7(e)(i) of the Lease, and the outcomes and analysis by that consulting firm of the responses received. The submission followed:

> The juxtaposition of the words 'other relevant matters' in the sentence must be taken to refer to relevant matters arising from the independent community consultation process and the report prepared by NPC. It is not a licence to take into consideration matters at large or to conduct a parallel process. Were it otherwise, the process could have been undertaken by DCC without the need for the appointment of an independent consultant.
>
> It is clear on the evidence that the process undertaken by DCC was unauthorised and constituted a parallel enquiry which went beyond that which the parties had agreed.[76]

[94] It is necessary to give this contention its place in the statutory and contractual context. The contention is made on the assumption that s 134(2) of the Act does not operate to invalidate or disapply cl 9.7(e)(ii) of the Lease in the objective enquiry concerning reasonableness. The contention must be that DCC's subjective conclusion to refuse consent based on matters falling outside the Consultation Report was objectively unreasonable[77] having regard to the contractual arrangements between the parties.

[95] The objective enquiry concerning reasonableness does not approach the terms of the contract as if they form part of a statute, or the originating proceedings for declaratory relief as if they were a claim for breach of contract or an application for the judicial review on administrative law grounds. The question is whether, in the context of the contractual lease arrangement between the parties, DCC's conclusions leading to

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76 Appellant's Summary of Submissions filed 16 November 2017, [9(c) and (d)].

77 See, for example, *Iqbal v Thakrar* [2004] 3 EGLR 21 at [27]; Menzies J in *Creer v P&O Lines of Australia Ltd* (1971) 125 CLR 84 at 89.

the refusal might be reached by a reasonable person in the circumstances.[78] That assessment does not open up an enquiry as to whether the conclusions were necessarily justified in fact.[79] A number of observations may be made in that context.

[96] First, a landlord may submit to a more restricted discretion than s 134(2) of the Act would ordinarily allow. This is sometimes achieved by a covenant limiting the factors or circumstances which may be considered by the landlord in determining whether to grant consent to improvements (or alienation or change of use, as the case may be). That is not the case here. There is nothing in cll 9.7(a)(iii) and 9.7(e)(ii) specifically, or in cl 9.7 generally, which purports to fetter the ability of DCC to consider any matters relevant to the granting or withholding of consent (subject to the overarching requirement of reasonableness). The only restraint is that imposed by s 134(2) of the Act that consent not be unreasonably withheld.

[97] Accordingly, even if the particular words "amongst other relevant matters" had the limited operation contended by Perry Park, DCC was still entitled to consider matters relevant to the question of consent. By way of example, if there were concerns about the ability of Perry Park to perform its obligations under cll 9.7(a)(i), (ii) or (iv) of the

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78 See, for example, *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 at [3]-[4], *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385 at [25], [27].

79 *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377 at [4]; *Iqbal v Thakrar* [2004] 3 EGLR 21 at [26]. Although a factually irrational decision might be characterised as unreasonable.

Lease, and/or to comply with appropriate conditions that might attach to the consent, DCC might well have refused consent even if the community was strongly in favour of the proposal. Other examples given by the trial judge in *Perry Park (No 1)* at [56] include aesthetic matters or the possible effect on adjoining or neighbouring property.

[98] Secondly, it is difficult to find any work for those words "other relevant matters" to do if they are confined to matters already referred to within or arising out of the responses, outcomes and analysis provided by NPC. The more likely intention, and the more natural construction, is that those words accommodate the fact that members of DCC might become aware by some means of "other relevant matters" which were not the subject of the NPC process and analysis, whether they were additional views of community members or matters apart from community concern.

[99] On a proper construction of the Lease, the incorporation of the words "amongst other relevant matters" made it plain that DCC was not limited to a consideration of the matters arising from the community consultation process in determining whether to grant consent to the works. In other words, it was not by operation of cl 9.7(e)(ii) of the Lease submitting to a more restricted discretion than s 134(2) of the Act would ordinarily allow.

[100] Thirdly, it does not follow from the fact that the contractual arrangements required Perry Park to meet the costs of engaging a professional consulting firm to carry out the specialised task of a community consultation process that DCC could not inform itself by other means of relevant matters. Clause 9.7(e)(ii) of the Lease expressly contemplates that DCC could conduct "its own analysis of such matters". Perry Park's contention is that this was limited to an analysis of the NPC report or, at its broadest, an analysis of the responses to and outcomes of the NPC process. Neither the phrase nor the context in which it appears supports that restrictive reading. The better view is that it permitted DCC as a representative body to take its own soundings of community sentiment.

[101] The receipt of separate representations from community members outside the consultation process undertaken by NPC might well be characterised in one sense as a "parallel enquiry", but that description does not answer the question whether DCC's conclusions leading to the refusal might have been reached by a reasonable person in the circumstances. As the trial judge observed in *Perry Park (No 1)* at [60], the "elected members were entitled to play an independent role in the consultation process, including by visiting affected properties, responding to questions and by listening to objectors before the Meeting".

[102] Fourthly, the matters covered in the Consultation Report were extensive. As is discussed further below, almost all of the views expressed by the councillors at the Meeting concerned one or more of the matters raised in the Consultation Report, and the Resolution was actuated by the corporate conclusion reached by DCC on the basis of those matters. Properly characterised, DCC ultimately based its decision to refuse consent on matters that were, in broad terms, the subject of the community consultation process.

[103] For these reasons, neither cl 9.7(e)(ii) specifically, nor cl 9.7 generally, restricted DCC to a consideration of the NPC analysis for the purpose of determining whether to grant consent to the Second and Third Stage works; even if there was such a restriction, the considerations which actuated the refusal to grant consent were raised by the Consultation Report; and it cannot be said on the basis of Perry Park's contention in this respect that DCC's conclusions leading to the refusal could not have been reached by a reasonable person in the circumstances.

Irrelevant considerations

[104] The appellant's third ground of challenge to the decision in *Perry Park (No 1)* also concerns the construction and operation of cl 9.7(e)(ii) of the Lease. The contention is that it is apparent from the various reasons given by the councillors at the Meeting that they, and hence DCC, took into account irrelevant considerations and thus unlawfully or unreasonably withheld consent. In broad terms, those irrelevant

matters are said to be issues of cost, transparency in the commercial arrangements and environmental impact.

[105] As with the second ground of challenge discussed above, the question resolves ultimately to whether, in the context of the contractual lease arrangement between the parties, DCC's conclusions leading to the refusal might be reached by a reasonable person in the circumstances. For the reasons discussed in the context of the second ground of challenge, DCC was not confined to matters referred to within or arising out of the responses, outcomes and analysis provided by NPC, or to matters concerning the objections by members of the public generally. However, it is instructive for the purpose of considering the force of this third ground of challenge to examine the subjective reasons of councillors in passing the Resolution to refuse consent.

[106] No reasons were given by DCC in the Resolution for its decision to refuse consent. However, in its Defence DCC admitted the following paragraph pleaded at [17] of the Statement of Claim:

> At a time not presently known to Perry Park but by no later than 30 September 2014, DCC had determined that, in making the decision whether to consent to the works proposed by Perry Park for the Second Stage and the Third Stage, DCC was entitled to and intended to take into account all concerns raised by residents and members of the community.

[107] The proceedings during the Meeting also shed light on the reasons for the decision to refuse consent. The views expressed by the individual

councillors during the Meeting were recorded in a transcript tendered by Perry Park at the trial.[80] That transcript is the only source from which to glean the reasons for DCC's decision.

[108] The motion put to the Meeting was "to not approve the lights".[81] The motion was carried eight votes to three. The trial judge summarised the reasons expressed by seven of the eight councillors who voted in favour of the motion.[82] In that analysis, the main reasons expressed by at least five of those councillors who voted in favour of the motion were based upon their concerns for members of the community likely to be adversely affected by the lighting. These included possible affects upon the amenity of neighbours as a result of such things as excessive glare and noise, and detrimental impact on their property values. Most of the councillors speaking in favour of the motion stressed the need to listen to the people likely to be affected by the lighting and to respond to their concerns.

[109] The sixth councillor who voted in support of the motion, Cr Haslett, expressed concerns about a lack of transparency, partly by reference to the granting of the original lease without public consultation. The trial judge concluded that if that was what motivated Cr Haslett's opposition to the grant of consent it was clearly an irrelevant

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80 AB 560-569.

81 AB 568.

82 The eighth councillor provided no reason for her vote.

consideration, and that a decision to withhold consent for that reason would be plainly unreasonable.[83]

[110] However, it is not possible to conclude that this was Cr Haslett's main reason for opposing the grant of consent. By the time he spoke, three councillors had already spoken in favour of the motion and stressed the importance of the community's concerns during their speeches. Cr Haslett was the fifth councillor to speak, and in doing so he was clearly responding to the comments made by the fourth speaker, Cr Galton. Cr Galton complained about the lack of transparency in the process and said that the motion should be delayed for two weeks in order that all members of the public could become better informed about the proposal and the Consultation Report. There is no reason to suppose that Cr Haslett's concern about the lack of transparency was his only, or even his main, reason for voting in favour of the motion.

[111] The seventh of those who gave reasons in support of the motion, Cr Anictomatis, said that her main reason for opposing the lighting was that she thought it was a waste of money. But Cr Anictomatis also expressed reasons based upon the interests of the community, including those referred to in the Consultation Report. The trial judge also considered that if consent had been withheld for the reason that the lighting was a waste of money, such a decision would have been

83 *Perry Park (No 1)* at [71(a)].

unreasonable.[84] But, as was the case with Cr Haslett, Cr Anictomatis had also heard what had been said by the five previous speakers and may well have felt little need to repeat their concerns relating to community consultation.

[112] Following that analysis, the trial judge concluded that "even if the two councillors with irrelevant (or arguably irrelevant) reasons voted against granting consent for those reasons only, and would otherwise have voted in favour of consent, the result would still have been six votes to five against".[85] The appellant bore the onus of establishing that DCC unreasonably withheld its consent.[86] Even allowing for the uncertainties which present on the state of the evidence, it may be concluded that most, if not all, of those councillors who voted to refuse consent did so wholly or partly on the basis of community concern about the impact of the proposed works on the amenities of neighbouring properties. As the English courts have held, where the landlord's reasons include good reasons and bad reasons for withholding consent, unless the good reason is vitiated by the bad

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84 *Perry Park (No 1)* at [71(b)].

85 *Perry Park (No 1)* at [72].

86 *JA McBeath Nominees Pty Ltd v Jenkins Development Corporation Pty Ltd* [1992] 2 Qd R 121 at 129; *Iqbal v Thakrar* [2004] 3 EGLR 21 at [27]; *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513 at 519-20.

reason, consent will nevertheless have been reasonably withheld on the basis of the good reason.[87] This is such a case.

[113] For these reasons, even if DCC was restricted to a consideration of public objections based on an interference with the amenities of neighbouring property for the purpose of determining whether to grant consent to the Second and Third Stage works, the considerations which actuated the refusal to grant consent were matters of public objection rather than commercial or environmental issues; and it cannot be said on the basis of Perry Park's contention in this respect that DCC's conclusions leading to the refusal could not have been reached by a reasonable person in the circumstances.

The operation of cl 9.7(g) of the Lease

[114] As described at the outset, in the event that the appeal in relation to *Perry Park (No 1)* is unsuccessful, the appellant contends that cl 9.7(g) of the Lease was not engaged. Clause 9.7(g) of the Lease provides relevantly:

> If [Perry Park] is unable to undertake all of the works to be performed under sub-clause 9.7(f) or any part of those works ("the Un-performed Works"), due to the refusal on the part of [DCC] to provide consent to the Un-performed Works following a negative response to the community consultation process provided for in sub-clause 9.7(e):
>
> (i) [Perry Park] must undertake alternate capital upgrading works to the Premises ("the Alternate Upgrade Works") at a

87 *British Bakery (Midlands) Ltd v Michael Testier & Co Ltd* [1986] 1 EGLR 64; *BRS Northern v Temple Heights Ltd* [1998] 2 EGLR 182.

cost to [Perry Park] as specified in clause 9.7(a)(iv) less the reasonable costs incurred by [Perry Park] in completing the First Stage as provided for in clause 9.7(b). …

(ii) [DCC] and [Perry Park] will negotiate in good faith as to the nature, description and timing of the Alternate Upgrade Works, provided that if they are unable to agree in writing as to the nature and description of the Alternate Upgrade Works within 12 months of the date on which [DCC] notifies [Perry Park] of its refusal of consent of the Un-performed Works

[Perry Park] must

(A) pay to [DCC] the amount specified in sub-clause 9.7(a) less the amounts agreed by [DCC] as having been expended on the Upgrade Works … (Emphasis added)

[115] If the consent was not unreasonably withheld, Perry Park is clearly unable to undertake the works referred to in cl 9.7(f) as a result of DCC's refusal to provide consent to those works being done. The operative question is whether that inability is due to a refusal "following a negative response to the community consultation process provided for under sub-clause 9.7(e)".

The decision in *Perry Park (No 2)*

[116] The trial judge summarised Perry Park's submission in this respect in the following terms:

The substance of this submission is as follows.

(a) The obligation in cl 9.7(g) to perform the Alternate Upgrade Works only arises if Perry Park's inability to perform the Upgrade Works is "due to the refusal on the part of [DCC] to provide consent following a negative response to the community consultation process provided for under sub-clause 9.7(e)".

(b) The "community consultation process provided for under clause 9.7(e)" refers only to the community consultation

process carried out by NPC, the professional consultants commissioned by Perry Park and approved by DCC.

(c) Under cl 9.7(e) DCC is entitled to take into account three matters:

(i) the responses received, outcomes and analysis of the community consultation process;

(ii) its own analysis of those matters; and

(iii) any other relevant matters.

(d) For the purpose of determining whether there has been "a negative response to the community consultation process provided for under sub-clause 9.7(e)", the only relevant matter is that in (i) – ie the responses received, outcomes and analysis by NPC of the community consultation process.

(e) If one takes into account only the responses received, outcomes and analysis of the community consultation process conducted by NPC, the outcome cannot objectively be described as a "negative response". This is because the conclusions expressed by NPC in the Consultation Report (set out at [10] above) are not "negative".[88]

[117] After making observations concerning the inadequate drafting of cl 9.7(g), the trial judge stressed the need for a court to give meaning to contractual provisions having regard to the surrounding circumstances and commercial purpose or objects to be secured by the contract.[89] The trial judge said in that respect:

> Against that background, and given the commercial purpose of the clause, the words Perry Park "is unable to undertake all of the works to be performed under sub-clause 9.7(f) … due to the refusal on the part of the Owner to provide consent to the Un-performed Works following a negative response to the community consultation process provided for in sub-clause 9.7(e)" must be given a broad construction. In particular I see no reason why the relevant matter for determining whether there has been a "negative response" to the community consultation process should be limited

88 *Perry Park (No 2)* at [19].

89 *Perry Park No 2* at [26]-[27].

> to the conclusions expressed by NPC in the Consultation Report when the process outlined in cl 9.7(e) specifically provides that DCC may take into account its own analysis of that material when determining whether to give or withhold consent. Why would DCC insist on reserving to itself the right to act on its own analysis of the consultation process in deciding whether to grant or withhold consent and yet agree that (if it reasonably withheld consent) the only matter relevant to determining whether Perry Park should have to perform Alternate Upgrade Works would be the conclusions drawn by the professional consultant in the Consultation Report, which DCC may or may not agree with?
>
> It seems to me that if a reasonable businessperson were asked whether it was intended that cl 9.7(g) should apply if DCC refused consent to Stages 2 and 3 as a result of the process in cl 9.7(e), he or she would undoubtedly say yes. Such a construction gives congruent operation to cl 9.7(e) and 9.7(g) and advances the commercial purpose of the Lease as amended.[90]

Obligation to undertake the Alternate Upgrade Works

[118] The question whether Perry Park is obliged in the circumstances to undertake the Alternate Upgrade Works requires an interpretation of cl 9.7(g) of the Lease, and the issue of what its terms mean is one of law not fact. The determination whether consent was unreasonably refused required a consideration of the contractual arrangements between the parties and the subject matter of the Lease at a higher level of abstraction, and that issue was one of fact not law.

[119] In construing the terms of the Lease, there is a presumption that the parties did not intend its terms to operate unreasonably, and that the construction will not be one that flouts business common sense.[91] Subject to that presumption, determining the intention of the parties is

90 *Perry Park No 2* at [30]-[31].

91 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201.

an objective enquiry to be undertaken in the same factual matrix in which the parties were at the time the arrangement was formed.[92]

[120] Clause 9.7(g) of the Lease embodies both a promise and a contingency. The promise is to undertake the Alternate Upgrade Works, but Perry Park's obligation to perform those works depends on the fulfilment of a contingency. That contingency is DCC's refusal to consent to the Un-performed Works following a negative response to the community consultation process provided for under sub-cl 9.7(e) of the Lease.

[121] That contingency is not devoid of content in the sense that any refusal of consent would trigger Perry Park's obligation to perform the Alternate Upgrade Works. As already seen in the discussion concerning reasonableness, consent might conceivably have been withheld on the basis, for example, of concerns about Perry Park's ability to perform its obligations under cll 9.7(a)(i), (ii) or (iv) of the Lease, the type of lighting proposed, aesthetic matters, or the possible effect on neighbouring property unrelated to community consultation or objection. If DCC refuses consent in circumstances falling outside the ambit of the contingency, Perry Park is released from the obligation to perform the Alternate Upgrade Works.

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92 See, for example, *Butt v Long* (1953) 88 CLR 476 at 486-490; *Robinson v Day* (1992) 106 FLR 423; *Botany Fork & Crane Pty Ltd v New Zealand Insurance Co Ltd* (1993) 44 FCR 27 at 30; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment & Services Pty Ltd* [1990] VR 834; *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288 at 300.

[122] Construing the meaning and ambit of that contingency begins with assigning the words their plain and ordinary meaning in the context of the contractual arrangement.[93] Where the words are ambiguous or susceptible to more than one meaning, that ambiguity falls to be resolved in the interpretive process.[94] The parties have advanced competing interpretations which identify potential ambiguity in the meanings of the terms "negative response" and "the community consultation process provided for under sub-clause 9.7(e)". Neither party sought to adduce extrinsic evidence at trial directed to resolving that ambiguity.

[123] It is necessary to determine first what is meant by "the community consultation process provided for under sub-clause 9.7(e)", because that determination is necessarily anterior to ascertaining the scope of the phrase "negative response". Clause 9.7(e)(i) provides that the Tenant must "undertake a community consultation process" which will be "undertaken by a professional consulting firm approved by the Owner (acting reasonably) in the manner described in Schedule 2 to this deed". As has been seen, the professional consulting firm selected (or approved) was NPC. Schedule 2 to the deed required the consultation process to be undertaken "[t]o the standard of consultation

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93 *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 at 348.

94 *Codelfa Construction* at 352.

category 2 described in the City of Darwin Community Consultation Policy, attached".

[124] Section 3 of the Policy provided expressly that "[c]ommunity consultation complements, but does not replace, the decision-making role of the Council". This is an expression of the principle that while DCC might take into account the results of a community consultation process, its broader representational functions and obligations were such that the result of that process could not dictate the ultimate decision. It also identifies a distinction between the community consultation process and the ultimate decision-making process.

[125] Section 5 of the Policy sets out a series of principles under which "[t]he Council will identify potential stakeholders in each specific circumstance", "[t]he Council will ensure information is easily understood and accessible to identified stakeholders", "[a] range of appropriate opportunities will be provided for people to access information and to be involved", and "[t]he Council will listen to community views and take into account all submissions made by various stakeholders". By entering into a contractual arrangement under which the consultation was undertaken by a professional consulting firm, DCC effectively delegated the design of measures necessary to satisfy those principles to that consulting firm; subject to the principle that the result of the consultation process could not dictate the ultimate decision.

[126] Section 6 of the Policy specified three levels of consultation. Relevantly for these purposes, Level 2 was said to represent a public promise that "we will keep you informed, listen to and acknowledge concerns and provide feedback on how public input influenced the decision". The Policy then provides examples of the different levels of consultation. So far as those examples contain any meaningful and relevant content, they stipulate a minimum three weeks for response, notification on the DCC website, advertisement in local media and/or a letterbox drop, public comment and surveys. Under the examples, that process culminated in a "[r]eport to Council summarising submissions for formal Council decision".

[127] Again, under the contractual arrangements DCC effectively delegated the conduct of those matters to NPC. In the discharge of those requirements, NPC provided an explanatory letter by letterbox drop to all properties in the immediate vicinity of the Land (approximately 640 individual residences); placed advertisements in the *Northern Territory News* and *Darwin Sun* newspapers; posted the concept plan and details on the Gardens Park Golf Links website (in lieu of the DCC website); and conducted four separate public forums at the Gardens Park Golf Links.[95] At the conclusion of that process, NPC produced the Consultation Report which effectively summarised the results. That constituted the community consultation process, and the Consultation

95 AB 157.

Report was, in effect, the "[r]eport to Council summarising submissions for formal Council decision". After that point, the ultimate decision-making process fell to be conducted by DCC in the discharge of its broader representational functions and obligations.

[128] The fact that cl 9.7(e)(ii) of the Lease permitted DCC to take into account its own analysis of "such matters" in considering whether to consent to the Second and Third Stage works, and in determining the terms and conditions of that consent, did not bring DCC's analysis within the ambit of the "community consultation process" contemplated under the terms of the contractual arrangements. What that provision achieved, together with the qualification "amongst other relevant matters", was to reserve to DCC the ultimate decision-making process for consent and the determination of matters properly taken into account in that process. The fact that DCC determined as part of its decision-making process to conduct the public forum prior to the Meeting also did not constitute the public forum as part of the "community consultation process" contemplated by the contractual arrangement.

[129] Those contextual considerations are reflected in the text of cl 9.7(g) of the Lease. Had the intention been that the contingency would operate on DCC's own analysis and determination of whether there had been a "negative response", the clause would more aptly have reflected that intention by use of words such as "following community consultation",

or, as was adopted in cl 9.7(e)(ii) of the Lease, on "its own analysis" of the community response. Instead, the parties framed the contingency by reference to a negative response to the "community consultation process", for which explicit and specific provision was made in the Lease and Policy.

[130] So far as business or commercial purpose is concerned, the primary purpose of cl 9.7 of the Lease, both before and after variation, was directed to the installation of lighting to the golf course at a cost to Perry Park of up to $1 million. These are and have always been the Upgrade Works under that part of the Lease. The performance of those works was to the mutual advantage of each party. DCC would obtain the benefit of $1 million worth of improvements to the Land, and Perry Park's business would be enhanced by attracting additional paying customers at night-time. The performance of Alternate Upgrade Works would likely not provide the same enhancement of Perry Park's business, and perhaps not the same benefit to DCC.

[131] The Lease does not contemplate that Perry Park would be obliged to perform the Alternate Upgrade Works if DCC refused to give consent for reasons other than a negative response to the community consultation process. Accordingly, the commercial purpose was not to require Perry Park to perform Alternate Upgrade Works (or in default to pay DCC the difference between total projected cost of the Upgrade Works and the cost of the First Stage), regardless of the reasons

underlying DCC's refusal to give consent to the Second and Third Stages. Nor was the commercial purpose to require Perry Park to perform the Alternate Upgrade Works if DCC gave its consent but the Development Consent Authority refused to issue a development permit.

[132] On an objective appraisal, that structure suggests an arrangement by which Perry Park was desirous of installing lighting on the golf course; DCC was concerned about a negative community response; an objective mechanism was set by which that response might be tested; and Perry Park would be obliged to perform the Alternate Upgrade Works if that mechanism raised issues which could not be addressed (or which Perry Park was not willing to address), during the course of the community consultation process by, for example, some modification to the master plan and concept design required under cl 9.7(d) of the Lease.

[133] That arrangement also properly reserved to DCC its decision-making role. The consequence of that reservation was the possibility that Perry Park might be denied approval to proceed with the Second and Third Stages for other considerations operative in the DCC decision-making process, or by the refusal of a development permit quite outside that process, in which case it would be relieved of the obligation to perform the Alternate Upgrade Works.

[134] For these textual and contextual reasons, the reference in cl 9.7(g) of the Lease to "the community consultation process provided for under sub-clause 9.7(e)" is properly interpreted to mean the process undertaken by NPC culminating in the provision of the Consultation Report. It should be accepted further that the determination of whether there was a "negative response" is to be judged objectively against the responses received and the outcomes and analysis conducted by NPC of the community consultation process as recorded in the Consultation Report.[96]

[135] That conclusion is not undermined by the respondent's proposition that the parties must have contemplated DCC would grant consent if its own analysis was that the community was in favour of the installation of lights, and it necessarily follows that DCC refused consent because the community's response was negative. The structure and wording of the two relevant covenants embodies an arrangement by which DCC could draw subjective conclusions concerning consent even if the process conducted by the professional consulting firm did not return a "negative result", but in that event Perry Park would have no obligation to perform the Alternate Upgrade Works.

[136] That interpretation does not give rise to any capricious, unreasonable, inconvenient or unjust consequences having regard to the commercial

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96 Plaintiff's Written Submissions on Paragraphs 47-51 of the Amended Statement of Claim dated 26 July 2016 at [31], AB 52.

and business purposes of the arrangement. Nor does the alternative interpretation afford a more congruent operation to the various components of the Lease as a whole.[97] The contrary contention is based in essence on two propositions. The first is that the Lease required Perry Park to perform either the Upgrade Works or the Alternate Upgrade Works regardless of circumstance. The second is that the same considerations governed the reasonableness of a refusal under cl 9.7(e) and the discernment of a "negative response" under cl 9.7(g). Neither proposition is made out.

[137] The respondent contends further that the construction urged by Perry Park would only add uncertainty to the parties' rights and obligations because cl 9.7(g) of the Lease offers no criteria for the objective assessment of whether there was a "negative response". The difficulty with the alternative construction pressed by DCC is that it would render the assessment entirely subjective in nature, in circumstances where the provision for the appointment of a professional consulting firm must necessarily have been intended, in part at least, to lend an objective character to that assessment. Were it otherwise, cl 9.7(g) would potentially permit DCC to refuse consent, and oblige Perry Park to perform the Alternate Upgrade Works, even if on an objective appraisal the community was substantially in favour of the proposal.

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97 *Wilkie* v *Gordian Runoff Ltd* (2005) 222 CLR 522 at 528 [15]; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22]; *Mount Bruce Mining Pty Ltd* v *Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117. Cf Respondent's Summary of Submissions filed 22 November 2017 [12].

[138] It falls then to consider whether there was a "negative response" in the relevant sense. This question also presents difficulties in interpretation. When that phrase is read in isolation, a negative response might comprehend a multiplicity of circumstances ranging from a single objection through to unanimous opposition. In context, however, the assessment of whether there was a "negative response" requires regard to the community consultation process as defined in the Lease and the Consultation Report produced as a result of that process.

[139] The content and conduct of the community consultation process has already been described. The Consultation Report annexed the written responses that had been received and provided a summary of the attitudes of those respondents.[98] That summary disclosed that 34 respondents (from 31 separate households) provided responses objecting to the proposal or raising specific concerns with it. Of those 34 respondents, 32 indicated that they (or the party on whose behalf they were writing) lived in, or otherwise had an interest in, property that overlooked part of the Land.[99] On the other hand, 41 respondents provided responses that were in support of the proposal. Nine of those indicated that they were residents of The Gardens or Larrakeyah, and three of those nine also indicated that they lived in a property overlooking part of the Land. The remaining respondents identified

98 AB 191.

99 Consultation Report, [3.1].

that they lived elsewhere, or did not provide address details.[100] Three of the responses provided no clear indication of support or objection to the proposal.[101]

[140] The Consultation Report then described four "community sessions" held at the golf course attended by a total of about 46 community members. The report then makes a number of observations concerning the community consultation process, including that: "Objections to the proposal were generally limited to residents/landowners with property overlooking the golf course. Support for the proposal was generally wider spread across the Darwin area and, in a small number of cases, interstate."[102] In assessing the level of negative response from residents and owners in proximity to the Land, it is of some significance that the community consultation process involved the delivery of consultation letters to 640 individual properties in the general area, including 190 dwellings with direct views of the Land.

[141] The Consultation Report contained a Conclusion stating:

> The consultation process identified that the majority of residents/landowners with views of the golf course (being those included in the direct consultation process) did not object to the proposal. Clear and vocal objection to the proposal occurred from a number of residents, generally concentrated within the suburbs of Larrakeyah and The Gardens, along with a number of outstanding concerns that the proposed proponent is currently addressing. Objections focussed on the indirect and direct impact

100 Consultation Report, [3.3].

101 Consultation Report, [3.2].

102 Consultation Report, [5].

> of lighting, behavioural and noise impacts and impact on the environment. Support for the proposal was generally wider spread across the Darwin area, citing broader community and tourism benefits, and benefits to recreational opportunities within the Darwin area. Although limited, some supporting feedback was received by residents/landowners overlooking the golf course, and feedback provided by residents living adjacent and interstate night golf facility.
>
> Feedback received from the consultation process has triggered a number of changes to the draft masterplan that are currently being pursued, including the location, orientation and direction of light towers, use of light shields and battles, as well as the details included within the management plan.[103]

[142] In the respondent's contention, even if it is accepted that the assessment is limited to the community consultation process conducted by NPC, that result was negative in the relevant sense. The submission follows that the term "negative" does not necessarily connote a majority against, and the number of objections and where those objectors live could not be considered a favourable outcome to the consultation process, and therefore represents a "negative response".[104]

[143] In the context of a process such as this, the term "negative response" is properly construed to mean a negative response from the majority of respondents or a preponderance of negative responses. The conclusions reached in the Consultation Report do not indicate that to be the case. The majority of residents or landowners in proximity to the golf course did not object. The number of written responses in

103 Consultation Report, [6].

104 See defendant's Submissions on Paragraphs 47-51 of the Amended Statement of Claim dated 10 August 2016 at [10]-[11], AB 57-8.

support was greater than the number of written responses in opposition. Of the 640 properties in the general area, and the 190 dwellings with direct views of the Land, objections were received from 31 households.

[144] It cannot be said that the response was negative on the basis that an insufficient number of people responded positively to the proposal. The level of response was received in the context of a "community consultation process" prescribed under the contractual arrangements. A failure on the part of residents of the properties in the area to make a response to the consultation letters, or to the process generally, does not translate to a negative response. In fact, the opposite conclusion might more readily be drawn. On an objective assessment, there was not a "negative response to the community consultation process provided for under sub-clause 9.7(e)".

[145] Nor can it be said that the assessment of whether there was a "negative response" is governed by whether DCC's refusal of consent was objectively reasonable.[105] As already described, that latter question turned on whether the reasons for withholding consent were sufficiently associated with the contractual arrangements and the subject matter of the Lease. The interpretation of cl 9.7(g) of the Lease raises quite different considerations. For the reasons already given, in the assessment of whether there was a "negative response"

105 Cf defendant's Submissions on Paragraphs 47-51 of the Amended Statement of Claim dated 10 August 2016 at [3], AB 55.

the "community consultation process" should not be interpreted to include DCC's analysis, the quite separate conduct of the public forum prior to the Meeting, and the ultimate decision-making process.[106]

[146] The respondent's contention that there was a negative response also draws attention to an evidentiary issue. Even if it was accepted that the obligation under cl 9.7(g) turned on DCC's discernment of a "negative response" following community consultations, rather than a negative response revealed in the Consultation Report, one would expect some documentary record justifying that conclusion if it was intended to trigger an obligation to perform the Alternate Upgrade Works. Although the court at first instance received the transcript of the Meeting, it is impossible to discern from what was said by the individual councillors that there was a negative response from the community on any objective appraisal. The passage of the Resolution following the conduct of the public forum attended by approximately 15 to 20 members of the public immediately prior to the Meeting is neither illustrative nor conclusive of a "negative response" in the relevant sense.

[147] For these reasons, cl 9.7(g) of the Lease was not engaged by DCC's refusal to provide consent to the Un-performed Works.

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106 Cf defendant's Submissions on Paragraphs 47-51 of the Amended Statement of Claim dated 10 August 2016 at [9], AB 57.

Disposition

[148] The following orders are made:-

(a) On the ground that the trial judge erred in concluding that the respondent's refusal of consent to the Upgrade Works in the Lease was not unreasonable or unlawful, the appeal is dismissed.

(b) On the ground that the trial judge erred in finding that the appellant was obliged to perform the Alternate Upgrade Works under cl 9.7(g) of the Lease, the appeal is allowed.

(c) The orders authenticated on 6 July 2017 are set aside and in lieu thereof there shall be a declaration that the appellant is not liable to perform the Alternate Upgrade Works.

[149] We will hear the parties in relation to costs.

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