Perry Park Pty Ltd v City of Darwin (No 2) [2017] NTSC 37

PARTIES:	PERRY PARK PTY LTD (ACN 062 030 826) v CITY OF DARWIN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	68 of 2015 (21539686)
DELIVERED:	12 May 2017
JUDGMENT OF:	KELLY J

CATCHWORDS:

LANDLORD AND TENANT –Terms of lease – Tenant required to carry out capital upgrade works –– Consent to proposed capital upgrade works withheld by landlord – Whether on construction of lease tenant liable to undertake alternate capital upgrade works

CONTRACTS – Lease – Construction of instruments – Obligation to undertake alternate capital upgrade works – Commercial purpose of contract

Electricity Generation Corporation v Woodside Energy Limited (2014) 251 CLR 640; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, applied

REPRESENTATION:

Counsel:

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

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Paul Maher

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

Perry Park Pty Ltd v City of Darwin (No 2) [2017] NTSC 37
No. 68 of 2015 (21539686)

BETWEEN:

PERRY PARK PTY LTD
(ACN 062 030 826)
Plaintiff

AND:

CITY OF DARWIN
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 12 May 2017)

Background

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

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

[3] The lease contained a provision requiring Perry Park to perform certain works (the "Upgrade Works") to a value of not less than $1 million. Following a dispute about what was required the parties entered into a deed

of variation and amendment of the lease which set out in greater detail the obligations of Perry Park in relation to the Upgrade Works in cl 9.7. (The lease as amended is referred to in these reasons as "the Lease".)

The Lease

[4] Essentially the Lease provides that Perry Park is to perform Upgrade Works worth $1 million.[1] The Upgrade Works are to be carried out "with the prior written consent of [DCC] and on such terms, conditions and directions as [DCC] may reasonably specify or give as a condition of giving its consent".[2]

[5] The Upgrade Works are to be completed in three stages. Before the variation to the Lease, the parties had already agreed that Stage 1 of the Upgrade Works would consist of installing lighting to the first hole of the golf course. Stages 2 and 3 (which involve installing lighting on the other holes) require the consent of DCC which is not to be unreasonably withheld.

[6] Clause 9.7(e) obliges Perry Park to undertake a community consultation process and provide the results to DCC. DCC is entitled to take into account the outcome of that consultation process in deciding whether to consent to Stages 2 and 3.

[7] Clause 9.7(g) purports to deal with what follows if consent is withheld in the circumstances set out in that clause. In broad terms, it provides for Perry Park to perform "Alternate Upgrade Works" to the value of $1 million

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1 Clause 9.7(a)(iv)

2 Clause 9.7(a)(iii)

less the cost of Stage 1 or to pay an equivalent amount in default of agreement on the Alternate Upgrade Works. (Clause 9.7(e) and the relevant parts of cl 9.7(g) are set out below.)

The community consultation process and refusal of consent

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

[9] NPC undertook the community consultation process in August and September 2014, and on 20 October 2014 produced a written community consultation report ("the Consultation Report") which it provided to DCC and Perry Park.

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

(a) Forty one individuals provided responses that were in support of the works proposed by Perry Park for Stages 2 and 3.

(b) Of the forty one responses in support, nine individuals indicated that they were residents of The Gardens or Larrakeyah[3] and three of those individuals further indicated that they lived in a property overlooking part of the Land.

[3] These are residential suburbs close to the Land.

(c) Thirty four individuals provided responses objecting to the works proposed by Perry Park for Stages 2 and 3.

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

(e) Three responses neither objected to nor supported the works proposed by Perry Park for Stages 2 and 3.

(f) The majority of residents and/or landowners with views of the Land who were included in the direct consultation process did not object to the works proposed by Perry Park for Stages 2 and 3.

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

[11] At a council meeting on 28 October 2014 DCC resolved not to consent to Stages 2 and 3 of the Upgrade Works.

The proceeding

[12] Perry Park brought proceedings against DCC claiming declarations that DCC had unreasonably withheld its consent to Stages 2 and 3 of the Upgrade Works and that Perry Park is not liable to perform any Alternate Upgrade Works.

[13] The matter was set down for trial before me on the preliminary point "whether the Defendant's refusal of consent to the Plaintiff to perform the upgrade works in the lease was lawful". On 25 May 2016 I determined that DCC had not acted unreasonably in withholding consent to Stages 2 and 3 of the Upgrade Works and that the refusal to consent was therefore not unlawful, and I published my reasons.[4]

[14] Following that decision, by consent, I gave directions for the parties to file and serve written submissions on the remaining question (ie whether on the true construction of the Lease, Perry Park is obliged to perform Alternate Upgrade Works). The parties agreed that I should determine that question on the basis of the affidavit evidence already filed and the written submissions.

Issue for determination

[15] Accordingly, what is now before me for determination is Perry Park's application for a declaration that, as events have unfolded, on the true construction of cl 9.7(g) of the Lease, Perry Park is not liable to perform any Alternate Upgrade Works.

Provisions of the Lease

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

> (i) undertake a community consultation process with respect to the works proposed by [Perry Park] as the Second Stage and Third

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

Stage[5] and as described in the master-plan prepared under sub-clause 9.7(d). The consultation process will be undertaken by a professional consulting firm approved by [DCC] (acting reasonably) in the manner described in Schedule 2 to this deed;

(ii) promptly provide [DCC] with the responses received and the outcomes and its analysis of the responses received from the community consultation process and it is agreed that [DCC] 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 [Perry Park] for the Second Stage and Third Stage and the terms and conditions on which such works are to be undertaken; *[punctuation as per original]*

[17] Clause 9.7(g) 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 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[6] 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 …

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5 referred to in these reasons as Stages 2 and 3

6 referred to in these reasons as Stage 1

Perry Park's contentions

[18] The primary claim made by Perry Park in its amended statement of claim is that it is not obliged to perform the Alternate Upgrade Works on the ground that DCC had wrongfully withheld consent to Stages 2 and 3 of the Upgrade Works. It is conceded by Perry Park that that contention is not compatible with the decision handed down on 25 May 2016.

[19] The second basis for Perry Park's claim to a declaration that it is not obliged to perform any Alternate Upgrade Works is a contention that the clause does not apply in the circumstances. 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".

Construction of the Lease

[20] I do not agree with two of the key premises of this submission. I do not agree that the words "community consultation process provided for under clause 9.7(e)" refer only to the community consultation process carried out by NPC. It seems to me that those words are apt to refer to the whole process provided for in cl 9.7(e) including (at least) the analysis of the results undertaken by DCC. Nor do I agree that, 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 [19](a) above – ie the responses received, outcomes and analysis of the community consultation process by NPC.

[21] It must be said at the outset (and I think this was common ground between the parties) that this is a very poorly expressed contractual provision. It is riddled with ambiguity. As counsel for Perry Park pointed out in submissions, it does not appear to cover the field, yet there is no other clause dealing with the situation in which Perry Park is unable to carry out the Upgrade Works for reasons other than DCC's refusal to grant consent to Stages 2 and 3. What the parties agreed should happen, for example, if DCC consents to Stages 2 and 3 but the Development Consent Authority refuses to grant its consent, is not specified.

[22] Nor is it clear what is meant by "following a negative response to the community consultation process provided for under sub-clause 9.7(e)". Does this mean that there must be a causal connection between the "negative response to the community consultation process" and DCC's refusal to grant consent, or does the refusal to grant consent merely have to "follow" (ie come after) the "negative response to the community consultation process"? What have the parties agreed should occur if, for example, there was a negative response to the community consultation process (whatever that means), and DCC determined at a meeting that that would be no barrier to consent, but that it resolved not to grant consent for a different (lawful)

reason (for example that the conduct of night golf by Perry Park would interfere with a restaurant opened up by DCC in adjacent parkland)? Fortunately, it is not necessary for present purposes to resolve either of these two conundra.

[23] There is further lack of clarity on the questions of whose response must be negative, and what constitutes a "negative response". The question to be answered is, "Has there been a negative response to the community consultation process provided for under sub-clause 9.7(e)"? As the clause is worded, this question is susceptible of so many potentially different meanings as almost to have no meaning at all. What is a "negative response" and who must have it? Would one "negative response" to the community survey suffice? Is it in fact the response of DCC that is referred to rather than that of the surveyed residents?

[24] Returning to the key contention by Perry Park – that the only relevant matters for determining whether there has been a "negative response" to the community consultation process are "the responses received, outcomes and analysis of the community consultation process by NPC" - even if that contention were accepted, it would not resolve the difficulty. How many "no" votes from members of the community consulted during the process would be necessary to satisfy the criterion – one, fifty percent, all?

[25] Though not expressly stated, Perry Park's contention appears to be that if the conclusions expressed by NPC in the Consultation Report are generally

positive (or at least not generally negative), there cannot be said to have been "a negative response". I see no reason, either in the words used in cl 9.7(g) or in the scheme of cl 9.7 as a whole, for adopting such a construction of cl 9.7(g).

[26] In construing a contract (including a lease), "preference is given to a construction supplying a congruent operation to the various components of the whole."[7]

[27] Further, a construction which gives a commercial contract or lease a businesslike interpretation is to be preferred. "The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean."[8] The court construing a commercial contract must consider "the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract," and in giving consideration to the commercial purpose or objects of the agreement, the court will be assisted by an understanding of the background and origin of the provisions under consideration.[9]

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7 *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16]

8 *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640 at 656 [25] per French CJ, Hayne, Crennan and Kiefel JJ

9 *Ibid* at 656-657 [35]; see also *Ceccon Transport Pty Ltd & Ors v Tomazos Group Pty Ltd* [2017] NTSC 25 at [82]

[28] The variation to the original lease that inserted cl 9.7 came about as a result of a dispute about Perry Park's obligations in relation to the Upgrade Works. That clause provides in cl 9.7(a) a general obligation for Perry Park to perform the Upgrade Works "with the prior written consent of [DCC] and on such terms, conditions and directions as [DCC] may reasonably specify or give as a condition of giving its consent"; in cl 9.7(b) and (c) for Perry Park to carry out Stage 1; and in cl 9.7(d) for Perry Park to deliver a master plan for Stages 2 and 3. Clause 9.7(e) (set out above) makes provision for a community consultation process which DCC is entitled to take into account in considering whether to consent to Stages 2 and 3. Clause 9.7(f) sets out Perry Park's obligations in relation to the construction of Stages 2 and 3 if consent is given. Clause 9.7(g) (relevant parts set out above) deals with what happens if consent is refused. Clause 9.7(h) puts in place a process for agreeing on variations and resolving disputes in relation to variations.

[29] It seems to me that the commercial purpose of these provisions was to preserve DCC's right to refuse consent to subsequent stages of the Upgrade Works (which was to be exercised reasonably); to put in place a process of community consultation by which it could gauge the attitude of affected members of the public; to ensure that DCC could take into account its own analysis of the consultation material as well as other relevant matters; and to provide for what would happen if DCC consented to Stages 2 and 3 [cl 9.7(f)] and also what would happen if DCC refused to consent to Stages 2 and 3 "following" that community consultation process [cl 9.7(g)].

[30] 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 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?

[31] 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.

[32] I have already found as a fact that DCC withheld consent to Stages 2 and 3 as a result of the process in cl 9.7(e). I analysed the minutes of the Meeting and found at [73] of my reasons for decision of 25 May 2016:

> The majority of councillors voted against granting consent to the Second and Third Stages for reasons that had to do with the responses to the consultation process including the depth of feeling of those against, the more detailed and reasoned content of the objections as distinct from those supporting, and the effect on the amenity of directly affected neighbouring properties.[10]

[33] Accordingly, it seems to me that cl 9.7(g) is engaged and Perry Park is obliged to perform Alternate Upgrade Works in accordance with the provisions of that clause. (It is not necessary for me to determine whether the clause would have been engaged if DCC had refused consent "following" that process but for a reason or reasons unrelated to the process.)

[34] Perry Park's application for a declaration that it is not liable to perform any Alternate Upgrade Works is refused.

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10 *Perry Park Pty Ltd v City of Darwin* [2016] NTSC 27 at [73]