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## Landlord and tenant – lease of Council Property

### **Lease terms, consent of the landlord to development – Perry Park Pty Ltd v City of Darwin [2016]**

#### **In a nutshell**

The Supreme Court of the Northern Territory considered the express terms of a lease between the City of Darwin (**Council**) and Perry Park (**PP**) the operator of the Darwin Golf Links, that allowed Council to take into account its own considerations in declining to consent to PP's plan to install lights at the city golf course.

The Court considered the legal principles relating to how a landlord should go about giving consent; and whether, in this particular case, Council's 'refusal of consent to the Plaintiff to perform the upgrade works in the lease, was lawful.'

The case illustrates the importance of carefully worded lease terms; the incorporation of Council Policy in the lease; the process of Council implementing the terms; and deliberations of Aldermen and Councillors in session.

#### **Gardens Park Golf Links – lights**

PP runs the Gardens Park Golf Links. The golf links were leased from Council. The lease term was 10 years from 1 July 2010; plus an option to renew for 15 years. The land 'is public land surrounded by residential development and DCC is a municipal authority.'

The lease required PP to carry out certain works (the lighting of the various holes on the golf course in stages) to a value of not less than \$1 million. In September 2013, this proposed work was set out in greater detail. The First Stage (lighting to the first hole) was completed. The Second and Third Stages required the installation of lighting to the other holes.

In the lease, Council reserved the right to withhold consent in certain circumstances. The lease provided for '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 question for the Court in this case was whether Council's 'refusal of consent to the Plaintiff to perform the upgrade works in the lease, was lawful.' That Court decided that was the case; and Council 'did not unreasonably withhold consent to the Upgrade Works.'

The Court saw the provision in the lease about consent as Council legitimately retaining 'the right to take into account the views of the public in accordance with its public consultation policy which was annexed to the Lease.'

This was because the lease set out:

- the requirement for community consultation in accordance with Council's pre-existing Policy on community consultation.
- the requirement that such consultation be in accordance with Level 2 consultation as specified in that policy.
- cl 9.7(e)(ii), where it referred to 'among other relevant matters', allowed Council to take into account its own analysis of the responses to the community consultation process.

### **Terms of the lease**

The Schedule to the lease required Council's Policy on community obligation to be followed to 'level 2 consultation (which includes 'open forum public question times immediately prior to 2nd Ordinary Council Meeting' and that 'Elected members provide community leadership and guidance, and facilitate communication between the community and the council.'

Overall, the terms of the lease were key to the outcome of the case. The lease expressly empowered Council 'to pay regard to its own analysis of the responses to the community consultation process.'

### **Consultation**

To support the next stages, PP was required to:

- deliver a masterplan for the rest of the holes (second hole to eighth hole); including 'the proposed location of all proposed connection points, power lines and other infrastructure for the Upgrade Works.'
- undertake community consultation.

Council would then take these matters into account '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.'

PP provided Council with the masterplan; and engaged a consultant for the community feedback. The consultation process was comprehensive and included a letterbox drop of 640 residences; advertising in newspapers; posting of information on the Golf Links website; and conducting public forums. Council also held a public forum of its own.

### **Councils resolution**

At its meeting to decide the matter, Council resolved not to approve the installation of lights at the golf links. The motion was carried eight to three. Some of the Aldermen expressed reasons; and a transcript of what was said was provided to the Court. The reasons expressed by four Aldermen 'all concerned the fact that residents who were directly affected by the proposal were against the installation of the lights.'

## Tenants arguments

PP contended:

- Council's decision was unreasonable; and PP asked the Court to find it was entitled to proceed with the next stages.
- s134 of the *Law of Property Act* required Council to take into account only things that affected its property interests, and this was not a 'property interest' of Council.
- Council could only take into account 'negative responses' (cl 9.7(g) provides that Perry Park's obligation to undertake 'alternate capital upgrading works' or pay a capital sum in lieu, only arises '[i]f the Tenant is unable to undertake all of the works to be performed under sub-cl 9.7(f) or any part of those works ('the Un-performed Works'), due to the refusal on the part of the Owner to provide consent to the Un-performed Works following a *negative response* to the community consultation process provided for under sub-cl 9.7(e)' (emphasis added)).
- the resolution was not made reasonably and in conformity with the lease and was made arbitrarily and capriciously.

The onus was on PP to establish that DCC acted unreasonably. The Court was not persuaded by any of the above contentions. Applying the lease terms, the Court thought Council could legitimately have regard to:

- 'those supportive responses which favoured the extension of use of the public facility into the hours of darkness by the provision of lights'; and
- those objections on the grounds of nuisance to neighbouring properties as a result of glare, excessive light, noise and drunkenness.'

## The Courts decision

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

The Court observed:

- Council 'is a municipal authority which has leased public land to Perry Park.'
- 'It therefore has a legitimate concern to ensure that developments occurring on that land are not of such a nature as to incur public disapproval, in particular from residents of the municipality directly affected by any such developments.'
- 'To protect against that risk, it has provided in the Lease that Perry Park must undertake the same kind of public consultation process which [Council] has committed itself to undertake on public land directly controlled by it.'

- ‘In entering into the variation of the lease which spells out that obligation in detail, Perry Park was content to allow [Council] to protect itself against that risk in that manner.’

Regarding the *Law of Property Act* argument, the Court reviewed relevant legal authorities. Noting you must have regard to 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’, the Court concluded that as fact situations can vary, circumstances need to be evaluated case by case. There will be some obvious cases where withholding consent would be unreasonable, but in each case, the facts and terms of the lease need to be specifically considered.

Here, the purpose of the lease terms was apparent; and that was to reserve to Council the overriding right to withhold consent, taking into account the relevant matters set out in the lease.

In relation to the argument about whether Council was limited to taking into account only a ‘negative response’ to the consultation process, the relevant clause in the lease expressly stated Council could take into account its own analysis of responses received during that process. The lease allowed Council to take into account ‘other relevant matters’ in addition to community consultation; including the possible effect on adjoining or neighbouring property owned by Council.

Relying on, among other things, deliberations by Aldermen, PP also complained Council took into account irrelevant matters. Examining these contentions, the Court was not persuaded that the councillors as a body were motivated by or took into account irrelevant matters.

### **Take away**

The decision in the case turned on its facts and the particular clauses of the lease. The case highlights the importance of the lease appropriate to the context and case; following the process outlined in the lease; and deliberations of councillors in Meetings.

**For further information please get in touch with our lawyers at**

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