

## Cross Leases and Consent to Alterations: What "Reasonableness" Really Means

Liow v Martelli [2026] NZCA 101

**Cross lease properties often give rise to disputes when one owner wants to alter their home and neighbour consent is required. A recent Court of Appeal decision has clarified how the “reasonableness” should be assessed, confirming that consent decisions must be practical, balanced and context-specific.**

### Cross leases – a reminder

Cross leases are one of the most common, and most frequently misunderstood, forms of residential property ownership in New Zealand. It is estimated that there are over 200,000 cross lease titles nationwide, with nearly half located in Auckland alone.

In simple terms, a cross lease involves two layers of ownership:

- each owner holds an undivided share in the underlying freehold land; and
- each owner also leases their individual dwelling from all other owners under a long term lease, typically for 999 years.

The footprint of each dwelling, and any exclusive use areas, are shown on a registered flats plan which forms part of the legal title. That plan is not just illustrative. It is legally binding. What exists on the ground is expected to match what appears on the plan.

Most cross leases include a covenant restricting structural alterations or additions unless the consent of all lessors is obtained. Importantly, that consent is usually not permitted to be unreasonably withheld. This

means neighbours cannot refuse consent simply to prevent change or preserve things as they are.

Whether consent is reasonably withheld depends on the circumstances, including the impact of the proposed works on neighbouring owners and the overall context of the development. Altering a cross lease property without neighbour consent, or without updating the flats plan, can render the title defective, which in turn can affect saleability, lending, and insurance.

### The former approach: *Smallfield v Brown* (1991) 2 NZ ConvC 191

For many years, the leading authority on cross lease consent disputes was *Smallfield v Brown*. In that case, the High Court suggested that consent could be unreasonably withheld only where the benefit to the owner seeking the alteration was substantial and the detriment to the neighbour was “trifling”.

Although this comment was made in passing, it was often treated as setting a threshold test. In practice, the *Smallfield* approach tended to favour preservation of the status quo and made it difficult to challenge refusals of consent where proposed works had more than minor impacts.

### *Martelli v Liow* [2024] NZHC 968

The dispute in *Martelli v Liow* arose between neighbouring owners in a cross lease development. The respondents had previously carried out alterations to their own property. The appellants later sought consent to undertake substantial alterations to their dwelling, including extending the house closer to the boundary, adding a pool and decking, and reconfiguring outdoor living areas.

The neighbouring owners refused consent. The dispute was referred to arbitration, where the arbitrator applied the *Smallfield v Brown* approach and concluded that, because the proposed works would cause more than trifling detriment to the neighbours, consent could reasonably be withheld.

## Cross Leases and Consent to Alterations: What “Reasonableness” Really Means (Continued)

On appeal, the High Court held that this approach was wrong. The Court found that the alterations covenant in a cross lease is a contractual provision and should be interpreted according to ordinary principles of contractual interpretation. Reasonableness required a two-stage inquiry:

- identifying the actual reasons for withholding consent; and
- assessing objectively whether those reasons provided reasonable grounds for refusal.

The High Court concluded that the *Smallfield* “trifling detriment” test was not part of the lease and should not be treated as determinative. The High Court held that the arbitrator had applied the wrong legal test by relying on the *Smallfield* “trifling detriment” approach. The neighbouring owners, the Martellis, who had refused consent to the proposed works, appealed that decision to the Court of Appeal.

### ***Liow v Martelli* [2026] NCZA 101**

The Court of Appeal agreed with the High Court and confirmed that the *Smallfield v Brown* approach was wrong in law. It rejected any rigid or threshold test requiring detriment to be minimal before consent can be unreasonably withheld.

The Court held that the correct question is whether a reasonable lessor, acting jointly and having regard to the interests of all cross lease owners and the context of the development, could withhold consent. This is a fact specific assessment and should not be constrained by fixed rules.

In reaching that conclusion, the Court emphasised the long term nature of cross leases, which are often granted for very long durations. It is unrealistic to interpret them as preserving buildings in their original configuration indefinitely. Alterations, upgrades and redevelopment will often be desirable and, at times, necessary as planning rules, building standards and living patterns change.

Whether consent can reasonably be withheld must therefore be assessed flexibly, taking into account factors such as use and enjoyment, privacy, value and future development potential, rather than focusing narrowly on whether detriment is trivial.

The Court of Appeal dismissed the appeal, agreeing that the arbitrator had applied the wrong legal test, and directed that the dispute be reconsidered by the arbitrator using the correct approach to reasonableness.

### **Key Takeaways**

- No rigid test applies. Consent under a cross lease may be reasonably refused, but reasonableness is not confined to cases of trivial or minimal impact.
- The focus is on joint decision making. The correct perspective is that of a reasonable lessor acting jointly, not the views of an individual owner in isolation.
- Cross leases must accommodate change. Courts recognise that long term shared ownership arrangements must allow for alterations and redevelopment over time.
- Context matters. Reasonableness will depend on the specific circumstances, including impacts on use, enjoyment, privacy, value and future development potential.
- Early advice reduces risk. Alteration proposals and refusals should be approached carefully, as assumptions about consent can quickly lead to delays, disputes and cost.

### **Want to know more?**

If you have any questions about cross leases, please contact our specialist [Residential Property team](#).