

Can Your Neighbour Really Say No?

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A New Approach to Structural Alterations of Cross-Lease Flats

While freehold land remains the most common and preferred type of title in New Zealand, cross-lease titles continue to be prevalent in many of our major cities in the wake of the strict development restrictions imposed by the now repealed *Municipal Corporations Act 1954*.

A cross-lease title is made up of:

1. an ownership interest in an undivided share of the underlying freehold land; and
2. a lease over part of that land for a home (commonly referred to as a flat), and sometimes an exclusive use area, typically for a term of 999 years.

The other parties to the cross-lease arrangement, known as lessees, hold equivalent interests, meaning they also have a share in the underlying freehold land and a lease (normally on identical terms) over the remaining portions of the land.

Due to the shared interests associated with cross-lease titles, a common issue for cross-lease owners is the requirement to obtain consent from the other lessees before undertaking any structural alterations to the flat. Most cross-lease terms contain a provision to the effect that structural alterations must not be carried out without the consent of the other lessees, with such consent not to be unreasonably withheld.

In a recent Court of Appeal decision in *Liow v Martelli* [2026] NZCA 101, the Court reviewed the law relating to the withholding of consent for structural alterations and when such withholding will be considered reasonable. Given the existence of arbitration provisions in most cross-lease terms, and the cost-benefit considerations associated with litigation, decisions of this nature are relatively rare, with the previous test for reasonably withholding consent dating back to the case of *Smallfield v Brown* (1992) 2 NZ ConvC 191,110.

This test involved a factual assessment of whether the proposed alterations would cause a “more than trifling detriment” to the affected lessee. This set a relatively low threshold for reasonableness and did not take into account the benefit to the party seeking to carry out the alterations.

In *Liow v Martelli* [2026] NZCA 101 the Court of Appeal, upheld an earlier High Court decision which concluded that the existing approach was outdated, had been misinterpreted, and was not intended to be the determinative test for withholding consent. The Court of Appeal concluded:

“Whether the lessors, acting reasonably, can withhold consent in a particular case is ultimately a question of fact. It can be approached by asking whether a reasonable lessor, having regard to the interests of all the lessees and the context of the cross-lease, could withhold consent…”

This judgement represents a shift in favour of enabling reasonable development of cross-lease properties. It recognises that decisions must be made jointly by lessees and acknowledges the practical need for cross-lease properties to evolve over the course of their 999-year term. Consent can still be withheld by a lessee, however whether it is reasonable to withhold consent must be assessed against the facts of the case and what a reasonable lessor would do.

If you are considering renovations to an existing cross-lease property or are looking to purchase a cross-lease title with future development in mind, get in touch with our team to discuss how this change may affect you.

UPDATE:

The applicants subsequently applied for leave to appeal to the Supreme Court, arguing that the test in *Smallfield* had been relied upon for more than 30 years and that the Court of Appeal was wrong to overturn it. The applicants also argued that the appeal was of significant public importance given the large number of cross-lease properties in New Zealand. The Supreme Court dismissed the application for leave, finding that whether consent has been unreasonably withheld is ultimately a question of fact rather than one governed by rigid rules as was the approach adopted by the Court of Appeal.