IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA133/2023
[2024] NZCA 292

BETWEEN	WARREN AUSTIN TURNER, LINDA CHRISTINE TURNER AND GEOFFREY MALCOLM BILKEY Appellants
AND	KELVIN GLEN GOLDSBURY, CHRISTINE JOY NIGHTINGALE AND ONEHUNGA TRUSTEE COMPANY LIMITED First Respondents
	CCCK INVESTMENTS LIMITED Second Respondent

Hearing:	5 October 2023
Court:	Mallon, Churchman and Osborne JJ
Counsel:	S A Keall and S F Gazley for Appellants S J Ryan for Respondents
Judgment:	3 July 2024 at 4 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal is allowed. The High Court decision is set aside.

C The costs order in the High Court is set aside.

D The case is remitted back to the High Court for determination of the appropriate order for the division of the property and to reassess costs in light of this judgment.

E The respondents must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements.

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REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The appellants (the Turners), the respondents (referred to as the Goldsburys) and the Wardlaws are the owners of property that is subject to a cross-lease. The Turners' dwelling is in a poor state and the Turners wish to demolish it and replace it with a new build. Under the terms of the cross-lease they need the consent of the Goldsburys. That consent may not be unreasonably withheld.

[2] Although the Turners obtained consent from the Wardlaws, they have been unable to obtain the Goldsburys' consent to their plans. The Turners twice took the matter to arbitration without success. Essentially the Goldsburys considered that the Turners were obliged to maintain their house rather than demolish it and rebuild. And, if they were to rebuild, the Goldsburys say it would need to have the same, or very close to the same, footprint as the existing house and the same roof height and profile, even though it will be necessary for the floor of the house to be raised to deal with the risk of flooding.

[3] Neighbourly relations reached such a low point that the Turners felt unable to deal with the Goldsburys at all. This led to the Turners applying to the Court for a partition order in respect of the cross-lease under s 339 of the Property Law Act 2007. The application was dismissed by Edwards J in the High Court.[1] The Turners now appeal to this Court.[2]

The evidence

The property

[4] The layout of the four dwellings on the property is shown in the photograph below:

[5] The Turners own the dwelling marked with a red X in the above photograph (flat one).[3] The Goldsburys (Mr Goldsbury and Ms Nightingale) own and live in the dwelling numbered two (flat two) and their investment company (the second respondent) owns the dwelling numbered three (flat three). The Wardlaws own and live in the dwelling marked four (flat four).

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1 *Turner v Goldsbury* [2023] NZHC 179 [judgment under appeal].

2 The Wardlaws were applicants in the High Court but did not join the appeal. Although counsel for the Turners informally indicated the Wardlaws' support, they were not named in the notice of appeal and did not formally communicate with the Court. However Mr Wardlaw, who was 81 in September 2023, did provide an affidavit on appeal explaining his difficulties with obtaining consent from the Goldsburys for the installation of a lift. The application to adduce this evidence is discussed below at [91]–[92].

3 Each "owner" in a cross-lease holds a proportionate undivided share in the fee simple as a tenant in common (with the other "owners") as well as an estate of leasehold in their own dwelling. See generally: DW McMorland and others *Hinde, McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [14.086]. For present purposes it is sufficient to refer to the parties as owners of their respective dwellings.

[6] The cross-lease was created in 1995.[4] Prior to this, there was a wooden dwelling built in the 1920s at the rear of the section. In the 1980s the wooden dwelling was relocated to the front of the site and a new brick understorey was constructed. Flats two, three and four were built shortly after the creation of the cross-lease. Those three dwellings are free-standing townhouses, each in the same style, and were built with monolithic cladding.

[7] Mr Goldsbury purchased flat two in 1997.[5] The Goldsburys' investment company purchased flat three in 2005. Flat four was purchased by the Wardlaws in 2017 after it had been reclad by its prior owner. Flat one was purchased by the Turners in 2012. The Turners purchased flat one with a view to demolishing it and replacing it with a more modern property.

[8] The following photograph shows flat one in the foreground, with flat three at the back middle of the driveway and flat two (partially visible) at the back and to the left. Flat four is not visible as it is located immediately behind flat one:

4 The lease is dated 20 October 1995 and was registered on 25 October 1995 although the individual leases commenced later.

5 At the time of purchase he had not yet met Ms Nightingale, who later took an interest in the flat.

[9] The view standing on the balcony of flat three is shown in the following photo:

[10] The view sitting on a deck chair on the balcony of flat two is shown in the following photo:

Cross-lease terms

[11] Pursuant to the cross-lease, and except with the written consent of the lessors, a lessee's right to use and enjoy the property is restricted to their flat, the restricted area relating to the flat, and the common area for the purposes of access only (cl 10). Lessees are required to keep and maintain in good order, condition and repair the interior and exterior of their flat (cl 6). If a flat is destroyed or damaged, the lessee is required with all reasonable dispatch to repair and make good that damage or destruction (cl 19).

[12] Most relevantly for present purposes, cl 9 provides:

> **9. NOT TO MAKE ANY STRUCTRUAL ALTERATIONS OR ADDITIONS TO THE FLAT**
>
> (a) Not to erect on any part of the land any building, structure or fence, nor to alter, add to or extend any existing building on the land without the prior written consent of the Lessors. Such consent shall not be unreasonably or arbitrarily withheld.
>
> (b) If any addition or alteration proposed by the Lessee shall have the effect of altering the external dimensions of the flat, the Lessee shall upon receiving the Lessors' consent prepare and have deposited in the Land Transfer Office at the Lessee's own cost a flat plan of the alterations or additions and upon deposit of the plan, surrender this lease and execute a new lease in substitution therefore. The Lessors shall at the Lessee's cost execute such surrender of lease and the new lease in substitution therefore and the Lessee shall thereupon forthwith register the same. The cost of obtaining necessary mortgagees' consents shall be borne by the Lessee.

[13] Clause 26 provides that disputes are to be referred to arbitration before two or more arbitrators and their umpire where the dispute relates to:

> (a) the lease;
>
> (b) any clause or thing contained or implied in it;
>
> (c) the construction of the lease;
>
> (d) the duties or liabilities of any party in connection with the land, or the flat, or any other buildings on the land; or
>
> (e) the use or occupation of the land, or the flat, or any other buildings on the land.

[14] Clause 27 provides a written notice procedure if a lessee or lessor requires any matter or thing to be done by the lessors for the efficient and harmonious administration of the land, a flat or any other buildings on the land. In the absence of a unanimous decision, the matter is to be referred to arbitration.

Current state of Turners' property

[15] Ms Turner's evidence was that they wish to demolish flat one and replace it with a modern building because of the run-down state of the upper part of the house and the risk of flooding in the downstairs area. The risk of flooding was identified when they bought the property. The risk arises with a king tide and a storm surge. In January 2018, they twice had water up to knee-height.

[16] Ms Turner's evidence was supported by Mr Kohler, the architect instructed by the Turners. He described the present state of the property as "virtually condemnable" and that it was "old and past it" and "[m]aintenance [was] not the answer". He would not recommend a repair for the property as building a new house would be considerably cheaper. He was asked about an idea put forward by Mr Goldsbury to fix the risk of flooding by building a wall around the perimeter. Mr Kohler described this as "totally implausible" for a number of reasons.

[17] Mr Goldsbury's evidence on this point was to the effect that maintenance was an obligation under the lease, and the Turners purchased the property knowing of its condition and the risk of flooding. He disputed Ms Turner's evidence that the downstairs area flooded twice and that the flood level was up to knee-height based on his observations of the water line mark. He told Mr Turner before he purchased the property that, if he was intending to replace the existing dwelling, he might instead consider a freehold property that was for sale (at a higher price) on the same street.

The plans

[18] The first set of plans for discussion with the Turners' neighbours was prepared by Mr Kohler in December 2017. They were provided by the Turners to the Goldsburys and the Wardlaws for their consideration under cover of a letter dated 7 December 2017. By 14 February 2018, the Wardlaws had consented but the Goldsburys had not. The Turners' solicitors wrote to them asking for their consent, failing which there would need to be an arbitration.

[19] An initial response from the Goldsburys to the 14 February 2018 letter was to note on the letter that no resource or building consent applications had been filed with

Auckland Council. The Turners' solicitors advised on 16 February 2018 that this documentation had been prepared and was ready for filing pending the receipt of the Goldsburys' consent to the plans. On 5 April 2018 the solicitors for the Goldsburys advised that they did not consent to the current plans. They further advised that:

> … they would be favourably inclined to a proposal that complies with the permitted activity standards in the operative unitary plan. This would require a reduction in the height and bulk of the proposed building.

[20] Mr Kohler's evidence was that, at this time, the Auckland Unitary Plan (the AUP) height to boundary rule was under appeal. This meant that the plan he prepared had to be compliant with both the old rule and the under-appeal AUP rule. In about April 2018 the situation was resolved so that the AUP height to boundary rule became the only operative rule and Mr Kohler reworked the plans to ensure the design was fully compliant with that rule. This resolved both height and boundary issues, with the plan now in compliance, but at a cost to the design in that the ceiling heights of the building were reduced.

[21] By email communication dated 5 June 2018 the Turners' solicitors provided these reworked plans to the solicitors for the Goldsburys. On 30 July 2018 the Goldsburys' solicitors replied advising that the Goldsburys did not consent to the plans. The reasons given were:

(a) The plans were not an "alteration" under the terms of the cross-lease.

(b) The plans reduced the overall remaining available site coverage under the AUP for flats two, three and four. They calculated that the remaining available site coverage reduced from approximately 8 per cent to 4.85 per cent for the rear flats and that this would affect future development opportunities.

(c) Raising the floor level because the land was located within a flood prone area affected the bulk of the proposal and had other potential effects.

[22] The matter proceeded to arbitration with the substantive award issued on 4 March 2019. The Goldsburys had called expert evidence from an experienced property lawyer whose opinion was that, unless a dwelling was destroyed under cl 19 of the cross-lease, there was no right to demolish and rebuild a dwelling as cl 9 was concerned with alterations and additions. The arbitrator doubted the correctness of the argument that there was no right to demolish and reinstate whatsoever. His preferred approach was that cl 9(a) applied.

[23] As to the correct approach to cl 9(a), the arbitrator relied on the reasons of Fisher J in the case of *Smallfield v Brown*.[6] The key components of the arbitrator's decision as to this are as follows:[7]

> [52] The leading case is *Smallfield v Brown*. In dealing with the test for withholding consent, the High Court held:
>
> > *" ...* [This] *involves a comparison between the interests of both parties* [and] *... a consent will be unreasonably withheld only where the benefit to the parties seeking change will be substantial and the proposed alteration would produce only trifling detriment to the neighbour".*
>
> [53] Understanding the application of that authority is informed by an appreciation of the facts. There, the flat owner had wanted consent to add French doors and a deck. The alterations if consented would have enabled the flat owner's tenants to overlook the other owners flat and create some intrusion on their privacy. The High Court held the detriment thus arising to be sufficient to justify withholding of consent.
>
> [54] What emerges is that, when it comes to balancing benefit to an owner who proposes to make changes as against detriment to an owner who does not wish to see them made, in practical terms the balance does fall significantly in favour of the owner whose consent is sought. That reflects the reality that, when buying a cross lease title, it is important to most purchasers that there will not be changes to the other structures on the shared land (of which they will own an undivided share) that might affect the buildings in respect of which they will have exclusive use. Were it otherwise, cross-lease ownership would be unattractive. When a party buys a cross-lease title, they are not buying the same bundle of rights that apply to fee simple estates; amongst other things, they are not buying a right to redevelop the buildings they will occupy subject only to applicable planning restrictions. They buy the interest knowing that any such plans will require consent of their co-owners (just as they know that their co-owners will not be able to alter or redevelop the buildings they occupy without their consent).

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6 *Smallfield v Brown* (1992) 2 NZ ConvC 191,110 (HC).

7 Footnotes omitted.

[55] I can see that the structure which the claimants wish to build would be of substantial benefit to them. As the Kohler plans show, there will be a much larger floor area in the dwelling, and the issues of salt water inundation will be resolved. The building when completed would obviously be more valuable than the old and somewhat dilapidated structure that exists at present. There may well also be advantages in the reorientation of internal spaces, for example in that the kitchen would no longer be visible to people in the other flats and/or on the common areas.

[56] At the same time, I have no hesitation finding that the Kohler building would give rise to detriments to the respondents which are significantly more than 'trifling'.

[57] Specifically:

[a] the Kohler building would significantly and negatively impact the sight lines from flat 3 in particular, and also (although to a lesser extent) … from flat 2. Some sense of this is conveyed by the artist's impressions appended to this partial award;

[b] the proposal to increase the height of the structure by a metre is material;

[c] perhaps most importantly, I think the respondents are right to say that carrying that maximum height throughout the length of the structure (and the other alterations to the structure) will significantly increase the bulk of flat 1. It will be a more imposing structure than is the present;

[d] I understand the debate as to whether or not one should include the driveway in assessing 'net site area' but, however measured, I agree with the respondents that if the claimants are allowed to increase the footprint of flat 1 as they propose, that will necessarily have the effect of reducing the available site area should other flat owners wish to make alterations to their flats in due course. There is no particular reason why they should have to accept that the owners of flat 1 should have what Mr Ryan aptly called a 'first mover' advantage in that respect;

[e] the way in which the Kohler building has been designed to deal with inundation is to raise the floor level. Mr Kohler accepted in his evidence that for the most part the height given to the raised floor area has to be allowed for within the overall permitted height of the structure. Even so, the net result is to raise the building level by nearly a metre and, as I have said, I do not think that is a trifling or insubstantial impact as far as the respondents are concerned;

[f] there is no doubt that the Kohler plan involves altering the existing structure by altering and increasing its footprint. If there were nothing more to it than that, and the increased size was not apparent to the other flat owners, perhaps it would be unreasonable to withhold consent. However (as explained above) there is considerably more to this case than that. Not only will the additional footprint area add to the bulk of the building, but there is also the aspect of site coverage

dealt with above. In this respect I accept Ms Pidgeon's evidence on the point;

[g] The respondents have complained that if the building work was to proceed, they will be confronted with a long period of obstruction to the common driveway because of construction vehicles coming and going, and these and other construction effects could last over a year. In my view, construction effects are not usually of themselves a sufficient reason for an owner to withhold consent, but the situation is not so clear cut here. That is because the demolition and rebuilding of flat 1 according to the Kohler plans will be a substantial project. I accept that there will be considerable disruption to the access to and from flats 2, 3 and 4. I also accept that, because of the scale of the project, the works will likely last longer than if this were, say, simply the alteration of a smaller area, or replacement of roofing and/or cladding. While I would not have regarded the objection on grounds of construction effects as being sufficient on its own to justify withholding consent I accept that, when taken in combination with the other matters in this case, it is a factor which operates in favour of the respondent's position.

[58] The combination of the considerations listed above leaves me in no doubt that the claimants' refusal to consent to the Kohler plans is neither unreasonable nor arbitrary.

[24] The artist's impressions referred to at [57[a]] of the award were as follows:

ARTISTS IMPRESSION

ARTISTS IMPRESSION

[25] The first impression is the view of the rear of the proposed new dwelling. The second impression is the view of the rear of the existing dwelling.

[26] The Turners, having lost at arbitration, were ordered to pay costs to the Goldsburys of $33,300, plus an additional amount to reimburse further costs of the Goldsburys in uplifting the award. These costs were additional to their own costs in bringing the arbitration. The arbitrator had not ruled on whether they could demolish the house and build a replacement property, nor whether they could use a share of the remaining site coverage and, if so, what share. The award simply ruled that the Goldsburys' refusal to consent to the proposal at that time was neither unreasonable nor arbitrary.

[27] As a result, Mr Kohler advised the Turners that he was not able to say whether any fresh design could stray outside the existing envelope or whether the Turners had the right to any amount of the "spare" coverage area on the site. He considered it would have been a total waste of money to prepare a new design without these ground rules. He considered he needed clear guidance about this from the arbitrator "to avoid a creeping death [by] litigation as the Turners inched forward to getting some final plans approved by their neighbours". At this point, 16 months had gone by since the Turners had first raised their plans with the Goldsburys and they were still living in, as Ms Turner described it, a substandard home.

[28] The Turners' solicitors emailed the solicitors acting for the Goldsburys on 4 June 2019 seeking agreement on the two issues that would have provided Mr Kohler with the information he needed to prepare further plans. The email invited the Goldsburys' acceptance that the cross-lease did not prohibit a demolition and rebuild and proposed that they agree a formula for the respective availability amongst the lessors for the available site coverage. The email noted that the available site coverage was 40 per cent of 1,542 m^2 and that, as the total dwellings used 456.8 m^2, this left 160 m^2 "free". The email proposed that the right to use the available site coverage could be agreed amongst the lessors on the basis of the proportion of exclusive use areas, the proportion of existing site coverage, or some other rational basis. A response was invited within two weeks.

[29] By letter dated 28 June 2019, the Goldsburys' solicitors replied. They advised they were not in a position to agree that demolition and rebuilding was permitted under the cross-lease in view of the legal expert evidence they had adduced at the arbitration that this was usually not permitted and because the arbitrator had not had to determine the matter. They disagreed that the common driveway was part of the common area. They advised that it was difficult to agree a formula for use of the available site coverage in the abstract without a new proposal. They noted that, if the rebuild were limited to the existing flat one plan, there would be no need to consider any encroachment into available site coverage. They advised that any proposal for a departure from the existing footprint of the flat would need to be trifling. They also proposed mediation as a way forward.

[30] By letter forwarded on 1 July 2019 the Turners' solicitors repeated the request for confirmation that the Turners could demolish and rebuild and for agreement on how the site coverage might be proportioned failing which the Turners advised the matter would proceed to arbitration. On 12 July 2019 the Goldsburys' solicitors responded by reiterating that the Goldsburys would need to see a fresh (scaled down) proposal with plans or a software model to be able to visualise what was proposed.

[31] In the absence of agreement, the matter again proceeded to arbitration before the same arbitrator. The issues formulated by the Turners, as paraphrased by the arbitrator, were:[8]

> [a] does clause 9(a) allow a lessee to demolish and rebuild where the building is decrepit (with a related sub-issue as to the cause of the decrepitude)?
>
> [b] are the claimants entitled to rebuild outside the existing footprint of the flats plan?
>
> [c] if the claimants are able to build outside the existing footprint of the flats plan, how much of the available site coverage may they use (subject to the co-owner's consent), and how should available site coverage be allocated between the co-owners?

[32] On the first issue, the arbitrator determined that, under cl 19 of the cross-lease, there was a right to demolish the dwelling and rebuild if the dwelling was no longer

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8 Footnote omitted.

habitable but that was not the position here. The arbitrator further found that, under cl 9, the dwelling could be demolished and rebuilt only with the consent of the lessors, and that such consent could not be withheld unreasonably or arbitrarily.

[33] The arbitrator further found that, because the dwelling was not uninhabitable, it would be difficult to say that a refusal to allow a demolition and rebuild was necessarily unreasonable. More importantly, however, was that the Turners wished to do more than rebuild the dwelling because they wished to extend its existing footprint. The arbitrator agreed with the Goldsburys that it was not possible to say what would or would not be an unreasonable refusal of consent without seeing what was proposed. The arbitrator understood that the Turners were reluctant to incur the costs of having plans redrawn only to have the Goldsburys refuse consent again. However, that was what was required in order to obtain consent.

[34] On the second issue, the arbitrator noted that the Turners' argument assumed that it was necessarily unreasonable for the lessors to insist that any new structure be limited to the footprint of the existing building. The arbitrator disagreed with this position. He considered that it depended on the detail of what was proposed. He noted that it was relevant to any assessment of what was unreasonable that all owners were to be taken as understanding when they purchased their property that any change to their dwelling would require consent.

[35] The arbitrator went on to say:[9]

> [51] I can see (for example) that extending the footprint on the southern sides of the existing flat 1 might not intrude on the other exclusive use areas so negatively, with a possibility that refusal to an extension in those directions might be more susceptible to a finding of unreasonableness. But if the proposal is to extend the structure towards the driveway, or nearer to flat 2, then it might well be harder to categorise refusal of consent as unreasonable. The point is that neither the respondents or I know presently how much extra site area the claimants want to accrue, where, or what they want to build on it.
>
> [52] I decline to make any order to the effect that, in any allocation of site areas as amongst the co-owners, the area of the common driveway should be regarded as being available for calculating the total available site coverage. I do not agree with the implicit assumption that any refusal of consent to building outside the existing footprint

9 Footnotes omitted.

must be unreasonable; and I certainly do not think it appropriate to proceed on the footing that co-owners have any implicit right to expect to be able to accrue any part of the available site coverage in planning their alterations.

[53] If the claimants want to extend the footprint of flat 1, at a bare minimum they are going to have to start by producing at least a concept plan showing what they intend to do. That is the necessary starting point for any discussion as to whether it might be unreasonable for the respondents to refuse consent. Without it, the discussion has no focus.

[36] The arbitrator regarded the third issue as hypothetical. This was because it assumed that the Turners had a right to a consent to a proposal that extended the footprint of flat one when they had no such right.

[37] The arbitrator went on to make the following comments by way of a concluding note:

[60] It troubles me that the claimants obviously feel they have no choice but to look for solutions by third-party decision, when the pragmatic way to resolve the differences between these parties is by discussion and negotiation. That is what clause 9(a) intends. And, whether the claimants like it or not, the fact is that they are going to have to sufficiently identify what they are looking to have consent for, before they can expect the respondents to assess and respond.

[61] I think it is unfortunate that they have come back to arbitration, without a new plan, but with an expectation that an arbitrator will pre-emptively 'force' consent on the co-owners to things like building beyond the existing footprint, and using site coverage areas. In my view, the respondents are plainly entitled to know what the claimants are proposing. I doubt that they need plans at the building consent level of detail (or even at resource consent level of detail), but they do need to know what the shape and dimensions of the proposed new structure is, and what its appearance will be. Without that kind of information, no-one can realistically expect them to agree (much less find that refusal to agree is unreasonable).

[62] If that means that the claimants will have to incur costs to prepare drawings and provide the information, I think that is simply a function of the cross-lease terms that they agreed to when they bought the property, and by which all of the co-owners are bound. It is no less than the claimants would expect if the situation were reversed, and it was the respondents who were looking for consent to alterations to their flats.

[63] I understand that relations between the parties are difficult. At the same time, I cannot imagine that the respondents really want to see a decrepit flat in front of theirs, much less one that floods on some king tides. That cannot be good for the values of any of the flats in the

> cross-lease. Furthermore, there will come a time when the respondents (or their successors in title) will want to do work to their flats. They might be unwise to approach discussion on the basis that refusal to anything the claimants propose is in their long-term interests either.
>
> [64] I can only deal with the issues as they are presented to me. But I urge the parties to put their past differences behind them, to make an effort (both ways) to accommodate the interests of the other side, and to try to resolve matters by negotiation.
>
> [65] A mediator might well be able to assist.

[38] We were not told whether the parties took up the arbitrator's suggestion of a mediation. However, the Turners did instruct Mr Kohler to prepare new plans. By letter dated 18 August 2020 they enclosed the updated plans and asked the Goldsburys for consent or to respond with any questions or feedback. The response was made by letter of the same date. The Goldsburys advised:

> The plans received are a minor variation of the originals.
>
> They show a redesign not a replacement and the proposed dwelling is too big.
>
> I fail to see which issues have been addressed from [the arbitrator's] award/s. Could you please explain.
>
> In addition, you are required to do maintenance under clause 6a of the lease. Could you please attend to this.

[39] The Turners responded by letter dated 31 August 2020. The letter set out the changes from the previous plan to the present one: a reduction in total building coverage of 15.45 m^2; with a reduced coverage for the ground and the upper floors of 18.56 m^2 and 26.62 m^2 respectively; reduced coverage of the verandah and deck of 5.54 m^2; and a reduced building height of 0.85 m. The letter explained how the Turners had attempted to address the Goldsburys' concerns as follows:

> - On the site plan page of the plans already provided to you, you will see a table which details the reductions in the size and height of the house. For ease of reference, these are copied below:

Specifications	1st Proposed Plan	2nd Proposed Plan	Reduction of
Total Building Coverage	226.55 m2	211.10 m2	15.45 m2
GFA Ground Floor	182.28 m2	163.72 m2	18.56 m2
GFA Upper Floor	178.81 m2	152.19 m2	26.62 m2
Veranda & Deck (Upper & Lower)	74.39 m2	68.85 m2	5.54 m2
Building Height	9.95 m	9.1 m	0.85 m

- We have put a lot of effort in to address your concerns and have reduced both the height and size of the proposed house.

- Mr Hindle stated in his partial award dated 27 February 2019, "the proposal to increase the height of the structure by a metre, is material". The 2nd Proposed Plan reduces the height by 0.850m. The proposed new roof height is a trifling 0.09m above the current Flat 1 ridgeline.

- The proposed house building line steps back from the driveway 3.475m from the current house. The current Flat 1 building line is a solid, straight up two story on the driveway boundary to the roof. In the proposed plan there is a walkway up the side of the house with a safety wall between the walkway and the driveway to protect pedestrians. This wall is not full height and will provide Unit 3 with improved views down the driveway directly to the beach.

- The proposed kitchen is forward facing towards the beach, giving increased privacy to all 4 Units, ie Units 2 3 & 4 balcony decks would no longer face into the kitchen of Flat 1, and vice versa.

- The first floor deck to the rear of 1st proposed plan has been removed.

- The stud height has been reduced to 2.4m.

- The master bedroom at the rear of level 2 is no longer the full width above the garage, thus reducing bulk at the rear of the house.

- The size of the garage and the rumpus room have also been reduced.

…

- <u>Footprint size and shape</u>. The footprint of the existing Flat 1 is 182^2m. The 2nd Proposed Plan has a footprint size of 211.1^2m. However this larger footprint calculation includes a 17.70^2m ground floor deck in the front of the property. This deck has absolutely no impact on Units 2, 3 or 4. Without this deck the footprint of the actual house would be 193.4^2m. As noted in the above table, Proposed Plan 2 footprint has already been reduced from Proposed Plan 1 footprint by 15.45^2m. The proposed house footprint is a different shape to the current Flat 1. It is longer and narrower to best utilise the site and also provide a wider view down the driveway, as already mentioned above.

[40] The following shows the comparison between what was originally proposed at the time of the first arbitration and the August 2020 proposal:

ORIGINAL PROPOSAL

CURRENT PROPOSAL

EXISITNG DWELLING

DATE - 01.08.2020

IAN KOHLER ARCHITECT. © 2017
PO BOX - 28718, REMUERA 1541
M - 021 715 805
E - ik@ianchitect.com

[41] The response from the Goldsburys was given the same day. It simply stated: "[Mr Goldsbury] and I are happy to assess plans for a replacement dwelling and look forward to receiving these." There appears to have been another communication on behalf of the Turners in September 2020 but we do not have a copy of that in the case on appeal. By letter dated 23 September 2020, the response from the Goldsburys was simply: "Maintenance is the cheapest option which you are required to do under clause 6a of the lease."

[42] The statement of claim seeking an order for division of the property was filed in February 2021.

Reasons for court proceeding

[43] In her evidence in support of the High Court application, Ms Turner described being "stranded in a legal nightmare" after the second interim award. At that stage "[a]nother year had gone by" and they "still knew no more" and "were at the mercy of the Goldsburys". They could not be sure that, if they presented further plans of a dwelling, whether this would be opposed on the basis that it was a demolition and rebuild as they had failed to get a definite answer on that from the two arbitrations. Nor could they be sure whether a build outside the envelope of flat one was

non-negotiable or, if it could occur, whether it would exceed a "reasonable" area of coverage.

[44] Ms Turner said that they decided to give it "a last shot" with the plans they sent on 18 August 2020. They made no progress because the Goldsburys advised that any new dwelling had to be within flat one's existing envelope and, in any event, a lack of maintenance of flat one deprived them of the right to build a new dwelling. Ms Turner considered that the Goldsburys had refused to engage with the Turners in any meaningful way and that they appeared not to like them and to enjoy being difficult. Ms Turner found herself unable to deal with the Goldsburys.

[45] Examples Ms Turner gave of the difficulties she experienced in dealing with the Goldsburys were:

(a) In August 2017 the Goldsburys refused to supply written consent for the installation of an internet fibre cable. In September 2017, when the law had changed so as not to require written permission to install fibre cable, the Goldsburys abused the installers and this led to the installation being delayed by five months. Shortly after the installers had left, Ms Nightingale started a fight with Mr Turner, with Mr Goldsbury and their son also involved.

(b) Ms Nightingale had screamed at her on various occasions:

(i) Ms Nightingale threw rubbish onto Ms Turner's property and, when Ms Turner caught her doing so, Ms Nightingale "screamed into [Ms Turner's] face" and said she was "glad" that Ms Turner had seen her throwing the rubbish.

(ii) In November 2017 Ms Nightingale repositioned the Turners' rubbish bin so that the truck would be unable to empty it and when Ms Turner confronted Ms Nightingale, she "screamed" at Ms Turner that she was "mad".

(iii) At Easter 2018 Ms Nightingale "screamed" out the window of her vehicle that Ms Turner was a "cow".

(iv) In September 2020 Ms Nightingale "screamed" at Ms Turner: "Fuck, you're a dumb bitch."

(v) On 2 January 2021, when Ms Turner took a photo of a fence that the Goldsburys were building without obtaining the lessors' consent, she experienced a long tirade of verbal abuse from Ms Nightingale, who was being aggressive and appeared to be out of control, coming on to the Turners' property, getting closer and closer and yelling abuse and foul language that included that Ms Turner was the "the dumbest fucking bitch she had ever met" and when Ms Turner asked Ms Nightingale to get off her property, Ms Nightingale said that "you don't fucking own it".

(c) In April and May 2021 there was a major water leak between the meter box and the house under the shared driveway. Ms Turner said that they gave all the neighbours notice of the date and time that the work would commence. When the team arrived to start the repairs, Ms Nightingale was shouting that she had not granted permission and they were not to do anything without their permission.

[46] Ms Turner was not cross-examined in the High Court about these difficulties with Ms Nightingale even though they were largely not accepted by the Goldsburys in their evidence. Ms Turner said that they are left "stuck with living in a worn-out house, which [was] susceptible to inundation". She saw no point in trying to reason with the Goldsburys, nor any point in going off and spending money on reworking architectural drawings without any clear understanding of the framework for such a rework. Her experience was that contact with the Goldsburys only ramped up their bad behaviour. She said they were not necessarily now wanting to proceed with the August 2020 plans as they were now five years closer to retirement and may want to downsize. She said that those plans were based on the cross-lease and if they were granted a partition of the site then she understood they might not be able to build that

house anyway. She also said that she regarded it as unreasonable to expect them to replace the house with a single story house when it is currently a two-story house.

Neighbours' difficulties

[47] In support of their application in the High Court, the Turners called evidence from the Wardlaws and the two predecessor owners of flat four as corroboration of the difficulties they had encountered in dealings with the Goldsburys.

[48] Beverley Batten lived at flat four with her partner between May 2010 and July 2016. Her evidence was that the Goldsburys were reasonable neighbours in the beginning, other than sometimes hearing Ms Nightingale using "horrific language" and "screaming" when there were arguments or when Ms Nightingale was telling her two boys off. However, after a couple of years or so, Ms Nightingale "completely changed and started doing nasty things" that made Ms Batten "feel uncomfortable" and it got to the stage where Ms Batten "dreaded having to go out the front of the house in case [Ms Nightingale] was around". She no longer felt "safe in [her] own home" and became so stressed that it affected her mental health and this led to the decision to sell flat four. Ms Batten now lives two doors down.

[49] Matthew Duke's recladding company purchased flat four from Ms Batten and her partner in July 2016. His business carried out the recladding of flat four and then sold it to the Wardlaws in 2017. His evidence was that:

> 3. It was like a nightmare working next door and sharing a cross-lease property with [Ms Nightingale] and [Mr Goldsbury]. I found these people to be totally unreasonable, bitter and twisted and I can honestly say that in all of my years in business I have never come across 2 people so unreasonable and [p]sychotic. From the very beginning of our project it was very clear that [Ms Nightingale] and [Mr Goldsbury] were going to go out of their way to make life difficult for us along with our builders and subcontractors. There was no logical reason for their behaviour, and we had always gone out of our way to run a ship shape worksite that was considerate of all of its neighbours.

[50] Mr Duke went on to refer to an instance where Mr Goldsbury had "randomly" approached him on the driveway and threatened to "smash [his] head in with a

crowbar". He referred to other instances where Ms Nightingale had impeded access to flat four during the recladding work.

[51] Deryck Wardlaw, who purchased flat four from Mr Duke, gave evidence for the Turners. He supported the Turners' application for a division of the property having himself experienced a lack of cooperation from the Goldsburys. He provided examples of this:

(a) When the Wardlaws purchased flat four, there was a "junk boat" parked on the boundary at the front door of flat four. He approached Mr Goldsbury to ask him to move the boat. Mr Goldsbury declined to do so and said it was none of the Wardlaws' business.

(b) In 2018 Mr Wardlaw had a vent installed in the roof. In advance of the installation, he asked Ms Nightingale if the installer could put the foot of his ladder onto their property as there was only a 2.7 m gap between the two properties. Ms Nightingale agreed. However, on the day of the installation, when the builder put the foot of his ladder onto their property (as previously arranged), Ms Nightingale demanded to know why he had done so. Mr Wardlaw reminded Ms Nightingale that he had already sought her permission for this but she remained angry that Mr Wardlaw had not asked her again on that day. Ms Nightingale was unpleasant to Mr Wardlaw and the installer and since that occasion has refused to acknowledge greetings from Mr Wardlaw.

(c) The Goldsburys put a rope across the end of the common property in front of flat three and kept it there until late 2019, apparently to prevent anyone driving on the common land in front of flat three.

(d) When the Wardlaws applied for an internet fibre cable to be installed, the Goldsburys refused consent and banned the installers from the common driveway. The Wardlaws had to wait five months until the law was changed before they could get access to fibre.

(e) Mr Wardlaw had witnessed Ms Nightingale going onto the Turners' property to abuse Ms Turner and the language from Ms Nightingale was "loud, foul and violent". The abuse was because Ms Turner had taken a photo of a new fence that Mr Goldsbury had recently built between flats two and three, which had been built without seeking consent from the other leaseholders.

(f) The Wardlaws wish to add a minor extension to put in a lift shaft so that they can continue to live in the house as they become older and to meet the needs of older and frailer friends and family. The Wardlaws believe that asking consent of the Goldsburys would be an expensive waste of time considering the difficulties that the Turners have had.

[52] Ms Nightingale did not accept most of the above evidence or did not recall it. For his part, Mr Goldsbury accepted he had said to Mr Duke words to the effect of "if this doesn't stop somebody is going to wear a crowbar". He said he should not have said this but at the time Ms Nightingale had been dealing with loud music, swearing (which did not bother her) and the driveway being blocked on a regular basis during the recladding work. He also said that the description of Ms Nightingale from the witnesses did not match the person that he saw and that it had been a difficult year for Ms Nightingale because she had been diagnosed with a health issue that required treatment.

Valuation evidence

[53] The Turners obtained valuation advice dated 31 August 2022 from Warren Priest. Mr Priest produced his advice for the High Court hearing. The advice concluded:

> It is our opinion that the proposal to create four new fee simple titles will be of benefit to all four property owners. This is provided that the proposed dwelling is no higher than the existing (or not significantly so), and that it occupies the footprint shown on the plans, and the existing view shaft is not compromised, especially for Flat 4.

[54] In cross-examination Mr Priest accepted that his premise was that the new dwelling on flat one would be as per the proposed plans, and that it would not obstruct

the view from flats two, three and four any more than the existing dwelling. He also understood that the proposed new dwelling would not be higher than the existing flat and that the new titles would be subject to a covenant to this effect. He also accepted that, although all the lessors under the cross-lease would benefit from having fee simple titles, the Turners would benefit the most.

Planner evidence

[55] In support of their High Court application, the Turners also called evidence from Jonathan Cutler, a planner. He said that under the AUP, the whole of the land including the common area (the driveway) was available for calculating the Council's requirement that no more than 40 per cent of a site be covered by buildings. He also said that, if the cross-lease was converted to fee simple titles, the driveway would be excluded from that calculation.

[56] Mr Cutler also said that proposed planning changes would allow for increased intensification. This would allow increased height to 12 m and at least three dwellings on each of the four sites that made up the cross-lease. He also confirmed that the Council was reviewing its approach to assessment of sea level hazards and that change was coming. This had possible implications for the minimum floor level of the Turners proposed dwelling if there was a proposed plan change notified about this prior to the Turners resource consent application.

Surveyor evidence

[57] The Turners called evidence from Michael Lucas, a surveyor. He produced the scheme plan annexed to the statement of claim which showed the boundary divisions on the cross-lease. He explained that the common area was shown in the scheme plan as lot five and was a jointly owned access lot with each of the current four owners having an undivided one-quarter share.

Goldsburys' response

[58] Mr Goldsbury gave evidence in the High Court that flat one could be protected from water intrusion and refurbished. He confirmed that he and Ms Nightingale

received the amended plans with Mr Turner's letter dated 18 August 2020. The Goldsburys viewed these plans as basically continuing the design that had been rejected at the first arbitration, although with a lower height. On the coverage issue, the Goldsburys' view was that flat one would be treated as its own site.

[59] Mr Goldsbury also explained that, because they had some difficulty visualising the impact of the changes to the plans, they engaged a surveyor to mark up on the plans the outline of the existing flat as well as an outline of the original plans. These mark ups were produced in the High Court. Mr Goldsbury was concerned about the substantial increase in the length of the proposed dwelling relative to the existing flat one, the increased height (because of the flat roof as compared with the existing gable roof) and the substantial boundary fence along the driveway. He said:

> Overall, [we] believe that the size of the proposed building, its increase in bulk and scale, exceeds the size of a reasonable replacement for the existing building on Flat 1. We consider the proposed building is a substantial increase in size over the existing building in Flat 1. It will reduce the "space" around the building, particularly at the rear of the existing building on which we have an outlook.

[60] Mr Goldsbury also referred to construction effects over a year or longer with access and use of the driveway affected during this period. He and Ms Nightingale viewed the cross-lease as having important controls. He said the differences they have with the Turners come from their insistence on a large home. In questions from the High Court Judge, he confirmed that he would not object to the Turners replacing flat one rather than maintaining it, if the new dwelling was single level or was a two storey dwelling of the same height as the existing one (with a gable roof) and that did not have the bulk of the proposed plans (where the Goldsburys would be looking more at a building structure than they presently do).

[61] Ms Nightingale's evidence was to similar effect.

Property Law Act

[62] An order dividing a property among co-owners may be made under s 339 of the Property Law Act. As relevant it provides:

> **339 Court may order division of property**
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> (1) A court may make, in respect of property owned by co-owners, an order—
>
> …
>
> (b) for the division of the property in kind among the co-owners; or
>
> …
>
> (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
>
> …
>
> (d) only after having regard to the matters specified in section 342.
>
> ...
>
> (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
>
> (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).
>
> (6) An order under subsection (1)(b) (and any related order under subsection (4)) may be registered as an instrument under—
>
> (a) the Land Transfer Act 2017; or
>
> ...

[63] The matters specified in s 342 are as follows:

> **342 Relevant considerations**
>
> A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:
>
> (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:

(b) the nature and location of the property:

(c) the number of other co-owners and the extent of their shares:

(d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:

(e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:

(f) any other matters the court considers relevant.

[64] The further orders specified in s 343 are as follows:

343 Further powers of court

A further order referred to in section 339(4) is an order that is made in addition to an order under section 339(1) and that does all or any of the following:

(a) requires the payment of compensation by 1 or more co-owners of the property to 1 or more other co-owners:

(b) fixes a reserve price on any sale of the property:

(c) directs how the expenses of any sale or division of the property are to be borne:

(d) directs how the proceeds of any sale of the property, and any interest on the purchase amount, are to be divided or applied:

(e) allows a co-owner, on a sale of the property, to make an offer for it, on any terms the court considers reasonable concerning—

(i) the non-payment of a deposit; or

(ii) the setting-off or accounting for all or part of the purchase price instead of paying it in cash:

(f) requires the payment by any person of a fair occupation rent for all or any part of the property:

(g) provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under section 339(1).

High Court judgment

[65] The Judge declined to grant the application for division.[10] In doing so, the Judge considered each of the factors set out in s 342 as follows:

(a) Section 342(a) (the extent of the share in the property): This was a neutral factor because two of the four flats were owned by the Goldsburys, who opposed the application, while the Turners and Wardlaws owned the other two flats and supported the application.[11]

(b) Section 342(b) (the nature and location of the property): This weighed against an order for division.[12] This was because the Turners had purchased their flat on the basis of the cross-lease, with the knowledge of the restrictions it contained.[13] The cross-lease provided a mechanism by which disputes between neighbours could be resolved. The Turners triggered those dispute resolution mechanisms but were unsuccessful before the arbitrator. The Turners' application should not be allowed to circumvent that result.[14]

(c) Section 342(c) (the number of other co-owners and the extent of their shares): This was a neutral factor for the same reasons as the first factor.[15]

(d) Section 342(d) (hardship): This factor weighed against an order for division.[16] This was because there was "considerable merit" in the submission for the Goldsburys that the Court should be slow to intervene and to extinguish the rights in the cross-lease to control the impact of changes made to the other flats where the mechanism provided for under the cross-lease was still workable.[17] Here, if the

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10 Judgment under appeal, above n 1.
11 At [29].
12 At [34].
13 At [32].
14 At [33].
15 At [35].
16 At [56].
17 At [38].

Turners considered the Goldsburys were acting unreasonably by withholding consent, then they had the option of referring the dispute to arbitration.[18] Being on the losing side of an arbitration did not provide a reason to bypass the mechanism and partition the land.[19] While some of the Goldsburys' behaviour had been inflammatory, unnecessarily hostile and fell short of the sort of neighbourly behaviour to be expected, most of it had nothing to do with the cross-lease relationship and granting the order would not remove the need to deal with each other as neighbours in relation to the shared driveway.[20]

(e) Section 342(e) (value of any contribution made by any co-owner): This factor held no weight in the overall analysis.[21] The Goldsburys had submitted it was relevant because the Turners had failed to undertake maintenance since purchasing the property in 2012 but the Judge considered she was unable to determine whether the current state of the Turners' flat was due to a failure to maintain.[22] The issue was of only peripheral relevance to the core matters in any event.[23]

(f) Section 342(f) (any other matters): There were no additional matters raised by the parties.[24]

[66] The Judge acknowledged that the efforts to revise plans and secure consent had been "time consuming and costly", that it had been "difficult" at times for "the Turners to understand the Goldsburys' key concerns" and the Turners' frustration was "understandable".[25] However, the Goldsburys had provided a broad outline of their concerns and it remained for the Turners to present a proposal to them and seek their consent.[26] If the Turners believed the Goldsburys were being unreasonable in

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18 At [39].
19 At [39].
20 At [49].
21 At [61].
22 At [59].
23 At [60].
24 At [62].
25 At [42] and [44].
26 At [46].

withholding consent, then it was for the Turners to trigger the arbitration process and seek a determination on the issue.[27]

[67] The Judge distinguished *Minehan v McGuigan* and *Gonsalves v Williams* because there were no other avenues in those cases by which the acrimony could be relieved and they were cases concerned with orders for sale, rather than for partition, which meant that the parties would no longer have to deal with each other following the sales orders.[28] The Judge also distinguished *Del La Varis-Woodcock v Thomaes* on the basis that that situation also did not include a mechanism to relieve the potential flashpoints inherent in co-ownership.[29]

[68] The Judge concluded that the interests of justice did not favour partition.[30] In view of this outcome, the Judge considered it was not necessary to address the Turners' submissions regarding the sharing of expenses of the partition between all parties, nor the Goldsburys' submissions for conditions to be imposed if the Court ordered partition.[31]

Appeal

[69] The parties are agreed that an appeal from a decision under s 339 is a general appeal in respect of which the Court is entitled to take is own view on the evidence and the weight to be accorded to it. We agree. As explained in *Lo v Lo*, the Court is engaged in making an evaluative judgement about the resolution of the differences between the parties having regard to the various factors identified in ss 339 to 343 of the Property Law Act.[32]

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27 At [46].

28 At [50]–[51], referring to *Minehan v McGuigan* [2020] NZHC 1686, (2020) 21 NZCPR 135 and *Gonsalves v Williams* [2014] NZHC 2376.

29 At [52]–[53], referring to *Del La Varis-Woodcock v Thomaes* [2017] NZHC 1041, (2017) 18 NZCPR 686.

30 At [63].

31 At [64].

32 *Lo v Lo* [2021] NZCA 693, (2021) 22 NZCPR 721 at [71]. Compare with *Robertson v Robertson* [2021] NZCA 295, (2021) 22 NZCPR 281 at [22], albeit that decision concerned the High Court Judge's decision to order a sale by public auction rather than whether to make an order at all.

[70] The Turners submit that the Judge made an error in that she appears to have found that the Goldsburys did not receive the plans prepared in August 2020. Specifically, the Judge said:

> [20] Further plans were prepared in August 2020. The Turners say they sought the Goldsburys' consent to these plans. However, the Goldsburys say they have only ever received two sets of plans from the Turners, both designed by Mr Kohler. Their decision to withhold consent is only in respect of the specific plans presented.

[71] We agree with the Goldsburys' submissions that in this passage the Judge was purporting to record the respective positions and was not making a finding about this. However, we disagree with the Goldsburys' submissions that there is no reliable evidence that they received the August 2020 plans. As set out earlier, their letter dated 18 August 2020 stated that the plans were enclosed. The Goldsburys responded by letter of the same day stating that "[t]he plans received are a minor variation of the originals". Their response went on to say that the plans did not respond to the issues accepted in the arbitration, and that it was a redesign not a replacement and the proposed dwelling was too big.

[72] If the Judge misunderstood what plans the Goldsburys had received at this point, it is unclear what impact, if any, this had on the Judge's consideration of the hardship factor. While the August 2020 plans were before the Judge, her decision did not engage with whether it would have been unreasonable for the Goldsburys to refuse to consent to them. The Judge took the view that it was for the Turners to trigger the arbitration process if the Turners believed the Goldsburys had unreasonably withheld consent to them.

[73] The Turners say that the Judge should have considered whether the Goldsburys' concerns were reasonable. They say that, had she done so, it would have led to the conclusion that the Goldsburys had adopted a position of general intransigence. They further say that if they had triggered the arbitration procedure, it would have been open to the arbitrator to find that any replacement dwelling outside the existing footprint was more than a "trifling" detriment. They say they would be left without the information they needed to produce plans where any refusal of consent would be found to be unreasonable.

[74] The "trifling" detriment test originates in the High Court decision in *Smallfield v Brown*.[33] That case concerned a cross-lease with two flats, flat one at the front and flat two at the back. The owners of flat one wished to extend their flat to the rear, and to add a deck and inground swimming pool also to the rear. The Judge said:[34]

> I think that a consent will be unreasonably withheld only where the benefit to the party seeking change will be substantial and the proposed alteration would produce only trifling detriment to the neighbour.

[75] The Judge in *Smallfield v Brown* went on to find that consent was not unreasonably withheld because the alteration would likely result in some loss of privacy, some increased noise and a strong sense of visual intrusion.[35] The Judge considered this constituted a sufficient detriment to outweigh the corresponding benefits to the owners of flat one. Since then, it seems that the test of substantial benefit and trifling detriment has been habitually applied by arbitrators asked to determine if consent has been unreasonable withheld under a cross-lease.[36] It was the test applied by the arbitrator in the present case.[37]

[76] We agree with the Turners that on the basis of this test they could not expect a favourable outcome unless they presented a plan that kept within the existing footprint of flat one. In his award on the first arbitration, the arbitrator disagreed with the proposition that it was necessarily unreasonable for the Goldsburys to insist on this. He also said it was difficult to say that a refusal to allow a demolition and rebuild was necessarily unreasonable. He regarded the increased height as material, and continuing that height through the length of the structure as significantly increasing its bulk. In the award on the second arbitration, the arbitrator again said he did not agree with the implicit assumption that any refusal to consent to building outside the existing footprint was unreasonable. He also said that if the proposal was to extend the structure towards the driveway or near to flat two, then it may well be harder to exclude refusal of consent as unreasonable.

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33 *Smallfield v Brown*, above n 6.
34 At 191,118.
35 At 191,118.
36 See also the decision in *Estate of Ferguson v Walsh* (1999) 4 NZ ConvC 193,032 (HC).
37 See above at [23].

[77] The submissions for the Goldsburys in this Court say that the Turners could have sought leave to appeal these awards but they did not do so. However, that would have involved yet more cost, as well as the necessity of meeting the high legal threshold for leave on a question of law.[38] Moveover the arbitrator's decision reflected what was viewed as the accepted test at this time, which was weighted heavily in favour of the lessor whose consent was sought. We agree with the Turners that, on this test, further arbitration would have been pointless unless the plans for a replacement building corresponded with the existing footprint and dimensions of flat one as it presently is or varied from them in only a trifling way.

[78] The problem with that from the Turners perspective is that the height of the lower level must be raised to a height of 3.78 m (with a discretion to reduce that by 0.5 m) because of the coastal inundation risk. It is obvious that this in turn meant that a replacement two storey dwelling with the same roof height and profile as the existing flat would compromise the internal living space relative to the existing flat. Therefore, to achieve something other than a new dwelling with the same footprint and roof height and profile, it would be necessary to negotiate with their neighbours rather than to trigger the arbitration clause.

[79] We therefore agree with the Turners that the Judge placed too much weight on the fact that all parties purchased their properties in the knowledge of the cross-lease restrictions and on the basis that the arbitration clause provided the mechanism by which disputes between neighbours may be resolved. This was not a case of the Turners seeking to circumvent the agreed process. They had twice tried that process without success. They then went to some effort to alter their plans with concessions intended to address the main concerns of the Goldsburys but received no considered response to the concessions they had made.

[80] While it was for the Turners to present plans to the Goldsburys, there was no real reason why they could not have made it plain that they did not insist on maintenance over a rebuild, nor that any rebuild had to correspond with the existing footprint. For example, the Goldsburys could have discussed an extended footprint

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[38] See *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [54].

that would not cause them concern — for example, removing the bulk of the property visible from their flats by removing some further part of the second story at the rear of the property, or perhaps keeping the two storey height across the length of the property but keeping the whole of the property back from the common driveway.

[81] The Goldsburys did not do that. Indeed it is plain from the fact that they responded on the same day that they gave no detailed consideration to the amended plans or what adjustments to them might have been acceptable. It is understandable that the Turners took the Goldsburys' response as being agreeable to only a replacement building with the same footprint and external dimensions as flat one. This may explain why the Turners apparently did not take up the offer to mediate the dispute — which on the face of it would otherwise have been a reasonable and sensible path towards a potential resolution.

[82] Subsequent to the High Court judgment in this case, the correctness of the *Smallfield v Brown* test was considered in *Martelli v Liow*.[39] Gault J held that neither "substantial" benefit nor "trifling" detriment were part of the legal test for whether consent was unreasonably withheld under a cross-lease.[40] The Judge considered that they provided a gloss on the quintessentially fact specific assessment of unreasonableness.[41] The Judge held that, while the benefit to the party seeking change and the detriment to the cross-lessor were relevant considerations, other considerations might also be relevant.[42] The Judge held that the correct approach was to consider whether a reasonable lessor would withhold consent in the particular circumstances, and whether the lessor reasonably believed that the proposed use would injure its interests.[43]

[83] This approach would likely have been helpful to the Turners had relations not broken down. This leads to the next point. We agree with the Turners that the Judge placed insufficient weight on the breakdown of neighbourly relations. It is the case

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39 *Martelli v Liow* [2024] NZHC 968. In that case Anderson J had earlier granted leave to appeal the arbitrator's award on a question of law, namely whether a "trifling detriment" test was wrong: see *Martelli v Liow* [2023] NZHC 1678.

40 At [67].

41 At [40] and [67].

42 At [68].

43 At [71].

that an order for division of the property will not entirely remove the need for the Turners and the Goldsburys to deal with each other to the extent that they will continue to share a driveway. But the more important point is the Goldsburys' intransigence in relation to anything other than a replacement with the same or close to the same existing footprint and height dimensions as the existing flat. Ms Turner's evidence was that she is no longer able to deal with the Goldsburys. That Ms Turner is not being unreasonable about this is supported by the evidence of Ms Batten, Mr Duke and Mr Wardlaw. All four reached the point where they had given up on having a reasonable relationship with the Goldsburys.

[84] It follows that we do not accept the submission for the Goldsburys that they were not intransigent. We accept that the Judge did not make this finding, but the Judge's focus was on the rights that a cross-lease provides and the arbitration clause as a mechanism for resolving disputes rather than making findings of fact about the rights or wrongs of the respective positions. However, the evidence demonstrated that the Goldsburys were insistent on any replacement being of the same footprint and height as the existing flat one (even though the Turners needed to raise the level of the first floor due to the flooding risk) and neighbourly relations had broken down to the extent that any negotiations for something more than that would not take place. As it was put in *Kid Country v Hoy*, "[c]ooperation—or at least some give and take—must inform a viable cross-lease arrangement. Neither is foreseeable."[44] That is the case here.

[85] Unless an order for division is made, the Turners are left with the following options:

(a) retaining the existing delipidated property that is at ongoing risk of coastal inundation;

(b) replacing the dwelling with a building of the same or very close to the same footprint and height dimensions as the existing dwelling;

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[44] *Kid Country Te Atatu Ltd v Hoy* [2019] NZHC 988, (2019) 20 NZCPR 882 at [61].

(c) for anything beyond (b), potentially further rounds of drafting plans that reduce the footprint and height from the August 2020 plans, seeking consent to them and triggering the arbitration clause if consent is not forthcoming; or

(d) selling the property.

[86] We accept that the approach in *Martelli* would improve the Turners' prospects in arbitration under option (c). However, we consider this involves a degree of financial and emotional hardship in reviewing the August 2020 plans, potentially making still further alterations and once again seeking the Goldsburys' consent, proceeding to arbitration if it is not forthcoming and taking the risk that the arbitrator finds the Goldsburys' concerns are the concerns of a reasonable lessor.

[87] Standing back, we consider this is a situation where the mechanism in the cross-lease for resolving this dispute has failed. We accept that, with a partition without conditions, the Goldsburys will lose the protections they have under the cross-lease to control development of the dwellings going forward. We also accept that the Goldsburys' conduct and evidence have shown that this is a right to which they attribute significant value. Against that, the evidence of Mr Priest is that the value of the Goldsburys' titles will be higher as a freehold title if appropriate covenants in relation to development on the front title are in place. The Property Law Act confers a broad discretion in appropriate cases to affect property rights, including the existing rights under a cross-lease.[45] We consider that the parties "are locked into an ownership position which they cannot resolve because of the positions they have taken".[46] We consider the "most just and practical way through the impasse" is a partition order subject to conditions.[47]

[88] We have therefore reached the view that it is appropriate that there be an order for division of the property subject to conditions. The Turners' submissions proposed

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45 At [63].
46 *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401 at [32].
47 At [32].

that we allow a period of time for the parties to endeavour to reach appropriate conditions for this Court's approval. We do not consider that is appropriate.

[89] As the Goldsburys submit, the Turners, who are seeking the partition, have not put up a suite of conditions for the respondents or this Court's consideration. We are not confident that the parties would reach a timely agreement on the conditions that would be appropriate. Nor do we have the benefit of the High Court's view on the conditions that would be appropriate. We also note that, since Edwards J considered the matter, the decision in *Martelli* has been delivered. The Wardlaws should also have the opportunity to make submissions on the conditions. It may also be that updating evidence will be necessary, for example as to the present status of relevant planning rules. The Turners' intentions may have changed. The conditions would likely need to address a range of matters, such as (for example): that the order would be subject to subdivision consent; who is to bear the cost of the subdivision consent; whether the division should be in accordance with the scheme plan attached to the statement of claim; and what site coverage and height restrictions should be put in place.

[90] Given all these matters, we conclude that it is appropriate that the case be remitted to the High Court for determination of the appropriate order for division in light of this decision.[48]

Application to adduce new evidence

[91] The Turners sought leave to adduce further evidence. The proposed further evidence related to a perceived change in the position of the Goldsburys in relation to an indication at the High Court hearing that they would agree to the Wardlaws adding a lift shaft to their flat in return for the Wardlaws' consent to the Goldsburys recladding their flats. Subsequent to the hearing, the Goldsburys made this conditional on the Wardlaws withdrawing their support of the Turners' claim against the Goldsburys in the High Court.

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[48] Senior Courts Act 2016, s 57.

[92] We consider the evidence is fresh in that it relates to events subsequent to the High Court hearing. The evidence is also credible in that it simply adduces the correspondence between the Wardlaws and the Goldsburys about this. The evidence also has some, albeit limited, cogency. It provides some further corroboration of the difficulties the Turners have had in obtaining cooperation from the Goldsburys. There is no proper reason for why the Goldsburys' consent to the lift shaft should be tied to the Wardlaws' support for the Turners' partition application. As noted, it transpired that the Wardlaws did not take an active role in the appeal.[49]

Result

[93] The application for leave to adduce further evidence is granted.

[94] The appeal is allowed. The High Court decision is set aside.

[95] The costs order in the High Court is set aside.

[96] The case is remitted to the High Court for determination of the appropriate order for the division of the property and to reassess costs in light of this judgment.

[97] The respondents must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
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Daniel Overton & Goulding, Auckland for Respondents

[49] See n 2 above.