When the developer thinks the owners corporation is unreasonable under a defects settlement deed

In commercial agreements, it is common to encounter clauses stipulating that consent “must not be unreasonably withheld”. These provisions serve an important function as they restrain what would otherwise be unrestrained discretion, offering a contractual check against arbitrary refusal. By imposing an objective standard of reasonableness, such clauses require an evaluation of whether a reasonable decision-maker in the relevant circumstances would have withheld consent, taking into account the terms of the contract, its commercial objectives and the broader surrounding factors.

In disputes concerning such clauses, the party claiming that consent was unreasonably withheld bears the burden of proof. Importantly, it is not sufficient to demonstrate that the decision was incorrect but rather that the refusal fell outside the scope of what a reasonable decision-maker would have made in the circumstances.

The decision in B32 Investments v The Owners - Strata Plan 81539 [2026] NSWSC 160 (**B32 Investments**) provides a practical illustration of how this principle is applied in practice. In B32 Investments the court clarified that reasonableness is not restricted to adherence to express contractual clauses but extends to a broader assessment of commercial suitability.

The first plaintiff in this matter was B32 Investments Pty Ltd (formerly Omaya Investments Pty Ltd), and the second plaintiff was Arinson Holding Pty Ltd (formerly Omaya Holding Pty Ltd). These entities form part of a group of companies that make up the Bechara Group. The defendant is the Owners Corporation of the residential strata scheme, Strata Plan 81539, located at 39 Cooper Street, Strathfield NSW 2135. The first plaintiff was responsible for constructing the building that forms Strata Plan 81539 for the second Plaintiff developer.

The dispute in B32 Investments arose from a clause in a settlement deed following building defect proceedings. After a default under an initial settlement agreement between the parties, and the commencement of winding-up proceedings, the parties agreed to revised settlement terms under a Deed of Settlement and Release. Under this deed, the plaintiffs paid $2 million to the defendant and provided security through a mortgage over a property valued at approximately $4.3 million. A specific clause contained in the deed allowed for substituted security, provided the substitution had an unencumbered market value of at least $2 million. Another clause specified that the defendant’s consent must not be unreasonably withheld. Pursuant to these clauses, the plaintiff attempted to replace the original security with a mortgage over another property valued at approximately $2 - 2.5 million. While the value of this property satisfied the contractual minimum requirement, the defendant withheld consent on the basis that the proposed substituted security was materially inferior, less marketable and carried greater enforcement risk.

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The Court rejected the plaintiffs' argument that meeting the $2 million threshold made the defendants refusal unreasonable, clarifying that the threshold sets a minimum, not a comprehensive standard. Since the deed did not expressly limit what the defendant could consider, the defendant was entitled to assess all relevant factors affecting the adequacy of the substitute security, including its comparative value to the original security.

Applying established principles, the Court found the defendant's refusal reasonable. Key factors in its decision included:

- The significant disparity in value between the existing security, valued at $4.3 million, and the proposed substitute, valued at approximately $2 million;
- The proposed property's restrictive zoning, which limited marketability and posed practical resale risks;
- The context of security intended to protect against insolvency clawback, making these commercial considerations particularly important; and
- The plaintiffs' prior default, which heightened the defendant's exposure and reinforced the legitimacy of withholding consent.

Taken together, these factors demonstrated that the refusal was not arbitrary, but a rational and commercially justified decision**.**

Key Takeaways:

The decision in B32 Investments demonstrates that meeting a minimum contractual threshold does not automatically guarantee consent. The key consideration is whether the proposed arrangement is commercially reasonable within the specific circumstances, clarifying that consent can only be considered unreasonably withheld if the refusal lacks a rational commercial justification. This decision highlights that the phrase "not unreasonably withheld" preserves room for meaningful commercial judgment, rather than enforcing a rigid standard.

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