

SUPREME COURT OF QUEENSLAND

CITATION: *Impact Healthcare Pty Ltd & Anor v St Vincent's Private Hospitals Ltd* [2024] QSC 62

PARTIES: **IMPACT HEALTHCARE PTY LTD**
ACN 084 694 726
(first applicant)
AND
PHILLIP JOHN KAY
(second applicant)
v
ST VINCENT'S PRIVATE HOSPITALS LTD
ACN 083 645 505
(respondent)

FILE NO: 3565 of 2024

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 22 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2024

JUDGE: Applegarth J

ORDER:

- 1. It is declared that the respondent has unreasonably withheld consent to the proposed sale of 70 per cent of the second applicant's shares in the first applicant to a third party PEHA Holding Co Pty Ltd ACN 617 266 627 or its nominee.**
- 2. The respondent pay the applicants' costs of the application on the standard basis, in the amount to be assessed unless agreed by the parties.**

CATCHWORDS: CONTRACT – CONSENT – CONSENT NOT TO BE UNREASONABLY WITHHELD – where the first applicant provides services to the respondent's hospital under an agreement for the management of an emergency centre – where the respondent must approve the sale of shares in the first applicant – where its approval cannot be unreasonably withheld – where the second applicant proposes to sell shares in the first applicant – where the respondent withheld its consent to the transfer because it wanted to negotiate changes to the agreement – whether the respondent unreasonably withheld its consent to the transfer

Boss v Hamilton Island Enterprises Ltd [2010] 2 Qd R 115, cited
Cathedral Place Pty Ltd v Hyatt of Australia Ltd [2003] VSC 385, cited
Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd (1998) 14 NSWLR 438, cited
EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd (2010) 41 WAR 23, cited
Fulham Partners LLC v National Australia Bank Ltd [2013] NSWCA 296, cited
International Drilling Fluids Ltd v Louisville Investments [1986] 1 Ch 513, cited
Houlder Brothers & Co Ltd's Lease [1925] Ch 575, cited
Re Idoport Pty Ltd [2012] NSWSC 524, cited
Re Sun Cable Pty Ltd [2023] NSWSC 1037, cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, cited
West Layton Ltd v Ford [1979] QB 593, cited

COUNSEL: N K Ferrett KC & J P Hastie for the applicants
 C Jennings KC & S Holland for the respondent

SOLICITORS: Macpherson Kelley for the applicants
 Thomson Geer for the respondent

- [1] The first applicant, Impact, manages and operates a successful and profitable Emergency Centre at a private hospital owned by the respondent, SVPH. It does so under an agreement made in 2001, which is for an indefinite period. SVPH, not Impact, is responsible for capital expenses and equipment in the Emergency Centre. Because Impact trades profitably, it has no need to raise capital to meet capital or other expenses.
- [2] Impact's sole director and shareholder, Dr Kay, proposes to sell 70 per cent of his shares in Impact to PEHA Holding Co Pty Ltd (PEHA) or its nominee. PEHA is a reputable company that operates emergency centres in several private hospitals in different parts of Australia. PEHA is an acronym for Private Emergency Health Australia.
- [3] Under the Agreement, SVPH's prior informed approval to the proposed sale of Dr Kay's shares to PEHA is required. The Agreement provides that SVPH will not unreasonably withhold its approval to the sale by Dr Kay of his shares in Impact. Its approval was first requested in December 2023. It still has not given it. Impact submits that SVPH's conduct in withholding its approval is unreasonable.
- [4] Impact and PEHA have provided ample information about PEHA during the four-month period since Impact first requested SVPH's approval of the share sale.
- [5] The sale of shares will not affect Impact's operation of the Emergency Centre. Dr Kay will remain in charge of Impact, as its Director and as the person who, in

conjunction with an experienced Management Team, manages the Emergency Centre. Impact will continue to perform its role and fulfill its contractual obligations with the same people and the same proven procedures that have been a financial success for it and the Hospital in terms of admissions and business for SVPH.

- [6] The 2001 Agreement that Impact negotiated is an agreement that will continue if, as might be expected, Dr Kay implements a succession plan. If and when Dr Kay chooses to hand over his role as Director of Impact or Manager of the Emergency Centre, one would expect him to do so to a person with similar skills and qualifications in the management of an emergency centre. This is because:
 - (a) Impact will require SVPH's approval to Dr Kay ceasing to be a Director of Impact or Manager of the Emergency Centre; and
 - (b) it would be in Impact's interests to have such a succession plan that will maintain and enhance the value of shares in Impact, including Dr Kay's shares.
- [7] Any such succession is in the future because the proposed transaction with PEHA is one in which it will be a "silent partner" with Dr Kay, who will maintain his involvement in and the right to manage Impact's business without interference from PEHA. PEHA has agreed to this.
- [8] The essential point is that the Agreement will go on without Dr Kay if he dies or decides to cease in his current position, provided, if may be expected, he is replaced by a person with similar skills and qualifications. That the Agreement would be for an indefinite period and continue without Dr Kay was something that the parties to the 2001 Agreement contemplated when they agreed the terms of clauses 4.13 and 5.1.
- [9] SVPH does not like the fact that the Agreement will continue for an indefinite period. It would like to amend or replace the Agreement with one for a definite term. It would like to change the Agreement so that its commercial terms are more favourable to SVPH. It would like to "modernise" the Agreement in these and in other respects by amending or replacing it. Modernisation is a word it uses to refer to amending or replacing the Agreement.
- [10] SVPH made clear, especially in a meeting on 1 February 2024, that the granting of its consent to a change in Impact's shareholding was conditional on the "modernisation" of the Agreement.
- [11] SVPH has no legal basis to make its consent conditional on "modernisation" of the Agreement. It has no legal right to insist that the Agreement be amended or replaced. Making its consent conditional on negotiations to amend or replace the Agreement was unreasonable.
- [12] After Impact's lawyers pointed this out, SVPH, through its lawyers, tried to "walk back" the threat to withhold its consent until Impact agreed to renegotiate the Agreement. Despite this, renegotiation of the Agreement to secure terms more favourable to SVPH remains on its agenda. SVPH has gone so far as to threaten to terminate the Agreement if Impact will not renegotiate it.

- [13] The evidence supports the conclusion that SVPH has used the consent process to put itself in a more advantageous contractual position than it is entitled to be under the terms of the Agreement. Therefore, it has acted unreasonably and has unreasonably withheld its consent.
- [14] This conclusion is reinforced by the fact that it is objectively unreasonable for SVPH to not have decided to grant or refuse the approval for the share sale by now. SVPH has been assured many times over the last four months that nothing will change in the operation of the Emergency Centre as the result of the proposed change in Impact's shareholders. Dr Kay will remain as Director of Impact. Impact's Management Team will be the same. Had SVPH needed any additional assurances about those matters and that it would be "business as usual", it might have sought it in the form of enforceable undertakings as a condition of granting its approval. It was unreasonable to not accept the assurances that Dr Kay has given. His sworn evidence is that any sale of his shares is on the condition that he maintains his involvement in the management of the business without interference from PEHA, and that PEHA agreed to this request. Moreover, SVPH is protected against unapproved changes were Dr Kay to cease to be a Director of Impact or cease to manage the Emergency Centre. SVPH is protected in that regard by clauses 4.13(1)(a) and (c), 4.13(2)(b) and (c), and 4.13(3).
- [15] SVPH has been given sufficient information about PEHA and has had months to inquire about PEHA and its reputation. This includes inquiries of other hospitals at which PEHA operates emergency centres, including three Mater Hospitals in Queensland that, like SVPH, are associated with Catholic Health Australia.
- [16] SVPH made requests for information that may have been relevant to deciding whether to enter into a new service agreement with a new operator. Much of the information it sought was not needed to decide to approve the sale of Dr Kay's shares. SVPH persists in pressing for:
- (a) more information about PEHA, particularly PEHA's balance sheets and audited financial statements for the last three years; and
 - (b) a copy of any written agreement about the proposed share sale.
- [17] This information is not reasonably necessary in the circumstances to protect any legitimate interest that SVPH has in granting or refusing approval to a sale of shares in Impact. Impact and, indirectly, its shareholders are not required to inject capital into the business. It is a profitable business. It is not building a mine or a high-rise building. This is not a landlord/tenant case with a request to the landlord to approve an assignment to a new tenant. In such a case, the proposed tenant's financial circumstances and ability to pay the rent are legitimate matters for inquiry and information.
- [18] SVPH knows enough about the financial affairs of Impact, particularly that it is a successful and profitable company that does not require injections of capital. SVPH does not need the kind of financial information that would be needed by an entity that is asked to approve a change in the shareholding of a company that runs an ailing airline, a mining venture, a business that is unprofitable, or another business that needs a large capital injection.

- [19] SVPH knows enough about PEHA and has had enough time to make inquiries so as to make an informed decision about the individuals who manage PEHA, about PEHA's shareholders, about the nature of PEHA's business, and about its reputation. There is no proper basis to suggest that PEHA is disreputable or otherwise the kind of entity whose position as a shareholder in Impact will have an adverse effect on SVPH's legitimate interests. To repeat, PEHA is a proposed shareholder in Impact. It plans to invest in a successful business, not to change it. Even if it has plans to replace Dr Kay at some future point as the executive in charge of Impact who manages the Emergency Centre, such a change could not be made without SVPH's approval.
- [20] A shareholder's financial position is quite separate to the financial position of the company in which it is a shareholder. PEHA's financial position does not bear upon Impact's financial ability to perform the Agreement. Information in PEHA's balance sheet and its other financial statements was not reasonably necessary for SVPH to make an informed decision. More details about PEHA's financial position are not reasonably necessary for SVPH to make an informed decision about approving Dr Kay's proposed share transfer.
- [21] In the circumstances, it was not reasonable for SVPH to require the additional information that it sought about PEHA's financial position.
- [22] SVPH is not being asked to approve entry into a new service agreement with a new operator, although its requests for information about PEHA might suggest this was the case.
- [23] SVPH also seeks a copy of any agreement that Dr Kay and PEHA have entered into in respect of the proposed share transfer. In my view, how and when Impact and Dr Kay report to its shareholders and any agreement which Dr Kay and PEHA have reached about how Impact's internal affairs will be conducted if PEHA becomes a shareholder, and the terms of any agreement between Dr Kay and PEHA about succession planning or other matters, are not relevant to the approval that is being sought.
- [24] The approval that SVPH has been asked to give does not go beyond the sale of shares. If, for argument's sake, the agreement between Dr Kay and PEHA deals with the respects in which meetings of shareholders of Impact will be conducted and the reports and financial information that are provided to shareholders from time to time, then that is their business. It is not SVPH's business.
- [25] If, for argument's sake, any agreement between Dr Kay and PEHA addresses their plans about how long Dr Kay is expected to remain in his present role and makes prudent provision for succession planning, then that is a matter for those parties. If and when Dr Kay, in consultation with Impact's Management Team and its shareholders, decides that he wishes to cease to be a Director of Impact or decides to relinquish his position as Manager of the Emergency Centre, then SVPH's approval will be required for the change. Until then, succession planning is a matter for Dr Kay and, in the event PEHA becomes a shareholder, for him and PEHA to progress. Presently, it is not a matter for SVPH's approval.
- [26] In the current circumstances, SVPH has no right to demand that information from Impact as a condition of approving a change in Impact's shareholding.

- [27] The lack of an objectively reasonable basis for SVPH to continue to withhold its approval on the basis that Impact declines to provide the outstanding information reinforces my earlier conclusion. That conclusion is that SVPH has unreasonably used the approval process to obtain something to which it is not entitled. It has no entitlement to require the Agreement to be amended or replaced. It was and is unreasonable for it to use the approval process to obtain something the Agreement does not give it.
- [28] The provision about approval to a change in shareholding protects only a legitimate interest that is protected by that clause. It does not entitle SVPH to withhold its approval in order to obtain a collateral, commercial advantage. This is what SVPH has done. It has unreasonably withheld its approval.
- [29] In addition, its unreasonable insistence on additional information about PEHA before it will consider granting approval means that it has unreasonably withheld its approval.
- [30] On either basis, Impact is entitled to declaratory relief.

Background

- [31] Impact established 23 years ago, and continues to operate, a successful emergency centre at a private hospital at Chermside. In 2001, the hospital was known as the Holy Spirit. In 2019, Holy Spirit assigned its rights under its 2001 agreement with Impact to SVPH, which operates the hospital as St Vincent's Private Hospital Northside.
- [32] The background to the 2001 agreement was that Holy Spirit was expending \$100 million in building a hospital on a greenfields site. One of the high inherent risks in establishing a co-located private hospital on the Prince Charles Campus was a condition that Holy Spirit operate an emergency centre at the new hospital. It was crucial to Holy Spirit that the hospital and its emergency centre open at the same time. This was not an emergency centre being developed from an existing, functioning hospital. It was a first for Australia.
- [33] Impact's ability to establish and successfully operate an emergency centre was critical to the Hospital's success.
- [34] Impact's sole director and sole shareholder is the second applicant, Dr Kay. He established Impact in the late 1990s as a consulting company that specialised in Emergency Medicine advice for setting up and operating emergency centres in the private sector. Impact developed a management philosophy of fundamental principles for the successful operation of private emergency centres. Impact and Dr Kay became known for their ability to analyse and turn hospitals in difficulty around.
- [35] The Queensland Manager of Holy Spirit approached Impact in late 2000 or early 2001. Because of the negative experience that Dr Kay had in dealing with the management of St Vincent's Hospital in Toowoomba (despite the success of the Toowoomba Project), he advised Holy Spirit that he had no interest in setting up another emergency centre. However, Holy Spirit pressed its request and invited him to communicate Impact's conditions and requirements. Impact's lawyers drafted

the Agreement. Dr Kay presented to the Board of the Holy Spirit and explained to it that he required every clause in the Agreement. The terms were not negotiable. The Agreement was not for a defined term. Holy Spirit entered into the Agreement.

The successful operation and management of the Emergency Centre

- [36] Impact delivered on its promise to deliver and operate a high-standard emergency centre at the Hospital.
- [37] Dr Kay has never worked clinically in any of the emergency centres that Impact has developed, operated and managed. He has never had a clinical role in the Emergency Centre at Chermside. Until recently, he was employed in the public sector and worked for 24 years as the Director of the Emergency Department at the Princess Alexandra Hospital. His contribution to Impact's success was to develop fundamental principles and a management philosophy for the operation of a private emergency centre in Australia and for Impact to recruit and retain a Management Team for the business.
- [38] Impact's Management Team at the St Vincent's Emergency Department at Chermside consists of:
 - (a) a Director of the Medical Group Practice Company, Dr Mulcahy, a senior emergency specialist, who has been involved in the business since its inception. Dr Mulcahy is responsible for the recruitment of experienced emergency medicine specialists who are employed by Impact to provide the services required at the Emergency Centre. Dr Mulcahy is assisted by Professor David Ward, another senior emergency specialist who has worked in the business for about 15 years. Dr Mulcahy and Professor Ward practise full-time at the Emergency Centre and also mentor, teach and educate medical practitioners who are recruited to practise at the Hospital;
 - (b) a Medical Group Practice Manager;
 - (c) a Nurse Practice Manager; and
 - (d) a Marketing Consultant.
- [39] Dr Kay's role entails accessing key performance indicator data and meeting with the Management Team to discuss and resolve any issues that would have an adverse effect on the performance of the business or Impact's operations.
- [40] Until the present dispute, Impact and Dr Kay had maintained a very good relationship with SVPH and its predecessor, Holy Spirit. The evidence describes it as cordial and professional, without major arguments or tension.
- [41] Over the last 23 years, Impact has not received a single letter of complaint from SVPH or its predecessor, Holy Spirit, about the quality of the operation or performance of Impact's obligations under the Agreement.
- [42] Impact has constantly exceeded capacity and revenue projections to the point that the Emergency Department regularly generates work beyond the capacity of the Hospital, which requires the transfer out of many admissions to other facilities.

- [43] Dr Kay retired from employment in the public sector on 30 June 2023 and also retired from clinical practice. His retirement from employment in the public sector gave him at least an additional 40 hours per week to pursue matters associated with Impact, including its performance of the Agreement.

The Agreement envisaged future changes in the control and ownership of Impact

- [44] The Agreement which Impact entered into in 2001 and which continues did not envisage that Dr Kay would remain forever as Impact's Director, CEO or sole shareholder. This makes sense because no one lives forever and at some stage someone in Dr Kay's position might wish to cease to continue in that executive role or sell some shares in Impact. The last possibility is an obvious one, particularly, as proved to be the case, the business was a success and Dr Kay wished to sell some or even all of his shares.
- [45] The Agreement was not for a finite term, or a finite term with options to renew, or a finite term with a provision for the parties to negotiate in good faith for a replacement agreement at the end of the original agreement. It was an agreement that, if performed, would continue for longer than Dr Kay might live and beyond his ceasing to be a director of Impact or being involved in the management of the Emergency Centre. The Agreement contemplated a succession. If Dr Kay ceases to manage the Emergency Centre, the Agreement obliges Impact to replace him with someone of at least equivalent ability, experience and expertise approved by the Principal and (except where a replacement was consequent upon Dr Kay's death) for Impact to arrange a proper handover that would involve Dr Kay training his replacement.
- [46] The Agreement provides that Dr Kay will not cease to be a director of Impact, sell his shares in it, or cease to manage the Emergency Centre without the Principal's prior informed approval (unless he dies or becomes so ill or incapacitated as to be unable to perform his role as director and manager).
- [47] Clause 4.13 is the critical clause in this dispute. It provides:
- “(1) Should Dr Phillip Kay:
- (a) cease to be a director of the Consultant;
- (b) sell his shares in the Consultant; or
- (c) cease to manage the Emergency Centre
- without the Principal's prior informed approval (unless he dies or becomes so ill or incapacitated as to be unable to perform his role as director and manager), the Consultant will be in breach of its obligations under this agreement.
- (2) The Principal will not unreasonably withhold its approval to:
- (a) the sale by Dr Kay of his shares in the Consultant;
- (b) his ceasing to be a director of the Consultant; or

(c) his replacement as a manager of the Emergency Centre after the Emergency Centre has been operating for 3 years continuously.

- (3) In any case where Dr Kay ceases to manage the Emergency Centre, the Consultant must replace him with someone of at least equivalent ability, experience and expertise approved by the Principal and (except where the replacement is consequent upon the death of Dr Kay) the Consultant must ensure that there is a proper handover which will involve Dr Kay training his replacement and both of them working together in the Emergency Centre for a period of at least four weeks.”

[48] Clause 5.1 provides additional context. It states:

“The Consultant will at the request of the Principal procure that Dr Phillip Kay provides a written undertaking to the effect that he will not resign as a director of, or from the employ of the Consultant or sell transfer or assign his shareholding or any part of his shareholding in the Consultant such that he ceases to become the majority shareholder within 3 years of the date of the agreement and thereafter without the consent of the Principal, which consent will not be unreasonably withheld. It will be unreasonable for the Principal to withhold consent in the event that Dr Phillip Kay’s position with the Consultant changes and a person with similar skills and qualifications trained by Dr Kay in the management of the Emergency Centre is proposed to assume Dr Kay’s role and or acquire Dr Kay’s shareholding.”

- [49] Impact is remunerated in accordance with a Schedule to the Agreement, which includes a royalty of the Generated Hospital Revenue. Impact employs certain personnel, while the Hospital employs others. Impact has operated a profitable business under the Agreement since its inception and for more than two decades. As a result, it has not required any injection of capital from Dr Kay or anyone else. In essence, Impact is required to provide the management structure under which the Emergency Centre operates and to source doctors working in it. The nursing staff in the Emergency Centre are employed and paid by SVPH. Impact is not required to contribute any capital or equipment to the Emergency Centre. Capital and equipment are provided by SVPH.
- [50] Impact’s operation of the Emergency Centre has proven profitable for it and benefited SVPH (and its predecessor, Holy Spirit).
- [51] The Emergency Centre is an important part of the Hospital’s business model. A well-run emergency centre is a source for admissions to a hospital.
- [52] The Emergency Centre attends to between 13,000 to 15,000 patients annually. The Emergency Centre refers thousands of patients annually to the Hospital. Dr Kay estimates that, during recent years, through Emergency Centre admissions into the Hospital, Impact has generated on average about \$25 million of revenue for SVPH each year.

- [53] In summary, the performance of the Agreement over the long-term has been for the mutual benefit of Impact and the operator of the Hospital.

SVPH's intent to amend or replace the Agreement and its lack of a legal basis to do so

- [54] Despite the financial and reputational benefits that the Emergency Centre operated by Impact has provided and continues to provide to the Hospital, SVPH is keen to amend or replace the Agreement. SVPH does not like the fact that the Agreement is for an indefinite term. It would like an amended or replacement agreement to be for a defined term and to enable SVPH to exercise greater control over the services being provided by the Emergency Centre. SVPH would also like the Agreement to refer to certain current regulatory requirements and certain practice standards.
- [55] SVPH has no proper legal basis to insist on changes that would convert an agreement, which is able to be determined by either party in the circumstances specified in clause 7 or by Impact giving six months' notice under clause 2.2(3), into an agreement for a finite term.
- [56] Clause 2.2(2) provides that the parties "agree to renegotiate the appropriate clauses in the event of major changes induced by the Government or Health funds which by its nature causes serious immediate detriment to either party such as Medicare schedules, Health fund legislation". There is no suggestion that this specific provision about renegotiation of terms is engaged.
- [57] Because it has no legal basis to require Impact to renegotiate the Agreement, let alone a basis to insist on amendments, SVPH has kept its plans to "modernise" the Agreement to itself until recently.
- [58] Despite a cordial and professional relationship between the parties, no mention has been made by SVPH until recently about its desire to "modernise" the Agreement. I infer this is because SVPH knew that it had no legal basis to request a renegotiation of terms with which Impact is content. Impact continues to perform the Agreement and SVPH has no grounds to terminate it.
- [59] SVPH is intent on renegotiating the Agreement so as to secure a commercial advantage. It would prefer an agreement that allows it to share in the Emergency Centre's profit. The situation at St Vincent's Northside contrasts with its arrangements at its private hospital in Toowoomba, under which SVPH receives a facility fee. SVPH wants to negotiate an agreement of the kind it negotiates with new service providers.
- [60] Modernisation, like motherhood, sounds like a good thing. It depends, however, on what is meant by "modernisation". If "modernisation" meant matters such as updating references to statutes, regulations and standards that have been repealed or replaced by more modern versions, then no one could sensibly oppose it. However, the Agreement was designed for the long-term and does not contain references to statutes and regulations that have been replaced. It imposes a variety of obligations

on Impact about patient care, management and reporting systems, and the capability of medical personnel.

- [61] The term “modernisation” when used by SVPH is not limited to an updating of references to legislation or standards. It embraces SVPH’s aim to convert an agreement of indefinite duration into an agreement for a limited term, and for the agreement to have more favourable commercial terms for SVPH than the Agreement.
- [62] Lacking a legal basis to require such fundamental changes to the Agreement, SVPH has used the need to obtain its approval for Dr Kay to sell his shares as an opportunity to amend or replace the Agreement.
- [63] SVPH does not suggest that the need to “modernise” the Agreement is something that has suddenly dawned on it in the last few months. Mr Steele, the Chief Executive Officer of St Vincent’s Private Hospital Brisbane and St Vincent’s Private Hospital Northside has been in his current role since March 2020 and has met with Dr Kay on many occasions. They have enjoyed a good, professional relationship. Mr Steele did not mention anything about modernising the Agreement until 29 December 2023.
- [64] It is not a coincidence that “modernisation” was raised less than two weeks after Mr Steele met with Dr Kay and Mr Derrington of PEHA, at which time Dr Kay informed Mr Steele that he proposed selling 70 per cent of his shares in Impact to PEHA. Impact’s request for SVPH to consent to the sale of shares gave SVPH the opportunity to tie the granting of consent to a renegotiation of the terms of the Agreement.
- [65] This was made evident in a meeting on 1 February 2024, attended by a number of persons including the CFO of the Private Hospital Division of the group of entities known collectively as St Vincent’s Health Australia, Mr Marcard. Dr Kay’s evidence, which I accept, was that Mr Marcard informed the meeting that Impact’s request for consent would not be put before the SVPH Board before agreement was reached on SVPH’s request for modernisation of the Agreement. Dr Kay recalls that Mr Marcard was very firm in his explanation that the granting of consent was conditional on the modernisation of the Agreement. His position was stated more than once to avoid misunderstanding. Mr Marcard restated the position and informed Dr Kay and the others present at the meeting that SVPH would prepare and provide a heads of agreement of the changes required for modernisation of the Agreement and anticipated that the heads of agreement would be provided within two weeks of the meeting.
- [66] Mr Marcard’s affidavit states that Dr Kay said words to the effect:

“So you’ll withhold consent if we don’t agree?”

to which Mr Marcard responded in words to the following effect:

“That’s our position. We want a modern agreement. If you can get us the information requested, we can make a decision within two weeks.”

- [67] Mr Marcard says that he did not intend to mean that, without any modernised agreement, consent to the sale of shares in Impact to PEHA would be withheld. He simply stated that SVPH's "position" was that it wanted a modernised agreement.
- [68] Mr Steele does not dispute the substance of Dr Kay's version of what was said at the 1 February meeting about this issue, but could not recall the precise words that were spoken.
- [69] I find that SVPH's position at the 1 February 2024 meeting was stated as Dr Kay recalls. Dr Kay appeared to have a good recollection of what was said and reiterated by Mr Marcard. The words that Mr Marcard said he used would convey that SVPH's position was that it would withhold its consent if Impact did not agree to modernisation. That was its position. Dr Kay understood the two-week period to refer to the time required to develop a term sheet about modernisation, rather than the time it would take SVPH to grant its consent once certain information was provided. But that is a different aspect of the conversation.
- [70] Mr Marcard made clear that the request for consent would not be put to SVPH's Board unless there was a commitment to modernise the Agreement. The granting of consent was conditional on the modernisation of the Agreement. I do not accept SVPH's submission that it never made modernisation of the Agreement a condition to SVPH's approval. It did so on 1 February 2024.

Other communications

- [71] SVPH's intent on achieving a "modernisation" of the Agreement has been apparent in other communications with Impact in recent months. Mr Marcard's pronouncement of 1 February 2024 should be viewed in that context.
- [72] Over the last five years, Dr Kay and his business partner, Dr Mulcahy, had several meetings with and became well-acquainted with Mr Derrington, the Commercial Director of PEHA, and Dr Gaudin, the Clinical Director of PEHA. They discussed matters of mutual interest and how PEHA operated.
- [73] In late 2023, Dr Kay had received accounting and legal advice about re-structuring his business affairs and had disclosed such a possibility to Mr Steele. The matter was taken no further and a planned discussion on 4 December 2023 was postponed.
- [74] In the meantime, Mr Derrington and Dr Gaudin expressed an interest in PEHA buying some of Dr Kay's shares in Impact. This was an attractive proposition for Dr Kay because it enabled him to remain a shareholder of Impact and continue his involvement in it, in circumstances in which he was not ready to leave. He informed Mr Derrington and Dr Gaudin that he would only consider selling some of his shares on condition that he maintained his involvement and the right to manage the business without interference from PEHA. Mr Derrington and Dr Gaudin agreed to this request.
- [75] On 18 December 2023, Dr Kay and Mr Derrington informed Mr Steele of the proposed transaction and assured him that it would have no impact on Dr Kay's role or otherwise affect Impact's operating model or management team.
- [76] On 20 December 2023, Dr Kay wrote to SVPH and, among other things:

- (a) confirmed the matters which Mr Steele had been told at the meeting and said, specifically, that:

[Dr Kay] will continue to hold a substantial equity stake in the Impact Healthcare business, and [Dr Kay] will remain as CEO of the business with a commitment to continue to operate the business autonomously, with no change to the existing operating model or disruption to the primary points of contact with St Vincent's;

- (b) outlined that the Proposed Transaction involved the sale of 70% of Dr Kay's shares in Impact to PEHA or its nominee;
- (c) enclosed an information package which, in turn, set out PEHA's key personnel and experience in operating private emergency departments; and
- (d) requested that SVPH provide its consent to the Proposed Transaction pursuant to clause 4.13 of the Agreement.

- [77] On 29 December 2023, Mr Steele responded in a letter that noted Dr Kay's wish to sell the majority of his shares to PEHA and then stated:

"Given the original document dates back to 2001, we believe this provides both parties with an opportunity to modernise the agreement."

This was the first time Dr Kay had heard anything about modernisation.

- [78] The same day Dr Kay responded to Mr Steele's reference to "an opportunity to modernise the agreement" by saying that this was not reasonable. Dr Kay wrote:

"The agreement is not up for 'modernisation' as PEHA is buying in on contingent on current contract provisions. No changes.

The contract is to be sold as it stands with me in control of the facility as we explained. You have to have reasonable cause to object.

If you don't, then it goes legal unfortunately."

- [79] On 8 January 2024, Dr Kay wrote to Mr Steele noting that he trusted that Mr Steele and SVPH had been provided with sufficient information and context about PEHA. He wrote:

"As we discussed, there will be no change to the day-to-day operations and our incoming partner PEHA is a highly credible partner (the largest such operator in Australia) that will add additional strength. We see this transaction as materially positive for the long term continuation of outstanding emergency care at St Vincents. We are committed to the continuation of quality care for St Vincents and look forward to continuing our relationship.

I am writing in relation to your email following the letter I sent on 20 December 2023, suggesting your legal team would be in contact with us to table some 'modernisation' of the contract.

The introduction of this step at this point in time is not required legally or reasonable and puts our transaction at risk, which you will appreciate will cause us loss. I have sought extensive legal advice on this. The timing of this transaction does not afford that step and nor does the legal requirement in the contract which has no such provision that gives the hospital the right to require this.”

- [80] On 17 January 2024, SVPH requested a range of information. SVPH’s persistent requests for certain information seems misguided in respect of a simple proposal to sell shares. Its request for financial information, including balance sheets and profit and loss statements, information about ownership of PEHA and other matters, was premised on the need to assess what was described as “PEHA’s suitability as a candidate for the proposed ‘succession’ to the management of the Emergency Centre”. This request seems to have been made because Dr Kay’s letter of 20 December 2023 had said that the proposed transaction with PEHA would reinforce “the long-term sustainability of the business through a partnership with a scaled and partner centric business with deep capability and aligned values”. He went on to say that the main objective of the transaction was to “provide succession of a scaled and partner centric business to continue to support St Vincent’s over the long-term”.
- [81] The reference to “succession” in the 20 December 2023 letter made Mr Steele and SVPH jump the gun. Understandably, Dr Kay may have had in mind a process by which PEHA and individuals like Dr Gaudin, Mr Derrington and others, might eventually succeed to the management of Impact and assume all or part of the management functions that Dr Kay had undertaken and was planning to continue to undertake for the foreseeable future. Dr Kay acted reasonably in previewing and disclosing this vision for a future succession in Impact’s management.
- [82] SVPH was not being asked, however, to consent to any transition or succession in the management of Impact. Dr Kay was not proposing to cease to be a director of Impact or to cease to manage the Emergency Centre. He clearly intended to continue in those roles. Unfortunately, SVPH’s persistent requests for information about PEHA’s financial affairs has treated the consent request as something more than a change in the shareholding of Impact.
- [83] As noted, Dr Kay made clear in communications on 29 December 2023 and on 8 January 2024 that the topic of “modernisation” was not up for discussion, was not legally required or reasonable, and put the proposed transaction at risk. Despite this, SVPH’s letter of 17 January 2024 again raised the topic of modernisation. It asserted that a “willingness by Impact Healthcare/PEHA to enter into negotiations for a modernised form of Agreement would be considered favourably by SVPH as a positive indicator of alignment of values”. This suggests that modernisation was being tied to the issue of consent.
- [84] On 19 January 2024, Dr Kay advised that Impact and PEHA were happy to provide further information about PEHA and would welcome the opportunity to meet again, as well as with other executives and Board members. The letter continued:
- “With regards to the matter of ‘modernisation’ of the agreement which your letter also raises, PEHA has confirmed that it is willing to negotiate in good faith any reasonable ‘modernisation’ amendments to the Agreement on the topics outlined in your letter to

the extent not already dealt with by the Agreement. However, you will appreciate that the priority right now is to progress the consent issue which is separate to any project to ‘modernise’ the Agreement, which will naturally take some time to get the finer details right. PEHA is absolutely willing to action this with you as a priority post the transaction completing and Josh will be able to give you this assurance directly also.”

- [85] On 20 January 2024, Mr Derrington of PEHA sent an email to Mr Steele attaching a further information pack. That information pack contained the names of three referees which, according to Mr Derrington, were “more than willing to talk through their experiences with PEHA”.
- [86] There followed the 1 February 2024 meeting at which, as I have found, SVPH made clear that the granting of consent was conditional upon the modernisation of the Agreement.
- [87] Impact’s solicitors wrote to Mr Steele on 8 February 2024 setting out Dr Kay’s account of the 1 February meeting and again requesting that SVPH provide its consent to the proposed transaction. A deed consenting to the proposed transaction was enclosed.
- [88] By this time, Impact either in face-to-face meetings or in written communications had disclosed information about PEHA and how the proposed change in the shareholding of Impact would not affect the operation of Impact’s business or the conduct of the Emergency Centre.
- [89] Impact’s solicitors’ letter of 8 February 2024 advised that Impact considered that provision of any further financial information about PEHA was not reasonably necessary or relevant to the issue of consent to the proposed share transfer, particularly bearing in mind that the identity of the Consultant (Impact) and its current financial position will not change under the proposed transaction. It advised that “provision of any further financial information should not be necessary to determine our client’s request for consent to the Proposed Transaction”.
- [90] The letter explained that there could be no reasonably held concerns where Impact had given assurances that the Emergency Centre will continue to be operated as normal. The letter pointed out that clause 4.13 was drafted so as to ensure that Dr Kay was involved in managing Impact and, if not Dr Kay, then someone of at least equivalent ability, experience and expertise approved by the Principal. The letter helpfully advised:

“Whilst the references and material provided to date clearly demonstrate that PEHA has the relevant skills and experience to operate the Emergency Centre, the request does not involve any change of management and the current key person (Dr Phil Kay) will continue in his current role. As such, there can be no reasonable objections to the Proposed Transaction.”
- [91] The 8 February letter correctly pointed out that there was no ability under clause 4.13 for SVPH to require amendment of the Agreement upon the occurrence of an event such as the proposed share sale, and that this is a “wholly irrelevant

consideration” for the purposes of clause 4.13. It advised that any insistence on “modernisation” of the Agreement as a pre-condition of consent to the proposed share sale was not reasonable.

[92] On 14 February 2024, SVPH’s solicitors responded in a letter that contained a detailed request for further information falling into eleven categories including:

- (a) financial information on PEHA including balance sheets, audited financial statements for the last 3 financial years;
- (b) a company search for PEHA;
- (c) a copy of any written agreement entered into by Dr Kay and PEHA in respect of the Proposed Transaction; and
- (d) details about PEHA’s organisational structure and key personnel.

SVPH’s solicitors advised that it was not in a position to consent to the proposed transaction unless and until it had a reasonable opportunity to consider the 11 items of information that it had requested.

[93] SVPH did not specifically deny that it had told the meeting on 1 February 2024 that it would not put the request for consent to the Board before agreement was reached on the “modernisation” changes that SVPH required to the agreement. Instead, its solicitors advised:

“For the avoidance of doubt, SVPH has not insisted that modernisation of the Agreement is a pre-condition to the giving consent. Rather, SVPH saw that it was the right timing and opportunity to modernise the Agreement simultaneously with the incoming of a new party (which eventually seeks to succeed the Consultant). SVPH’s proposal to modernise the Agreement, to which both the Consultant and PEHA confirmed they agree to do (but after completion of the proposed transaction), is not the cause of any delay in giving its consent to the proposed transaction.”

[94] On 20 February 2024, Impact provided more information about PEHA to SVPH in response to the request for the 11 items of information. Dr Kay noted in his letter to Mr Steele that much of the information requested had already been given and the balance sheets and financials were not reasonably required. Dr Kay noted, “You can easily see in the information that PEHA is a solid and reputable company, so I do not see any barrier to immediate consent”. He went on to advise why it was extremely important for SVPH to provide its consent, given the intended timing of the transaction with PEHA. He again offered to answer any questions that SVPH had of him or of PEHA about the information that had been provided.

[95] The information that Impact provided SVPH on 20 February 2024 included:

- (a) the entity nominated to acquire Dr Kay’s shares, being Ficus North Pty Ltd;
- (b) its organisational structure;
- (c) the details of its subsidiaries used to operate the emergency departments at the Mater Hospitals in Townsville, Mackay and Rockhampton;

- (d) its key persons and their qualifications and experience;
- (e) its corporate values; and
- (f) the names of each of its shareholders.

[96] Despite Impact, through its solicitors, carefully explaining why, given the nature of the proposed transaction, SVPH had no reasonable basis to request additional financial information, and despite the provision of ample additional information on 20 February 2024, SVPH on 22 February 2024 maintained its request for the following:

- “(a) financial information for PEHA including:
 - (i) balance sheet for the last 3 financial years;
 - (ii) audited financial statements for the last 3 financial years;
 - (iii) most recent set of management accounts for the current financial year;
- (b) PEHA’s commercial model as an operator of emergency departments to private hospitals as referred to in the first PEHA information pack;
- (c) evidence of PEHA meeting patient-centred key performance indicators (or the like) in respect of services provided us a similar agreement; and
- (d) a copy of any written agreement entered into between the Consultant and PEHA in respect of the proposed transaction, including a share sale agreement.”

[97] By 22 February 2024, Impact and its solicitors had made clear that the issue of “modernisation” was separate to the consent issue and that SVPH’s insistence on “modernisation” should not affect consideration of the requested consent. Despite this, SVPH on 22 February 2024 again raised the issue of modernisation. Rather than expressly make a commitment by Impact to modernising the Agreement a condition of consent, SVPH threatened to terminate the Agreement should the parties fail to “re-negotiate modernised terms within a suitable period”. The relevant parts of SVPH’s letter of 22 February 2024 are as follows:

- “14 The process for modernisation [of] the Agreement is separate from the process for consent to a sale of shares in the Consultant under the existing terms of the Agreement, and is being treated by St Vincent’s as such. Nevertheless, in addition to ensuring an alignment of values and the suitability of PEHA for the purposes of the consent process, the above request for information is also relevant to PEHA’s stated position that is willing to negotiate in good faith the modernisation of the Agreement within the spirit of the mission of St Vincent’s. In this context, and to form a starting point for the parties’ discussions, we would be assisted by PEHA identifying acceptable terms from a clinical services perspective.

15 We do emphasise that the modernisation [sic] of the Agreement is a matter of urgency for St Vincent. Should the parties fail to renegotiate modernised terms with a suitable period, we reserve our right to terminate the Agreement on reasonable notice. As to this, we note that clause 2.2(3) of the Agreement provides for a 6 month notice period if the Consultant terminates for any reason, but does not prescribe a notice period if the Principal so terminates. That has the consequence, having regard to the Agreement as a whole, that the Principal has an implied right to terminate on reasonable notice according to the principles set out in *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1998) 14 NSWLR 438 AT 443-448. Should there be any dispute about this, we invite you to let us know, so that we can consider whether any steps should be taken to engage appropriate mechanisms to resolve the dispute.”

- [98] On 17 February 2024, Impact (through its solicitors) served a notice of dispute under clause 17 of the Agreement in relation to SVPH’s failure to consent to the Proposed Transaction. Impact proposed the names of three mediators to conduct a mediation under clause 17 of the Agreement.
- [99] On 6 March 2024, SVPH, through its solicitors, stated that any mediation should include a “discussion of the principles of a modern iteration of the Agreement”. SVPH accused Impact of appearing to be “avoiding the issue of modernisation”. Its solicitors advised that if the matter of modernisation remained unresolved, SVPH was prepared to terminate the Agreement on six months’ notice.
- [100] In subsequent correspondence, SVPH made clear that it would not attend a mediation which was “confined to the issue of the consent alone”.
- [101] On 21 March 2024, Impact and Dr Kay initiated this proceeding which seeks a declaration that SVPH has unreasonably withheld consent to the proposed sale of 70 per cent of Dr Kay’s shares in Impact to PEHA, and seeks an order for SVPH to do all things reasonably necessary to consent to the proposed transaction.
- [102] Only after the proceeding commenced did SVPH abandon many of its previous requests for information about PEHA. It renewed its requests in respect of:
- “(a) the provision of financial information about PEHA, including balance sheets and audited financial statements for the past 3 financial years (**Financial Information**);
 - (b) information about the ownership of PEHA; and
 - (c) a copy of any written agreement entered into in respect of the Proposed Transaction.”

Legal principles

- [103] The question whether a party has unreasonably withheld consent is a question of fact. The question cannot be determined “on abstract considerations”.¹ It is determined by reference to the circumstances under which the conduct occurred and by reference to the nature of the contract, its terms, the consent that is sought, and the nature of the relationship between the parties to the contract.² The answer to the question of whether consent has been unreasonably withheld “must, in every case, depend on the facts of the particular case”.³
- [104] Roskill LJ in *West Layton Ltd v Ford*⁴ stated that:
- “the right approach ... is to look first of all at the covenant and construe the covenant in order to see what its purpose was when the parties entered into it; what each party, one the holder of the reversion, the other the assignee of the benefit of the relevant term, must be taken to have understood when they acquired the relevant interest on either side.”
- [105] Nettle J in *Cathedral Place Pty Ltd v Hyatt of Australia Ltd*⁵ adopted this statement of principle, noting that “circumstances are infinitely variable” and that “the question is one of contract and therefore the terms of the contract must always be determinative”.⁶
- [106] Some general principles may, however, be stated.
- [107] The applicant bears the onus of proving that consent has been unreasonably withheld.⁷
- [108] The reason for withholding consent must be to protect a legitimate interest that the provision for consent is intended to protect. Regard must be had to the subject matter of the contract which forms the relationship between the parties and the subject matter of the consent provisions. The reason for withholding or refusing consent must not be something extraneous or dissociated from the subject matter of the contract.⁸
- [109] As a matter of principle, and according to the authorities, a party is not entitled to refuse or withhold consent “in order only to acquire rights or benefits to which it was not entitled under or arising out of, or at least contemplated by the agreement”.⁹ To do so would give it a benefit or advantage for which it had not bargained.

¹ *Houlder Brothers & Co Ltd's Lease* [1925] Ch 575 at 584-5.

² *Ibid.*

³ *Lee v K Carter Ltd* [1949] 1 KB 85 at 92.

⁴ [1979] QB 593 at 605, followed in *Cathedral Place Pty Ltd v Hyatt of Australia Ltd* [2003] VSC 385 at [26] (“*Cathedral Place*”).

⁵ [2003] VSC 385.

⁶ *Cathedral Place* at [27]. *Cathedral Place* has been often cited with approval including by intermediate appellate courts, including *EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* (2010) 41 WAR 23 at [113]; *Fulham Partners LLC v National Australia Bank Ltd* [2013] NSWCA 296 at [44]-[45] (“*Fulham Partners*”).

⁷ *Fulham Partners* at [59]; *International Drilling Fluids Ltd v Louisville Investments* [1986] 1 Ch 513 at 520.

⁸ *Fulham Partners* at [44], citing *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 610.

⁹ *Cathedral Place* at [29].

- [110] The principle that a party must not use a consent procedure to acquire rights or benefits to which it is not entitled under or arising out of the Agreement applies where a party uses the consent process to have the other party agree to new terms of a contract. *Boss v Hamilton Island Enterprises Ltd*¹⁰ was such a case. The landlord indicated that it was not prepared to consent to an assignment of a lease, unless the lessee agreed to amendments that introduced new terms. The landlord acted unreasonably because it was seeking to “obtain a substantially more advantageous contractual position than that upon which it had insisted at the time of the grant”.¹¹
- [111] The objective and subjective position of the party required to give the consent is relevant.¹²
- [112] A party may act unreasonably in delaying or withholding consent. Williams J in *Re Sun Cable Pty Ltd*¹³ stated:
- “... consent is withheld or delayed unreasonably if it is withheld or delayed on grounds that have nothing to do with the relationship of the contracting parties in regard to the subject matter of the contract, or if it is withheld or delayed in order to achieve an objective which is a ‘collateral advantage’ outside the terms of the contract ...”
- [113] An unreasonable delay in responding to a request for consent may amount to a refusal to give consent,¹⁴ or a withholding of consent that is unreasonable.
- [114] The question of whether a refusal or withholding of consent was unreasonable is to be determined objectively having regard to all of the circumstances of the case.¹⁵

Application of these principles to this case

The contractual relationship

- [115] The contractual relationship in this case concerns the provision of management services and the operation of an emergency centre. Recital D to the Agreement refers to the engagement of Impact to provide “professional services in connection with the strategic management of an emergency centre within the Hospital”. The services that Impact provides under the Agreement are specified in clause 4.4. The relationship is about the provision of services by Impact for which it is remunerated. The contractual relationship is entirely different to the relationship in other cases about consent, such as a landlord/tenant case in which the landlord has a legitimate interest in knowing whether a proposed assignee has the financial capacity to pay rent, and about the assignee’s intentions in relation to the use and occupation of the premises.

The proposed transaction is not about the management of the Emergency Centre

¹⁰ [2010] 2 Qd R 115.

¹¹ At [147].

¹² *Fulham Partners* at [43] and *Re Idoport Pty Ltd* [2012] NSWSC 524 [50]-[51].

¹³ [2023] NSWSC 1037 at [145].

¹⁴ *Ibid.*

¹⁵ *Ibid.*

- [116] This is not a case in which Impact's rights are to be assigned to a new party. Impact remains the party to the contract. Dr Kay remains its director and the person who (with the support of Impact's Management Team) acts as manager of the Emergency Centre. Under the Agreement, he must remain in those positions. If he ceased to be a director or ceased to manage the Emergency Centre without SVPH's prior informed approval (unless he died or became ill or incapacitated), Impact would be in breach of the Agreement. Therefore, Impact and its shareholders would not wish to alter Dr Kay's role without SVPH's prior approval. Apart from anything else, a failure to obtain prior approval would give SVPH a basis to allege breach of contract and a basis upon which to try to achieve its aim of amending or replacing the Agreement.
- [117] Dr Kay's role as Director of Impact and Manager of the Emergency Centre is important to its operations, and therefore to the interests of SVPH as owner and operator of the Hospital. As Mr Steele explains, the continued operation of the Emergency Centre is "underpinned by Dr Kay's skills and experience in operating and managing [the Emergency Centre] and similar centres, as well as his network of doctors".
- [118] SVPH's interest in Dr Kay's continuing role as Director of Impact and as Manager of the Emergency Centre, and consequently the maintenance of the Centre's current operations and standards, is protected by various provisions in clauses 4.13 and 5, not by the provision about obtaining approval to sell his shares in Impact.
- [119] Dr Kay's ongoing role in managing the Emergency Centre is not in doubt, and it is not the subject of the consent that he has requested. The subject matter of the requested consent is the transfer of shares in Impact.
- [120] SVPH's interest in having Dr Kay or someone with similar skills and qualifications as Manager is protected by other contractual provisions.

The Agreement does not treat Impact as Dr Kay's alter ego

- [121] SVPH invites the Court to treat Impact as if it is the corporate alter ego of Dr Kay and that the Agreement is principally "one for the services of Dr Kay". With respect, that overstates the position and does not reflect the terms of the Agreement.
- [122] Under the Agreement he may remain Director of Impact and Manager of the Emergency Centre, while transferring some or all of his shares in Impact. To unreasonably withhold approval to his doing so would be to deprive him of a benefit that the Agreement contemplates. The Agreement contemplates that the Principal will have the benefit of Dr Kay working as Manager of the Emergency Centre at a time when he has sold all or some of his shares. This is the proposal that is the subject matter of the request for approval.
- [123] Attention to clause 4 of the Agreement also confirms that the Agreement contemplates a time when Dr Kay will cease to be a director of Impact or cease to manage the Emergency Centre. It might have been as early as three years after the Agreement was struck in 2001. Once that three-year period had expired, the parties contemplated that Dr Kay might be replaced as Manager of the Emergency Centre, subject to the Principal not unreasonably withholding its approval.

- [124] Clause 4.13(3) and clause 5.1 provide contextual support for the proposition that his replacement would be someone of similar skills and qualifications.
- [125] All of this is to say that the Agreement does not treat Impact as Dr Kay's alter ego. He may sell all or some of his shares in it, with approval to do so not being unreasonably withheld. Also, the Agreement contemplates that a point will be reached when Dr Kay ceases to manage the Emergency Centre and that their Agreement will continue with the Emergency Centre being managed by a person with similar skills and qualifications in the management of an Emergency Centre.
- [126] Again, the present dispute is not about such a scenario. Unfortunately, much of SVPH's communications and expressed concerns are as if it was being asked to approve a succession plan for the replacement of Dr Kay as Manager of the Emergency Centre.

The requested consent

- [127] One must focus on the subject of the requested consent. It is not about consent to a succession plan that involves Dr Kay ceasing to be a director of Impact or ceasing to manage the Emergency Centre.
- [128] If Dr Kay and PEHA have discussed a future succession or even agreed about how long he is expected to remain in his present roles, that is their business. It may become SVPH's business in the future. At that point, SVPH's interest in Dr Kay's successor being someone with similar skills and qualifications in the management of an Emergency Centre will be protected by other provisions about consent.
- [129] Dr Kay assured SVPH in his letter of 20 December 2023 that he would retain a substantial equity stake in Impact, would remain as CEO of the business with a commitment to operating the business autonomously, and with no change to the existing operating model or disruption to the primary points of contact between Impact and St Vincent's. He assured SVPH that PEHA as the proposed purchaser of shares in Impact would help reinforce the long-term sustainability of the business with a "scaled and partner centric business with deep capability and aligned values". He previewed the "succession of a scaled and partner centric business to continue to support St Vincent's over the long-term". He reiterated that the proposed sale was not intended to alter the existing operation of the Emergency Centre or involve any representative of PEHA as a point of contact with St Vincent's.
- [130] Dr Kay's assurance in December about his hope for a future succession involving PEHA was an understandable assurance that he expected at some time in the future there would be an orderly succession that would enable the Emergency Centre to continue and to continue to support the Hospital.
- [131] A future succession of the kind he previewed is something the Agreement contemplates and something that seemingly would be for the mutual benefit of the parties in continuing a successful Emergency Centre. I say "seemingly" because SVPH may see its commercial interests as better served by terminating the

Agreement and replacing it with an agreement for a definite term and which is on more favourable commercial terms than its agreement with Impact.

The interest protected by the relevant consent provision

- [132] The provision for consent about the sale of shares is apt to protect SVPH's interest in Impact not being controlled by a disreputable or unethical individual or entity.
- [133] Dr Kay's reference to PEHA, its capability and its "aligned values" was an assurance that he was not proposing to sell his shares to a crime family, a Wolf of Wall Street, a colourful Sydney racing identity, an abortionist, or someone whose character or reputation would be a legitimate concern to SVPH. SVPH was entitled to seek and obtain assurances and information about the character and reputation of PEHA, not its balance sheet or financial statements.
- [134] The provisions in the Agreement about obtaining the Principal's prior informed approval to a sale by Dr Kay of his shares in Impact, and that it not unreasonably withhold its approval, protect a legitimate interest of the Principal that it not be in a contractual relationship with a company that is partly or fully owned by a disreputable organisation or individual or an entity or individual that subscribes to values and practices that are at odds with the Principal's values and ethics. However, there is no suggestion that PEHA is of such a character or that SVPH has not been given sufficient time and information to ascertain those matters.
- [135] Despite ample information, face-to-face meetings, and the substantial time within which SVPH has been able to inquire about PEHA's ethics, its shareholders, and the character of its executives, SVPH has not raised any concern of substance about those matters. Its requests for information about PEHA's balance sheet, profit and loss statements, and management accounts could not reasonably be expected to tell SVPH anything of real relevance to PEHA's character, ethics, or values. Rich companies and individuals do not necessarily have good ethics or values. Companies and individuals who are not prosperous may have good ethics and values.
- [136] The Agreement does not require Dr Kay's shares to be sold to any particular entity, such as an entity that has similar skills and qualifications as Dr Kay or has a certain financial standing. The final sentence of clause 5.1 provides that it would be unreasonable "for the Principal to withhold consent in the event that Dr Phillip Kay's position with the Consultant changes and a person with similar skills and qualifications trained by Dr Kay in the management of the Emergency Centre is proposed to assume Dr Kay's role and or acquire Dr Kay's shareholding".
- [137] That is a specific instance in which it would be unreasonable to withhold consent. It does not limit other circumstances in which it would be unreasonable to withhold consent. The Agreement contemplates that, subject to the Principal's approval, which may not be unreasonably withheld, Dr Kay may sell his shares to an entity or person with no prior involvement in the management of an Emergency Centre, or any involvement in the health industry. Examples would be an investment bank, a superannuation fund, or a wealthy private individual.
- [138] Subject to the Principal reasonably withholding its approval, the Agreement allows Dr Kay to capitalise on the value of his shares by selling all or some of them. It

does not provide that he should only sell them to a certain class of investor. It would be unreasonable to limit his entitlement to do so by withholding approval to sell to, say, a reputable private investor.

The circumstances do not make the financial position of Impact or its shareholders relevant to the requested consent

- [139] An important circumstance relevant to the approval of the sale of shares is that Impact is paid by SVPH, not the other way around. This distinguishes the present case from a requested consent to the assignment of a lease to a new tenant, or some other transaction where the financial capacity of an incoming entity is relevant to a party's informed consent, and something about which it would reasonably request information.
- [140] Another relevant circumstance is that Impact has never been required to inject capital into the business. It is and always has been profitable. Dr Kay does not foresee that Impact would require an injection of capital from himself or any prospective shareholder in the near or foreseeable future, or at all. He explains that the operation of the business is "service orientated and not capital intensive". Therefore, this is not a case in which Impact's ability to raise funds from its shareholders is relevant. Because the business does not require such a capital injection, the wealth and financial circumstances of its shareholders does not appear to be relevant or justify in the circumstances SVPH's requests for copies of PEHA's balance sheets, other financial statements, and management accounts. In any event, an unexpected future request by Impact to raise funds from its shareholders in circumstances in which PEHA was unable to provide the requested funds would necessitate some other arrangement, such as PEHA selling its shares in Impact to an investor who could provide the required capital.
- [141] Notably, SVPH has not asked to obtain copies of Impact's balance sheet and other financial statements as a condition of its granting consent. The reason is probably obvious: Impact runs a profitable business, is not capital intensive, and does not require an injection of capital to continue to successfully operate its business and to perform its contractual obligations. If Impact's financial circumstances are not a matter for legitimate inquiry for the purpose of making an informed decision about approval for the sale of some of Dr Kay's shares, it is hard to see why the financial affairs of its shareholders or a potential shareholder is of legitimate interest to SVPH in connection with its consent to the requested share transfer.
- [142] The Agreement does not require Impact to pay SVPH. The Agreement does not require Impact or its shareholders to be of any particular worth. The worth and other financial circumstances of a party that wants to invest in Impact is not a matter that appears to be relevant in the present circumstances.

SVPH has treated the request for consent to transfer shares as if SVPH was being asked to enter into a new service agreement with PEHA

- [143] Unfortunately, SVPH has treated the request for consent to transfer shares to PEHA as if SVPH was being asked to enter into a new service agreement with PEHA. This emerges from Mr Marcard's affidavit. He explains his practice when entities within the St Vincent's Health Australia Group are considering "engaging a new service provider or varying aspects of an existing arrangement". With that process

in mind, he formed a working group to consider the proposed sale of Dr Kay's shares. Unsurprisingly, given SVPH's approach to the matter as if it was considering engaging a new service provider or varying aspects of an existing contract, Mr Marcard considered that SVPH needed to understand a number of things about PEHA. These included "how PEHA financed its operations".

- [144] SVPH's interest in understanding whether PEHA is a company of good standing is entirely legitimate. However, the matters that Mr Marcard said he needed to understand include "how PEHA proposed to maintain the continuity and the quality of services delivered under the Agreement". However, this was not a case in which PEHA was being assigned Impact's rights under the contract, which made it relevant to know how PEHA proposed to perform its obligations. PEHA was not being proposed as a new service provider. However, SVPH approached the matter as if it was.
- [145] As a result, SVPH requested many categories of information that were not required, including financial information on PEHA and details of its "commercial model as an operator of emergency departments in private hospitals".
- [146] It sought information about a succession plan to Dr Kay to ensure an orderly and managed transition. As I have explained, this would have been a legitimate request had Impact been seeking consent for such a succession plan. Many of these requests were not pressed after these proceedings were commenced. SVPH continues to press for detailed financial information on PEHA. The information it requests is not reasonably necessary to make an informed decision about approving the proposed sale of some of Dr Kay's shares.
- [147] Dr Kay's 20 December 2023 letter previewed a future process for succession, and in the following weeks and months he and PEHA, in the interests of disclosure and cooperation, disclosed much information about PEHA that supported the assessment which Dr Kay had made of PEHA and its executives. However, this related to a future anticipated succession, not the sale of his shares. Despite Dr Kay's and his solicitors' repeated assurances that this was simply a transfer of shares and that it would be "business as usual", SVPH used the consent process as if it was being asked to approve a succession under which Impact's way of operating the Emergency Centre was to be replaced by PEHA's commercial model and operating procedures.
- [148] Because the working group within SVPH treated the matter as if it was being asked to engage a new service provider or vary aspects of an existing agreement, it treated the request to approve the share sale as "a good opportunity for the Agreement to be modernised". These are Mr Marcard's words. Based on his discussions with the working group, he understood "modernised" to include incorporating a clearly defined term into the Agreement.
- [149] SVPH's insistence on negotiating the terms of an amended or replacement agreement is evident from what was said at the 1 February 2024 meeting and from its communications. Its lawyers' attempts to walk back what was said at that meeting does not mean that negotiating a new agreement did not remain firmly on SVPH's agenda. Modernisation had not been raised by SVPH in the years before December 2023. By 22 February 2024 it was advising the "the modernisation of the Agreement is a matter of urgency for St Vincents".

- [150] References were made by SVPH to the consent process and negotiations about a new agreement proceeding “in parallel”. I am not sure what SVPH meant by that. Railway tracks spring to mind. Each rail goes the same distance and to the same destination. SVPH was insistent that both the requested consent and “modernisation” of the Agreement be the subject of a mediation. When Impact wanted the mediation simply to be about the consent issue, the mediation was called off. This is not consistent with a commitment by SVPH to the consent process continuing to a determination if negotiations about modernisation came to a halt or were delayed. Its position was that consent and modernisation went together.
- [151] SVPH’s approach to treating the process as one involving negotiation of a new agreement with a new service provider is evident from the following paragraph of Mr Marcard’s affidavit, the position he pronounced at the 1 February 2024 meeting, and SVPH’s subsequent requests for information about PEHA’s financial operations:

“Entities within the St Vincent’s Health Australia group of companies have previously entered into arrangements with service providers backed by private equity. However, from my involvement in other such arrangements, when they occur, they are subject to and governed by contemporary commercial agreements with a defined term and typically incorporate a mechanism by which the quality of the service provided can be monitored.”

SVPH used the approval process to obtain a new or replacement agreement

- [152] All this points to the conclusion that well after 1 February 2024 and until at least the commencement of this proceeding, SVPH has treated the approval process as one that provides it with the opportunity to negotiate a new commercial agreement with Impact that includes a defined term. It has used and delayed the process for that purpose.
- [153] The Agreement does not entitle SVPH to use the approval process to request a new or replacement agreement.
- [154] SVPH withheld its approval in order to acquire rights or benefits under a new agreement, something to which it was not entitled under or arising out of the Agreement. It has sought to use the approval process to put itself in a more advantageous, contractual and commercial position than it is entitled to be in under the Agreement. In doing so, it has acted unreasonably and unreasonably withheld the requested approval.

Standards

- [155] SVPH and Mr Steele’s affidavit in particular raises reasonable points about the potential modernisation of the Agreement in relation to matters such as reporting to SVPH certain adverse clinical outcomes and a term requiring Impact to provide SVPH with “oversight of its patient handling procedures”. It also seeks to include more specific terms about the level of quality of services provided at the Emergency Centre. Three things should be said about these matters. First, neither Impact nor PEHA indicated that they were not prepared to discuss these matters. On the contrary, they indicated a preparedness to do so, but not in the context of the

approval process or as a condition for granting approval. Second, the approval process does not provide SVPH with the occasion or the opportunity to renegotiate the agreement even in respect of amendments that may be commendable. Third, SVPH's conception of "modernisation" of the agreement extends far beyond more specific terms about the quality of care and reporting. Dr Kay correctly apprehended that the insistence on "modernisation" was something of a Trojan horse by which SVPH wanted to replace the Agreement with an entirely different agreement, being an agreement for a defined term.

[156] The evidence does not adequately explain how PEHA's position as a shareholder of Impact would affect the ongoing operations of the Emergency Centre or affect the quality of care in circumstances in which the business will be run by the same people, according to the same principles, and with the same processes that currently apply. The fact that PEHA is backed by a "private equity" shareholder is not an adequate explanation.

[157] SVPH submits that if the proposed sale proceeds, PEHA will be "in control" of Impact and that SVPH is concerned to ensure that current standards of management of, and medical services provided in, the Emergency Centre are maintained. The "in control" submission does not sufficiently distinguish between:

- (a) control of operations; and
- (b) control of the company, in the sense of who Impact's majority shareholder will be.

[158] As for operations:

- (a) Dr Kay will remain in control of operations as Director of Impact and Manager of the Emergency Centre;
- (b) Dr Kay has required, and PEHA has agreed, that he manage the business without interference from PEHA;
- (c) in any case, Impact is obliged under the Agreement to, among other things:
 - (i) manage the Emergency Centre in line with world's best practice (cl 3.1(1));
 - (ii) operate the Centre in accordance with certain principles and a management philosophy that is set out in a Schedule to the Agreement (cl 3.7)
 - (iii) implement those principles to reflect the mission, values and philosophy of SVPH (cl 3.7);
 - (iv) perform the Services in a manner consistent with the moral teachings of the Catholic Church (cl 3.2); and
 - (v) ensure that all personnel have the necessary skills, judgment and experience to undertake their duties, and, in the event SVPH reasonably considers they do not, or have acted in a way that is inconsistent with its mission or the teachings of the Catholic Church, Impact must remove the person from the Emergency Centre upon SVPH's request (cl 4.12);

- (d) therefore, a shareholder in Impact, acting rationally, would not require Impact to change its operations in a way that would trigger a breach by Impact of these and other obligations;
 - (e) Dr Kay is committed to continuing business as usual; and
 - (f) Dr Kay cannot cease to be in charge of operations without SVPH's approval.
- [159] As for control of the company, as discussed, the Agreement does not expressly or impliedly require that Dr Kay's shares be sold to a party with the same skills and qualifications as Dr Kay.

SVPH will not be in a commercial relationship with PEHA

- [160] SVPH seeks to justify its requests for information and the time it has taken to decide whether to approve the transfer because if it approves the sale "it will necessarily follow that SVPH will be in a commercial relationship with PEHA, as PEHA will be the controlling entity of Impact".
- [161] SVPH will not, however, be in a commercial relationship with PEHA, as might have been the case had there been an assignment to PEHA of Impact's rights under the Agreement. SVPH will remain in a commercial and contractual relationship with Impact. As just discussed, PEHA will not be in charge of Impact's operations. Dr Kay or someone approved by SVPH with similar skills and qualifications will be.
- [162] SVPH has made requests for information about PEHA's finances, its "commercial model as an operator of emergency departments", and evidence of PEHA meeting "patient-centred key performance indicators (or the like) in respect of services provided in a similar agreement". It has done so on the basis that it needed to understand "how PEHA proposed to maintain the continuity and the quality of services delivered under the Agreement".
- [163] This misconceives the party whose obligation it is to maintain the quality of services.
- [164] Many of SVPH's requests were as if it was engaged in negotiations with PEHA about how PEHA proposed to perform obligations under a new agreement, based on PEHA's commercial model in other hospitals. In that regard, on 22 February 2024, SVPH wrote that it "would be assisted by PEHA identifying acceptable terms from a clinical services perspective".
- [165] SVPH made requests for information about matters that were not relevant to Impact's continuing performance of its obligations under the existing Agreement.
- [166] SVPH is correct, however, in submitting that it is reasonable for it to pay attention to "the identity and character" of the proposed purchaser and to request information about those matters. This is because the Agreement's provisions in clause 4.13 about approval are not confined to a change in the directorship of Impact or Dr Kay's replacement as manager of the Emergency Centre.

Provision of information about PEHA

- [167] The information that was disclosed by Impact and PEHA to SVPH indicates that PEHA is a company of good standing. Dr Kay chose to sell some of his shares to PEHA because he knows and trusts it and its directors, and therefore is interested in having PEHA as a shareholder (or “silent partner”). He assessed that PEHA provided a reputable and capable potential shareholder in Impact with whom he can plan a succession that will enable Impact to continue to operate the Emergency Centre, and thereby support SVPH’s hospital and SVPH’s business. His assessment of PEHA as having capability and aligned values has not been shown to be misplaced. The Agreement contemplates a process of succession.
- [168] The requested consent does not require SVPH to consent to anything other than PEHA becoming a shareholder in Impact. SVPH treated the request as being one to approve a succession by which PEHA effectively becomes the operator of the Emergency Centre. SVPH should not have done so since the nature of the request was clarified by Dr Kay and Impact’s solicitors. They explained that there would be no change in operations, and Dr Kay has given sworn evidence about that. His evidence was convincing and unchallenged in that regard.
- [169] The numerous requests for information that SVPH pressed prior to the commencement of the proceeding, and the requests that it still presses, were unnecessary for it to make an informed decision about the approval that was actually sought.
- [170] The additional information that SVPH has insisted upon obtaining about PEHA’s financial affairs was not reasonably required to make an informed decision about the requested approval.
- [171] SVPH did not have a reasonable basis to obtain a copy of any written agreement between Impact and PEHA. SVPH and PEHA’s preparedness to execute a confidentiality agreement in relation to information that is “commercial in confidence” does not mean that it was reasonable for SVPH to make all the information requests that it did.
- [172] If one assumes that any agreement between Impact and PEHA in relation to the sale of Dr Kay’s shares includes tentative plans about a future succession, then that is not information to which SVPH is presently entitled. If it includes terms about how Impact will report to its shareholders in the future about its operations, then these are matters about Impact’s future internal arrangements.
- [173] In summary, SVPH has had sufficient time and enough information to make an informed assessment about approving the proposed sale of shares. Viewed objectively, its withholding of approval prior to the commencement of this proceeding was unreasonable. Viewed objectively, its continued withholding of its approval is unreasonable.

Conclusion and summary

- [174] SVPH’s persistent and unreasonable requests for additional information about PEHA, about the agreement between Impact and PEHA, its insistence that negotiations about “modernisation” occur in parallel with the consent process, and its threat to terminate the Agreement if Impact does not negotiate a new agreement, all must be seen in the light of its 1 February 2024 pronouncement to the effect that

the granting of consent was conditional on the modernisation of the Agreement. That pronouncement confirmed that SVPH would withhold its consent if Impact did not agree to renegotiate the terms of the Agreement.

- [175] Not having a proper basis to insist on an amended or replacement agreement, SVPH has used the consent process as a means to secure such a benefit or advantage. It has treated the consent process as if it is being asked to enter into a new service agreement. Impact was entitled to ask that negotiations about any amendment to the Agreement not occur at the same time as, and thereby confuse and delay, the consent process. Despite this, SVPH has sought to resolve the consent process and to negotiate a new agreement at the same time. It would not mediate the consent issue to a resolution unless the issue of modernisation of the Agreement was part of the mediation.

- [176] SVPH has acted unreasonably in seeking to use the consent process to negotiate new terms of the Agreement or a replacement agreement. It has withheld or delayed deciding whether to approve the proposed sale on grounds that are not relevant to the subject matter of the consent that is being sought. It has withheld its consent in order to achieve an advantage to which it is not entitled under or arising out of the Agreement. It has used the consent process to obtain a substantially more advantageous position for itself than is provided for in the Agreement. It has sought to obtain a collateral advantage. In doing so, it has unreasonably withheld its approval.

- [177] In addition, its delay and withholding approval was objectively unreasonable having regard to all the circumstances of the case.

- [178] SVPH knows enough about PEHA and the nature of its business and has had sufficient time to satisfy itself about the nature of PEHA's business, and its values, reputation, and character. The position would be different were PEHA an unknown or disreputable entity. That might give SVPH grounds for concern about being in a contractual relationship with a company whose majority shareholder was of bad character or bad repute, or whose values did not align with SVPH and those to which Impact is required to adhere under the Agreement.

- [179] The simple fact remains that all Impact has requested is an approval for Dr Kay to transfer some of his shares to an entity that wishes to invest in Impact. Impact is not desperate to raise capital from a new shareholder. It does not need a new shareholder to inject capital into the business because the business does not require capital. The position would be a little different had Dr Kay negotiated to sell his shares to an investment bank, a superannuation fund, or a wealthy private investor which sought to own shares in a successful and profitable company that has the benefit of a contract of indefinite duration. Provided the entity or individual that was to become a shareholder in Impact was of good character, had a good reputation, and did not espouse matters that were inconsistent with SVPH's values, it is hard to see what basis SVPH could have for refusing to approve a share transfer to such an entity or individual.

- [180] The same situation applies to PEHA as an investor. SVPH has had enough time to be informed about those and any other relevant matters about a potential shareholder in a service provider, and to make an informed decision about its

approval. It has unreasonably delayed in making a decision about the requested approval.

- [181] In the circumstances, its withholding approval has been unreasonable.
- [182] Assessed objectively, SVPH has acted unreasonably in withholding its approval to a change in a service provider's shareholders.
- [183] The absence of reasonable grounds to withhold its consent and its unreasonable delay reinforces my conclusion that SVPH has withheld its approval because it has wanted to use the approval process to obtain something to which it is not entitled.
- [184] Impact is entitled to a declaration that SVPH has unreasonably withheld its approval.
- [185] In summary, SVPH has unreasonably treated the approval process as if it was negotiating a new service agreement with a new service provider. As much as SVPH would like to have a new agreement, the approval process was not to be used to obtain one.