

**SOUTHERN RENT ASSESSMENT PANEL  
AND  
LEASEHOLD VALUATION TRIBUNAL**

**CASE NUMBER: CHI/18UH/LBC/2009/0039**

**DECISION ON AN APPLICATION UNDER SECTION 168(4) OF THE  
COMMONHOLD AND LEASEHOLD REFORM ACT 2002**

**Property:** Flat 5 Dunmore Court and Garage  
Dunmore Drive  
Shaldon  
Devon  
TQ14 0BS

**Applicant:** Nessland Ltd

**Respondents:** Philip Kenneth Legge & Barbara Legge

**Application Date:** 5 October 2009

**Inspection/Hearing Date:** 9 December 2009

**Appearances:** Mr J Bates – Counsel for the Applicants  
Ms L Davies – Solicitor for the Respondents  
Mr D Stocks – Crown Property Management  
Mr G A Simmons – Director/Current Chairman Nessland Ltd  
Mr & Mrs P K Legge  
Mr A J Simmonds of East View House, Horse Lane, Shaldon

**Members of the Tribunal:** Mr T E Dickinson BSc FRICS - (Chairman)  
Mr T N Shobrook BSc FRICS – (Surveyor Member)  
Miss C Rai LLB – (Lawyer Member)

## **INTRODUCTION**

1. This is an Application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (The “2002 Act”) for a Determination that a breach of covenant or condition in the relevant lease has occurred.
2. The Applicant Company is the freehold owner situated at and known as “Dunmore Court, Horse Lane, Shaldon, Devon” Title No: DN102497 and has been registered as the same since 13 May 1986.
3. The Respondents are the leasehold owners of Flat 5 Dunmore Court under the terms of a lease dated 24 November 2005. A garage is included as part of the demised property. They have been registered as the same since 16 January 2006 under Title Number DN525421.
4. A site inspection was held on the morning of Wednesday 9 December 2009 in the presence of the Applicants, Respondents and their Representatives prior to the Hearing at Bitton House, Teignmouth.

## **THE ALLEGED BREACH**

5. The skeleton argument on behalf of the Applicant states that the Respondents are in breach of various covenants arising out of building works to a garage and the Applicant seeks a series of determinations to this effect. The Respondents are seeking a series of remedies by way of counter claim, all of which the Applicant suggests are wholly misconceived and not within the jurisdiction of the LVT.
6. The Applicants Case:  
  
Mr Bates for the applicant drew the Tribunal’s attention to the factor in dispute, i.e. the extent of land edged blue on Plan No 2 to the Deed of Surrender and Lease made on 24 November 1986 between Alan Robert Bennett and Downtdale Ltd.
7. Mr Bates stated that the Applicant was seeking four Determinations as follows:
  - a. Whether or not a breach has occurred on account of obstruction as a result of lorries and skips (in connection with the Respondent’s works) in Dunmore Drive as a result of the works;

- b. Whether or not nuisance, damage and annoyance has occurred as a result of the building works;
- c. Whether or not a breach has occurred as a result of works done to the demised premises without the landlord's consent (namely an extension to the garage), extending over land outside the demise;
- d. Cutting, injuring and maiming walls to the demised premises

#### **EVIDENCE OF DARREN STOCKS**

8. Following confirmation of the veracity of his Witness Statement, Mr Stocks, Managing Director of Crown Property Management Ltd, confirmed that five of the leaseholders at Dunmore Court had contacted his office and raised concerns about the safety of works over a period of 6 – 8 weeks. The leaseholders had complained straight away when the works commenced in about August 2009 about safety issues including the builders skip on the access road which was not lit at night. Mr Stocks emphasised that the access road was not very wide and not the best lit area.
9. Verbal complaints had been received at his office about lorries loading and unloading and obstructing the entranceway. The leaseholders who had complained were Sonia Dibbins of Flat 22, Freda Street of Flat 40, Geoff Simmons of Flat 44, Mrs Edwards of Flat 45 and Mr & Mrs James. Only one complaint had been received in writing, but verbal complaints had been received concerning large vehicles that had arrived on site every other day or so.

#### **EVIDENCE OF GEOFFREY ALAN SIMMONS**

10. Following confirmation of the veracity of his Witness Statement, Mr Simmons confirmed that he had been a Director of Nessland Ltd for seven years and was currently acting Chairman. He acquired his leasehold interest in 44 Dunmore Court in or around October 1985.
11. Mr Simmons stated that at the time he purchased his flat there was a row of garages and four car ports at the end of the row, which were oblong in shape and timber framed with Perspex roofs. To the right of the fourth car port there had always been a passageway. This ran around across the back of the car ports and garage with a width of 3 – 4 ft. Mr Simmons understood this passageway to belong to Nessland Ltd from the plans contained in his deeds, although he had no written evidence.

12. In response to the request by Mr & Mrs Legge for the Company's permission to carry out works to both their flat and garage, Mr Simmons confirmed that he had sent out a postal vote. Mr Simmons said that Mr & Mrs Legge had on two occasions applied to the Board of Nessland Ltd for consent to make alterations to their flat. On both occasions consent was refused by Nessland Ltd and Mr & Mrs Legge were notified of the Board's refusal (although it became clear later that consent for works to the flat had been given).
13. In his Statement Mr Simmons said that to the best of his knowledge the Board of Nessland Ltd had never consented to other tenants at the development making alterations of a similar nature to those Mr & Mrs Legge were currently undertaking.

In questioning, Mr Simmons did concede that Nessland Ltd must have consented to some alterations, including the blocking up of the access way at the rear when the four garages (including the Respondent's garage) were built.

#### **SUBMISSIONS BY THE APPLICANT:**

14. Mr Bates, Counsel for the Applicant, referred to the lease dated 26 May 1978 when the Freeholder demised Flat 5 and a garage. These were both edged in red on the plan attached to the lease. Since the draftsman prepared the 1978 lease, things had changed on the ground in that there are now only six spaces along the whole wall to the eastern side of the block and not eight as shown on the original plan.
15. Mr Bates referred to the fact that it was a term of the lease that the Leaseholder would not "injure cut or maim any of the walls ceilings floors or partitions of the demised premises"  
  
"... make any structural alterations or structural additions to the demised premises... without the previous consent in writing of the Lessor, such consent not to be unreasonably withheld"
16. Part 4 of the 1978 lease also referred to two broad nuisance covenants at Paragraphs 2 and 3 and also at Paragraph 9 "not to permit any vehicles goods or articles to obstruct the common main entrances, common passages ... or paths on the freehold premises". The exhibit marked NL4, the lease dated 24 November 1986 was supplemental to the 1978 lease. This surrender and lease was effectively a land swap with the new lease being taken out on the same terms. Neither lease referred to a garage. Both leases refer to land. There was certainly no covenant to build.

This was just a straight land swap. The land given up was outlined in red on Page 50 of the exhibit and the land received was edged blue on Plan 2 attached to the 1986 lease.

With regard to this plan, Mr Bates explained that the starting point was the far right hand line on the plan which went right up to the line at the north east corner to the rear. Space 5 was delineated with another line on the right hand side inside the northernmost line. This left a wedge shaped piece of land to the right hand northern side.

The question was does the blue line surrounding Space 5 deal with the oblong or encompass an additional wedge shaped area to the right hand northern side on the plan. Mr Bates submitted that the land edged blue was rectangular in shape. Nothing else had changed on the plan apart from the fact that Space 38 had now been renumbered 40.

17. The Plan was not the only evidence; one had the Statement of Mr Simmons (although Mr Bates stated that one would need to take a view on what weight should be attached to that).

The question was why should you retain the wedge shaped piece of land to the far right hand side and not build a larger garage on the land supposedly demised.

18. Mr Bates referred to two further variations of the lease, one dated 11 October 1995 to do with storage space and referred to in the exhibit marked NL2 in the bundle, together with a Deed of Surrender dated 24 November 2005, although no further documentation could be provided by the Applicant in relation to this Deed.

19. With regard to permission to build a garage, it was presumed that that was what was referred to in Schedule 1; no-one was pretending that that it changed the extent of the demise. The position today was that the Respondents held their flat and garage under the terms of the 1978 lease as varied by the 1986 Deed of Surrender and re-grant and the Deed dated 24 November 2005.

20. Mr Bates referred to the role of the LVT and the fact that only three cases about applications made under section 168 of the 2002 Act had been referred to the Lands Tribunal. Reference was made to Judge Huskinson's decision in Swanson Grange (Luton) Management Ltd v Eileen Langley-Esson. Whilst the LVT is empowered to determine whether or not a breach of covenant has occurred, the LVT must not go on to consider whether or not the Landlord would succeed in an action for forfeiture. Further, Mr Bates submitted that the LVT certainly has no jurisdiction to make any determinations or grant any of the remedies requested by the Respondent at Paragraph 21 of the Response.

The LVT has not been conferred any jurisdiction in relation to awards for damages or orders for rectification, or indeed to award costs to the Lessees. For the avoidance of doubt, the LVT is only empowered to consider whether or not the Respondents have committed a breach.

21. Mr Bates for the Applicant drew the Tribunal's attention to various photographs reproduced in the exhibit marked NL9 taken by Darren Stocks of Crown Property Management or members of his staff on both 28 and 30 August 2009. There was insufficient space on the right hand side of the skip lorry for a vehicle to pass and this was quite clearly an obstruction. The Lessee has covenanted not to obstruct and that is an objective state of affairs, in fact an absolute covenant.

Mr Bates also referred to the Lands Tribunal Case of GHM (Trustees) Ltd and Glass (LRX/153/2007). In this Decision the President of the Lands Tribunal referred to the limited extent of the LVT's jurisdiction in relation to Section 168(4) of the Act, in particular, at paragraphs 13 and 14 of that Decision.

22. With regard to nuisance, Mr Bates referred the Tribunal to the exhibit marked NL10 in the bundle and the letter of J Edwards to Crown Property Management dated 1 October 2009.

There was no doubt that broad nuisance and annoyance had been caused. No lights had been provided to the skip and its positioning was still dangerous at the present time. The Tribunal had heard the earlier evidence given by Mr Stocks of Crown Property Management. He said that a concern had been expressed about the weight of the skip and the scarring to the road surface. The nuisance clause within the lease was extremely broad and unqualified. This covenant related to the entirety of the demise and was expressed to benefit not only the freeholder or leaseholders but everyone else in the neighbourhood. Five of the leaseholders had complained verbally about the skip and lorry but only one saw fit to put an objection in writing.

23. In any consideration of the question of trespass, Mr Bates contended that the starting point was whether or not the land was actually demised. The Applicant contends that the Respondents are in breach of covenant in that they have built the extension on land which was retained by the Applicant and in those circumstances the applicant had an absolute right to refuse consent. Mr Bates referred to the Case of *Iqbal v Thakrar* [2004] 3 EGLR 21 where it was held that "the landlord has the right to refuse, even unreasonably, any alteration or addition which trespasses on what is retained by him". Therefore, it was his argument that if the land is retained by the Applicant, then the LVT should determine that a breach of covenant has occurred in this respect.

24. Mr Bates then referred again to Plan 2 on the 1986 Deed and stated that this plan makes clear that the northern side of the freeholders boundary was a diagonal line. The plot demised as Plot 5 on the plan was rectangular in shape and two distinct lines can be seen on the plan. The triangular piece of land on the northern side of the demised plot was retained by the freeholder and it is that land upon which the Respondents have built.
25. Mr Bates again referred to the evidence of Geoffrey Simmons who confirmed that it was his recollection that all the parking spaces had been the same size and that when the garages were constructed they were built to demarcate the demised land (Paragraph 4 of the Witness Statement of Geoffrey Simmons).
26. Mr Bates attached significance to the 1995 planning permission. He said that it was not credible that the owner at that time would have built a garage on a smaller footprint than demised. Therefore the extension of the garage must be outside the original demise and must be a breach.
27. Mr Bates further submitted that there can be no doubt that the works amount to injury, cutting or maiming of the walls of the garage contrary to the provisions of Clause 2(3) of the 1978 lease. The only questions were:
- a. whether or not the garage is part of the demised premises and;
  - b. whether or not the Respondents are entitled to carry out the works in dispute as they appear to contend that they are merely making good an existing breach of covenant by the applicant.
28. Mr Bates then referred to an extract from Woodfall Section 5 Fixtures. There was no doubt that the garage was part of the demised premises, although the 1986 lease demises a piece of land. Once a garage was built on that land, then the garage becomes part of that "piece of land". As Woodfall puts it "the maxim of common law was quicquid solo plantatur, solo cedit". Thus whatever was attached to the land became part of the land. Whether there has been a sufficient annexation to the land is a question of fact in each case. It depends on all the circumstances of the case, and in particular the degree of annexation and the object of the annexation. In considering the degree of annexation, the question is whether the article "can easily be removed, integer, salve et commode, or not, without injury to itself or the fabric of the building". In considering the purpose of the annexation, all the circumstances are to be considered, the question being whether the article was affixed "for the permanent and substantial improvement of the dwelling" or "merely for a temporary purpose or the more complete enjoyment and use of it as a chattel".

Thus once the garage was built, it became part of the “piece of land” which had been demised. It was further submitted that the fact that the garage was built subsequent to the demise of the land upon which it stood was irrelevant.

29. Mr Bates contended that it was inherently unlikely that the garage was constructed otherwise than on the full extent of the demised property but if the Respondents could establish that they have a contractual right to a larger garage, they should issue proceedings in the County Court for a mandatory injunction.
30. Mr Bates finally affirmed his conclusion that the Respondents are in breach of the four covenants set out at Paragraphs 5 – 7 of his skeleton argument.

### **RESPONDENT’S CASE**

31. Ms L M Davies, Solicitor and Director of Cressing Consulting Ltd, presented her case on behalf of the Respondents Philip and Barbara Legge.
32. Ms Davies explained to the Members of the Tribunal that Flat 5 was in the “ziggurat” block forming part of Phase 1 of the development built in the mid to late 1970’s, although there was a later Phase 2 completed in the 1980’s. There were approximately 50 flats in all in both Phases 1 and 2. Ms Davies contended that her clients already had the land in question leased to them under the provisions of the 1986 lease. Ms Davies had in her response set out full details of the various documents which all appeared to be validly executed as Deeds.
33. Ms Davies described that in the Deed of 1978 a garage would be provided, although this had never been constructed by the landlords. This was relevant in that it was incumbent upon the landlords to fulfil their covenants. The bank at the rear of the garages had been subsiding over many years and it was the landlord’s duty to complete a proper retaining wall and this they had failed to do. Ms Davies stated that she had some doubt as to whether the Respondents should apply for consent for the works, although they did seek such consent to reserve their position under the lease. The landlords in refusing consent should have given grounds for that refusal and they should have been reasonable.
34. With regard to obstruction, the Respondents contend that there is no breach of covenant with regard to the positioning of a skip in the parking bay or by skip delivery lorries.



## EVIDENCE OF ANTHONY JOHN SIMMONDS

35. Mr Simmonds confirmed that he was the owner and occupier of the freehold property East View House, Horse Lane, Shaldon and that his property has an adjoining rear garden boundary abutting the grounds of Dunmore Court.

The garden to his property directly abuts a piece of land which was excavated and levelled some years ago upon which garages for the blocks of flats were constructed, together with a retaining wall to support the steeply sloping site of his garden. For some time Mr Simmonds stated that he had a concern regarding the north easternmost corner of his garden where the land slopes steeply down towards the rear of the garages.

36. Mr Simmonds explained that he had lived at East View House since 2000 and that the north easternmost corner of the land had been unsupported for a number of years as a retaining wall had never been built.

37. Mr Simmonds stated that his concerns had been greatly increased when he heard that Mr Legge would be excavating this steep slope in order to extend his garage and he wrote to both Mr Legge and the Planning Officer at Teignbridge District Council in April 2006 to express these concerns. Apparently, Mr Legge had commenced works on 10 August 2009 and had now completed the extension to the retaining wall to support the vertical bank, the wall being about 8 – 9 ft in height at the north eastern corner of his garden. Mr Simmonds stated that this extension should prevent further slippage of land from his boundary into that area adjacent to the existing north flank wall of the garage.

38. Mr Simmonds stated that now his earlier concerns regarding the excavations carried out by Mr Legge had been resolved by the construction of a substantial retaining wall thus supporting his land, he had no further objection.

39. In conclusion Mr Simmonds stated that it would be extremely worrying for his neighbour Mr Carmen and himself if Mr Legge was obliged to demolish the wall he had just built. Their respective gardens would then be put at great risk of slippage or subsidence and they would have no option to require the landlords themselves to replace the demolished wall without delay.

## WITNESS STATEMENT OF PHILIP KENNETH LEGGE AND BARBARA LEGGE

40. Mr and Mrs Legge had provided a witness statement dated 15 November 2009 at Pages 195 – 199 of the bundle.

41. Following confirmation of the veracity of his Witness Statement, Mr Legge explained at the Hearing that in accordance with the original planning permission off street parking was provided for each of the flats at Dunmore Court and for the first six years they owned Flat 5 they had parked an additional vehicle on the designated parking bay off Dunmore Drive. However, the freeholders withdrew permission to continue with this practice. His garage was too small to accommodate his car.
42. For the duration of the works a skip had been parked in the last position in the designated parking spaces on Dunmore Drive. During the works skip lorries had arrived to deliver/empty the skips, the whole operation taking 15/20 minutes. In addition, Mr Legge had had three deliveries of materials, these being delivered immediately outside the garage and on each occasion the forecourt area had been swept.
43. Mr Legge explained that he had approached Nessland Ltd on several occasions. No reasons had been given for not granting him consent for the proposed works. He had spent 2 – 3 years trying to get permission and didn't want to lose the benefit of the planning permission for the works as this was only valid for 3 years.
44. When questioned about Crown Property Management, Mr Legge confirmed that he had always dealt with Nessland Ltd. Crown were not the managing agents for his flat, TMS in Torquay were the managing agents for Flat 5 and for all the Phase 1 units.
45. When questioned about the time taken to deliver a new skip, Mr Legge stated that this took approximately 15 minutes, possibly up to half an hour on occasions. This created no more of an obstruction than a parked car. When shown the photograph taken on 28 August 2009 where a white van was parked adjacent to the skip, Mr Legge agreed that it would have been impossible to pass but that van had only been in that position for about 5 minutes and the driver could move the skip lorry if required to do so.
46. When questioned on the subject of the photograph at Page 86 of the bundle, Mr Legge confirmed that the skip was in the process of mid movement. It would have taken about 15 minutes approximately to complete the job but that was very much dependent upon the lorry driver. In Mr Legge's view it was no more of an obstruction than the driver talking to him in his van. Mr Legge admitted that an obstruction had been caused on this occasion possibly, but not for too long.

47. When questioned on the contents of the letter received from Philip M Kay, Secretary to Nessland Ltd dated 25 February 2006 Mr Legge stated that that letter gave no reasons for not “doing the job”.
48. When questioned on the background situation, Mr Legge confirmed that he bought the flat in September 1999 with the garage on site in its original size. Mr Legge admitted that neither the previous owner, his solicitors or Nessland Ltd told him about the additional plot of land. From the existing Deed drawings however Mr Legge had determined that he had the ownership of the extra piece of land.
49. When questioned about the plan referred to as Plan 2 on the 1986 lease, Mr Legge confirmed that yes, he had been given this plan. He conceded that there were no measurements on the plan. Mr Legge stated that the land just looked like a bigger plot than the others, it was as simple as that.
50. Mr Legge went on to state that the date the planning consent was granted was September 2006 and that it would have expired 3 years later in September 2009.
51. When questioned about whether or not the skip was lit at night, Mr Legge confirmed that reflective bollards had been placed on the skip.

#### **RESPONDENT’S FURTHER COMMENTS**

52. Ms Davies referred to Case Law relating to both parcels of land and plans including the following:

Taylor v Parry [1840] 1 Man & G 604

Gordon-Cumming v Houldsworth [1910] AC 537 (House of Lords)

Eastwood v Ashton [1915] AC 900 (House of Lords)

Wiggington & Milner Ltd v Winster Engineering Ltd [1978] 3AER 436 (Court of Appeal)

Spall v Owen [1981] 44 P & CR 36 (High Court, Chancery)

With regard to general guidance under the law, Ms Davies stated on behalf of the Respondents that she had found no difference between the guidance given in Hill & Redman and Woodfall.

53. To summarise the position, Ms Davies stated that if there are specific words they govern and can overrule a plan, however, if no description or measurements are given, the plan will be the governing document, thus the plan will control the deed or document. The documents that she is referring to are deeds not contracts and only amended by other deeds.

54. Ms Davies referred to the standard description contained in the 1986 lease “for the purposes of identification only”. In the Court of Appeal Case of *Wigginton & Milner Ltd v Winster Engineering Ltd*. [1978], it was stated that even if a plan does say for identification purposes only, that does not preclude the plan being applied as definitive where other description is lacking. That is precisely the situation we have here.

55. Ms Davies also cited the case of *Shannon Ltd v Bennah Ltd* 1965 – (Chancery Division) where it was found that a Court can look at surrounding circumstances at the time of the grant of the land to assist it. Of significance in this case is a Receiver making dispositions to lessees.

A series of garages along the back eastern wall of the car park were allocated to Flats 1 – 12 in Phase 1 of the development. By the time Phase 2 had been constructed, nothing could have been more inconvenient than a block of garages on the open land. Flat 5 must have been the last flat with a garage.

It is thus the Respondent’s submission that there was every reason to get rid of the garage and make sure that there was still a strip of land available for access purposes still retained in the freeholder’s ownership. In this respect, Ms Davies for the respondent referred the Members of the Tribunal to the cases of *Johnston v Holdway* [1963] 1QB and *St Edmondsbury & Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1AER 772 (Court of Appeal).

56. To conclude, Ms Davies stated that words are to be construed according to their meaning and according to surrounding circumstances. It is the Respondent’s case therefore that the Deed is not clear. It does have a plan and shows a piece of land broader than a rectangle. The thing that governs is a Deed and we have a Deed here.

57. The Respondent’s case is that there is good authority to enable us to look at the plan and surrounding circumstances. In this instance, it was submitted that there were overwhelming circumstances for the freeholder to exchange the site of the garage and put it at the end of the block already owned.

58. Whilst the sum of £16,000 had been paid to the landlord for the flat, the landlord had never constructed the garage for the lessees as she suggested they were obliged to do. The lessor was in breach of Section 1 of the lease of 1978 which has continued.

59. With regard to access behind the garages, this was blocked off at the time the last four garages were built in 1989/1990. These garages extend back to the retaining wall and were built with the consent of the lessors. In Ms Davies submission, it was quite clear that that flat piece of land where the garages now stand was excavated many years ago, probably in the late 1980's. The landlord did construct part of a retaining wall, but the retaining wall was never completed. It was argued that as a result of the landlord's failure to complete the retaining wall, the land had been subsiding for many years. Mr Legge by building retaining walls was actually curing the subsidence problems. In Ms Davies's submission the walls should have been completed years ago by the lessor and this constituted a breach of the quiet enjoyment clause in the lease.
60. Ms Davies contended that there was clear evidence from the adjoining freeholders, Mr Simmonds and Mr Carmen, that the land is now properly retained and it was submitted that the Mr and Mrs Legge the lessees had taken appropriate action through rectifying defects and have thus avoided the need for the adjoining freeholders to take any further action.
61. With regard to complaints, Ms Davies submitted that there were approximately 50 leaseholders using the entranceway and of those 50 only one written complaint was received by the managing agents; hardly evidence of constant and serious complaints causing nuisance, in her contention.
62. With regard to consent for alterations, Ms Davies submitted that case law was considerable and there were two schools of thought:
- a. If the land is in the leaseholders ownership consent is not required
  - b. A more conservative route the leaseholders taking action to apply for consent and there is no dispute that they did this quite properly

There was no question that the landlords did not have full and proper information. Planning permission and building regulations approval were obtained and the Respondents asked for consent for the alterations. There was then a long period over which the landlord prevaricated. Consent was refused at first and then the landlords refused to give any proper reasons. That put the respondent in a very difficult and invidious position. In the case of *Go West Ltd v Spigarolo* [2003] 2AER (Court of Appeal) the Court did say that the response should be measured in weeks not months. Here the response dragged on for 3 – 4 years. In the case of *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 (Court of Appeal), an assignment case, the obligation was on the landlord to show that it was reasonable but not that it was right or justified.

Ms Davies also cited the case of *Lambert v F W Woolworth & Co Ltd (No 2)* [1938] Ch 883 (Court of Appeal) where it was held that if the onus of proof shifts onto the landlord, the landlord's refusal shifts that burden of proof from the tenant to the landlord, thus the landlords are in breach of covenant which they the Applicants are saying is the tenants breach. Had the landlord given valid reasons the proposal could have been challenged, but that was not relevant as the landlord had not given any reasons. In the case of *Midland Bank plc v Chart Enterprises Inc* [1990] 2 EGLR 59 (High Court, Chancery) the Court stated that a 2½ month delay was unreasonable.

63. Ms Davies contended that Nessland Ltd was a private limited company represented by a Board of Directors and of course the Board had the power to grant or not grant consent. There were other examples of where consent had been granted. With regard to the vote put out to the leaseholders, it was contended that there was no requirement under the Companies Act for a 75% majority. With regard to the Articles of Association of the Company, unfortunately at Companies House the critical sections of the Articles of Association are missing.

If the Articles are incomplete, they are thus denied to the Respondent with whom they are dealing. That would in fact represent a breach of the Companies Act.

64. With regard to temporary breach, Ms Davies cited the case of *Phelps v City of London Corporation* [1916] 2 Ch 255 (High Court) where an access way controlled by freeholders had been temporarily blocked with building materials. The Court held in this case that the situation was only temporary and did not cause obstruction. The temporary use in the instant case falls squarely with the Phelps case. It is the Respondent's case that the skip when parked did not cause an obstruction to the free passage of vehicles and pedestrians up and down the road giving access to the flats and that reflectors were in place. When temporary obstruction took place, it fell within the scope within the Phelps case. It was also stated that rights of passage to the side of the garage had not been interfered with.
65. Insofar as the Applicant in previous correspondence had alleged the works resulted in breach of insurance cover, no evidence had been produced by the Applicant and thus for want of evidence this in Ms Davies submission should be struck out.
66. With regard to status of Crown Property Management, no evidence had been provided that Crown were appointed agents. No evidence had been produced as to whether Crown had any proper authority and that is why Mr Legge questioned whether they had any authority at all to deal with the matter.

67. It was the Respondent's case that they owned the land on which they are extending their garage supported by authoritative case law. The Respondents properly sought consent and the landlord is in breach of covenant and the tenant is thereby entitled to proceed.

In Ms Davies's submission there had been no breach of covenant and no obstruction had been caused based upon authoritative case law. Insufficient evidence or claims had been made by other leaseholders in the block. If it were the case that the Respondents already had the land leased to them, they could not be in breach of covenant with regard to maiming or injuring the structure.

The Respondent confirmed that he had the original lease at home. The Tribunal requested at this juncture colour copies of the actual plan referred to as Plan No. 2 at Page 49 of the bundle. This would be provided, together with case references from the Respondents.

#### **APPLICANT'S SUMMING UP**

68. With regard to the extent of the demise, Mr Bates counselled caution relating to the intention of the parties in 1986. All that we have is the original plan contained within the 1986 Deed and the recollections only of Geoffrey Simmons. It could fairly be stated that there was indeed a dearth of evidence. Against that, Mr Legge had based his actions upon his interpretation of the plan.
69. With regard to failure to construct it was asserted that on the part of the landlords there was no breach of obligation to build a garage. Counsel here referred the Tribunal Members to Page 20 of the bundle – 1978 lease.
70. If you examine the words of the recitals in the lease, these are reflective. Mr Bates stated that one needs to look at the 1986 deed in relation to what is demised. There was no obligation to construct a garage and no mention is made of a garage on the land to be conveyed. There is indeed no statement relating to the obligation to build a garage.
71. Mr Bates again referred to the GHM (Trustees) Ltd and Glass case before the President of the Lands Tribunal, the Applicants position was very simple "we say that this is our land". If however the Tribunal were to find that the land is not in the ownership of the applicant, it was further submitted that that would not be the end of the case.
72. Mr Bates stated that with regard to the retaining wall, the fact that there was a complaint made by at least one of the adjoining freeholders is evidence of the breach irrespective of the subsequent withdrawal.

73. Mr Bates restated that whether or not a County Court Judge would grant forfeiture is irrelevant to the Tribunal's determination.
74. With regard to scope of works, it was submitted that there were two different covenants, one qualified and one absolute. The qualified covenant relates to landlords consent and cannot be relevant if the land belongs to the landlord. With regard to the clause "not to injure cut or maim" the obligation is absolute.
75. Mr Bates submitted that only if he were to be wrong about the ownership of the land do we get into the second argument above.
76. Mr Bates argued that submissions relating to company law were not within our jurisdiction.
77. Finally, Mr Bates confirmed that Crown Property Management Ltd were formally appointed by Nessland Ltd.

#### **DECISION OF THE TRIBUNAL**

78. A determination by the LVT under section 168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") is a pre-requisite for service of notice by a Landlord under section 146 of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or a condition in its lease.
79. The LVT is asked to determine finally pursuant to this application made under section 168 (4) that a breach of lease has occurred.
80. In response to the Applicant's contentions the Respondent's solicitor Ms Linda Davies states that:
  - a. Although alterations have been carried out to the garage, consent was sought from the Applicants (and this is not disputed). No swift response was forthcoming; eventually when consent was refused no reasons were given. It cannot be equitable or acceptable for a Landlord to be able either to unreasonably withhold or delay responding to a request for consent. This is confirmed by the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1988. The Tribunal is aware as a matter of fact that the Landlord and Tenant Act 1988 does not deal with consent for alterations.



- b. It does not accept that occasional or intermittent obstruction of the accessway on a temporary basis whilst a full and empty skip were located in a proper marked parking space constituted a breach of a covenant not to obstruct the access. A complaint from five lessees of whom only one of which was prepared to make a written complaint does not provide sufficient evidence of nuisance or breach. Furthermore the only written complaint was made by a letter from Mrs J Edwards dated 1<sup>st</sup> October 2009 which was long after the commencement of the works in August of that year.
81. It cannot be appropriate for the LVT to make a determination of breach if there is any valid suggestion or evidence that the breach did not occur at all or only has been deemed to occur because the Landlord acted in a dilatory or unreasonable way when considering or indeed failing to consider an application by the tenant for consent to make alterations to the tenant's property.
82. Whilst the Applicant continued to deny that it needed to even consider any application for consent because the alterations proposed by the Respondent were to property outside the Respondent's demise, it is the Respondent's evidence that the plan on the 1986 Deed of Surrender and Grant (which deed is effectively the land swap document) is conclusive and that the plan shows that the land upon which the extension to the garage is located belongs to and is demised to the Respondent.
83. Mr Bates has accepted that if the extension to the garage is on the Respondent's land its objections must "fall away" in this respect. This seems to suggest to the LVT that the Applicant's only objection is that it either claims or believes that the extension to the garage is on land that belongs to it. However, it has not produced any evidence of ownership preferring instead to rely on poorly reproduced plans and evidence from someone who cannot necessarily remember what happened many years ago. It became clear that the Applicant had never sought to examine the plans on the original 1986 Deed.
84. Instead Mr Bates relied upon an argument that it was inconceivable that anyone would choose to erect a garage on only part of the land demised. The garage had been built by the Respondent's predecessor. The argument is not persuasive in that it seemed to the LVT entirely possible that one might choose to limit the construction to a smaller site than the full extent of the demise to save on cost or for ease of construction and future maintenance. It is also noted that whilst on the ground the 12 garages showed the first 8 to be constructed in a position set away from the rear retaining wall and the final 4 against the retaining wall but set back at the front in fact upon inspection the rear walls were consistent with the plan but the front elevations all lined up. In

addition on the Plan No. 2 on the 1986 Deed the last garage plot number 5 (the Respondent's garage) does not appear to be larger than the other three at the end of the block.

85. Mr Bates' argument that if it had, there would have been no need for a separate boundary line to be shown on the plan did not seem persuasive either.
86. From the LVT's own knowledge and experience plans usually reflect the Architects projection of a site and were thereafter used without further amendment regardless of whether as drawn they aided the division of ownership for transfer purposes.
87. Prior to and at the Hearing the Tribunal had only been shown a poor reproduction of the 1986 Deed and plan and the colouring was not clear. At the Hearing Ms Davies was able to produce a better copy which she stated was a photocopy of the original deed which was in her client's possession. The plan on this copy was not coloured. In response to a request from the Tribunal, a colour photocopy of the original plan was subsequently sent to the Tribunal and the Applicant. This plan clearly showed that the blue colouring followed the diagonal line of the right hand northern boundary of the site and not the inner straight line. Therefore the additional wedged shaped piece of land seems clearly to be part of the demise.
88. The Applicant's claim is, however, that all of this even if accepted would be irrelevant because the Respondent has breached the "absolute covenant" not to cut maim or injure the demised premises. When pressed following questioning by the LVT, Mr Bates accepted that if the Applicant consented to alterations it would have been deemed to "waive" its right to enforce any breach of the absolute covenant, accepting that if such covenant were absolute any works to demised premises which could be described as constituting cutting maiming or injuring could be interpreted as breaching such covenant. Furthermore it was disclosed in the bundles supplied to the LVT that consent had been given to other tenants. It therefore may even be the case that consent has been incorrectly withheld in which case on the basis of Mr Bates own arguments waiver would be an appropriate mechanism to prevent the Applicant alleging breach.
89. Two Lands Tribunal decisions on "breach" were referred to by Mr Bates. Neither of these decisions was on "all fours" with facts of this case. Both referred to breaches of covenants relating to assignment. There was also some discussion by Mr Bates as to whether or not if any breach had occurred it was capable of remedy and thus deemed not to have occurred. Whilst he accepted that this debate was interesting he suggested that such considerations were not within the LVT's jurisdiction which is very narrowly defined in section 168 of the 2002 Act.

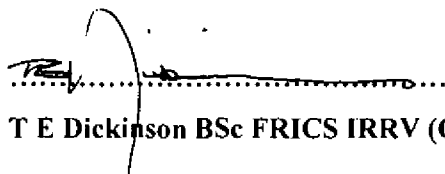
90. The Tribunal decided that notwithstanding the narrow definition of breach it cannot be correct or equitable or within the spirit of the intended consequences of the 2002 Act that it should determine that a breach has occurred if it has only occurred as a result of an error by or deliberate failure of the Applicant to properly consider an application by the Respondent.
91. The evidence supplied to the LVT in this case (see Page 75 of the bundle) is that the retaining wall was subsiding. Furthermore, the Applicants acknowledged if it consented to the Respondent's application it would enable the wall to be rebuilt or repaired or put in without it incurring expense. It was clear from the inspection of the interior of the Respondent's garage which the LVT undertook prior to the hearing that the walls at the rear and that adjoining the neighbouring property had suffered from recent and significant water ingress. Even more damning is the fact that the Applicant actually considered consenting to the alterations although it believed that these would result in a construction on its land because it could then charge the Respondent additional rent in addition to benefitting from the Respondent paying for works it would otherwise have to undertake to the retaining wall.
92. Furthermore the notes/minutes evidence the Applicant was aware that the neighbouring freehold landowners had withdrawn their objections. Notwithstanding this factual evidence, Mr Stocks of Crown Property Management and Mr Simmons Chairman of Nessland Limited each refer to objections by these freeholders as being relevant to the application. Mr Bates's own conclusions do suggest to the LVT that in fact the Applicant had already waived its right to refer to either of these objections in support of its applications and might even result in the LVT concluding that both statements were deliberately misleading and therefore should in part at least be disregarded.
93. It also seems possible that the entire decision making process adopted by the Applicant was flawed on the basis that parties who had no right to determine whether or not consent to the application made by the Respondent should be given had done so without proper guidance as to the facts or perhaps even in reliance on misleading information. Again page 75 referred to above is relevant. In addition, the one written complaint regarding the location of the skip and the alleged obstructions caused by the lorries removing full and delivering empty skips refers to the skip causing an obstruction notwithstanding it was located entirely within a designated parking space (as is evidence from photographs supplied within the bundle).
94. In page 77 of the bundle reference is made to a requirement that "all landings and stairwells should be kept free of obstruction and many contain furniture....."

However notwithstanding that this minute acknowledges such obstructions which are presumably also in breach of the same covenant which the Applicant seeks the LVT to determine that the Respondent has breached the Applicant has apparently not chosen to pursue such breaches against other tenants. This does seem to suggest an inconsistency with regard to the Applicant's actions and an inclination for it to waive a breach of covenant in one or probably more than one case, but not with regard to its perceived breaches by the Respondent.

95. In reaching its decision the LVT has considered all of the cases to which it was referred by the Applicant and copies of which were produced at the Hearing and also in so far as it was able to, the multiplicity of cases to which the Respondent's solicitor referred. However, it has only attached weight to those which it considered remained relevant. Since the LVT determines that the extent of the demise appears to be clearly shown in the colour copy of the plan attached to the 1986 deed which has now been produced by the Respondent and which was copied from the original of the 1986 Deed which is held by the Respondent, it has not found it necessary to rely upon the numerous cases cited by the Respondent as being persuasive in relation to the interpretation of that Deed.
96. The LVT has however found that the case of *Phelps v. City of London* 1916 is helpful in that its decision demonstrates the constituent elements necessary for a finding of breach.
97. In summary:-
- a. No evidence of obstruction has been established. Even if it was on the basis of the Applicant's own evidence it has in the past taken no action against other tenants who have caused obstructions but instead simply reminded them in minutes that they should not continue to obstruct accessways which is evidence that such intermittent breaches should not be dealt with by means of an application such as this application to the LVT
  - b. Insufficient evidence of a nuisance has been produced and on the basis of the Applicant's own evidence it was aware that statements made by two of its witnesses referred to complaints that had already been withdrawn yet it continued to deliberately represent that these complaints evidence a nuisance.
  - c. The extent of the demised land includes the land upon which the extension to the garage has been constructed. Therefore given that consent was sought and not given for reasons that were incorrect there can be no determination of breach on account of unauthorised alterations.
  - d. Even if a breach of the absolute covenant relating to not maiming cutting or injuring might be strictly interpreted the Applicant has admitted that its right to seek such determination might in certain circumstances be waived.

- e. The LVT consider that even if the absolute covenant should be strictly interpreted (and it does not consider it necessary in the context of this decision to determine this on account of its very narrow jurisdiction under the 2002 Act) the Applicant has waived its right to seek such a determination

**Signed:**



**T E Dickinson BSc FRICS IRRV (Chairman)**

**A Member of the Leasehold Valuation Tribunal  
appointed by the Lord Chancellor**

**Dated: 22 December 2009**