

# SUPREME COURT OF QUEENSLAND

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CITATION:	<i>Ayres v Donaldson &amp; Anor</i> [2010] QSC 99	
PARTIES:	<b>KENNETH WILLIAM AYRES</b> Applicant	10
	<b>v</b>	
	<b>VERA LENA DONALDSON</b> First Respondent	
	<b>SOUTH EAST QUEENSLAND SPORTS AIRCRAFT CLUB INC</b> Second Respondent	
FILE NO/S:	BS 2013 of 2010	20
DIVISION:	Trial Division	
PROCEEDING:	Application	
ORIGINATING COURT:	Supreme Court Brisbane	
DELIVERED ON:	29 March 2010	
DELIVERED AT:	Brisbane	
HEARING DATE:	26 March 2010	30
JUDGE:	White J	
ORDER:	<ol style="list-style-type: none"><li><b>1. The second respondent (South East Queensland Sports Aircraft Club Inc) has, in breach of s121 of the <i>Property Law Act 1974 (Qld)</i>, and the terms of a sub-lease between the first respondent and second respondent (dated 28 February 1993), unreasonably withheld its consent to the assignment of the sub-lease from the first respondent to the applicant.</b></li><li><b>2. The second respondent is ordered to sign and execute all necessary documents to effect the transfer of the lease from the first respondent to the applicant.</b></li><li><b>3. The second respondent is ordered to pay the applicant's costs of, and incidental to, the application on the standard basis, unless otherwise agreed.</b></li></ol>	40
CATCHWORDS:	REAL PROPERTY - Restraint on assignment of lease - Whether Committee acted unreasonably in refusing consent to assignment <i>Property Law Act 1974 (Qld)</i> , s121 <i>Daventry Holdings Proprietary Limited v Bacalakis Hotels Limited</i> [1986] 1 QR 406	50

HER HONOUR: The applicant, Mr Ayres, seeks orders by way of a declaration that the second respondent Club, in breach of section 121 of the Property Law Act 1974, has unreasonably withheld its consent to the assignment of a certain sub-sublease from the first respondent, Mrs Vera Donaldson. Mr Ayres seeks an order that the second respondent execute the necessary documents to transfer that lease to Mr Ayres.

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The second respondent, which I will refer to as "the Club", is a not for profit association which was incorporated pursuant to section 19 of the Associations Incorporation Act 1991 on the 19th of July 1989. The objects of the Club are to foster sports aviation activities; the support of other sports aircraft bodies; construction of a clubhouse and facilities for the membership; fundraising to support the Club; and to support flying training for all people interested in sports aviation. The rules of the Club provide for a management committee consisting of four persons who are responsible for the general control, management and administration of the Club, its property and its funds.

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The Club occupies land at the Kilcoy Airfield which it leases from the Somerset Regional Council, formerly the Council of the Shire of Kilcoy by a sublease which commenced on the 1st of January 1992. That lease is a sublease because the Shire leases the airport land from Seqwater, formerly the SEQ Water Board. That lease also commenced on the 1st of January 1992. The land in question abuts the Somerset Dam.

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The Water Board leased the land to the Council expressly to establish an airfield and an air park. The Council granted the sublease to the Club for the express purpose of developing and operating an airfield for use by members of the general public and as an air park with facilities for the housing of aircraft in hangars and for a Clubhouse and other facilities.

In order to effect the objects of the sublease the Council and the Club set up a joint committee known as the Kilcoy Airfield Board and Administration comprising three persons from the Club and one representative from the Council. The Board is required to meet bi-monthly. It is the responsibility of the Board to ensure that the airfield is maintained and operated at all times to the operational standard set down in the Civil Aviation Regulations. The Board is also required to advise the Council about maintenance or repairs required to keep the airfield in operational condition, for example, slashing grass, topdressing to ensure a safe operating surface, general tidiness and replacing or the painting of runway markers. The cost of such maintenance or repair is to be borne by the Council. The Board is responsible to the Council and is the line of communication between the Council and the users of the airfield.

Somewhat surprisingly the Board has not featured in this application.

The head lease between the Water Board and the Council precluded assignment or subletting without the prior written

consent of the Water Board. Similarly the sublease between  
the Council and the Club precluded assignment or subletting of  
the land without prior written consent. Both leases preclude,  
inter alia, the alteration or any additions to existing  
improvements without the prior consent in writing of the  
Council and the Water Board, in the case of the Club's  
sublease and the Water Board, and in the case of the Council's  
lease.

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On the 19th of January 1997 the Club entered into a sub-  
sublease with Mr Martin Donaldson and his wife Mrs Vera  
Donaldson, the second respondent. Mrs Donaldson is the  
executrix of her late husband's estate and is desirous of  
selling their interest in the hangar which Mr Donaldson built  
on the devised land. Mrs Donaldson wishes to sell that  
interest to Mr Ayres.

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The sub-sublease to Mr and Mrs Donaldson hangar site M, upon  
which an aircraft hangar was to be constructed by the  
Donaldsons. The recitals noted the consent of the Water Board  
and the Council to the sub-sublease. The lease is for 25  
years commencing on the 1st of October 1996 at a quarterly  
rental of \$65 while Mr Donaldson was a member of the Club.  
Amongst the sub-sublessee's covenants is an agreement to keep  
the hangar and surroundings clean, "not to make or cause to be  
made any structural alterations or improvements to the hangar  
without first obtaining the written approval of the Club,  
provided that such approval shall not be unreasonably  
withheld."

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By clause 2(n) the sub-sublessee agreed "not to assign, transfer or part with the possession of the hangar site except with the consent of the Club first had and obtained, such consent not to be arbitrarily or unreasonably withheld in the case of a respectable and reasonably responsible assignee, proof of which shall lie upon" the Donaldsons.

The sub-sublease is described as being subject to all the covenants and conditions of the head lease and the sublease.

The members of the management committee are Mr Douglas Muir, the President, Mr Mal Shipton, the Vice President, Mr Richard Hay, the Treasurer, and Mr Mark Foy, the Secretary.

Mr Ayres became a member of the Club on 17 August 2009. Mr Ayres is a motor mechanic/engineer who lives in Kilcoy and conducts a business there. He had known the late Mr Donaldson for many years. Mrs Donaldson wrote to the management committee on the 8th of November 2009 that she wished to sell the hangar to Mr Ayres and that her husband "would very much approve of the transfer". She deposed that she is aged 75 years and in frail health and has no interest in the hangar or the Club. Her late husband stored a partly restored Piper aircraft in the hangar and other goods and chattels. Mrs Donaldson gave permission to Mr Ayres to use her hangar prior to their agreement to buy being executed. She also gave her permission to Mr Ayres to install an emergency exit door in the rear of the hangar. Mr Ayres undertook to attempt to sell the aircraft in the hangar.

Mrs Donaldson did not, prior to these proceedings, provide  
Mr Ayres with a copy of the sub-sublease nor, it seems, when  
Mr Ayres became a Club member was he given any new member's  
pack or the like which would explain that assignment of leases  
for hangars, which the material suggests change hands from  
time to time at the airfield, must be with the prior written  
approval of the management committee. 10

The following, in summary, are the events which have caused  
the management committee to refuse to consent to the  
assignment of the sub-sublease from Mrs Donaldson and the  
estate to Mr Ayres. Mr Ayres wishes the assignment to be to  
his partner, Ms Reay, and himself. The contract of sale for  
the hangar is between Mrs Donaldson and Mr Ayres, not between  
Mrs Donaldson in her own capacity and her capacity as  
executrix of the estate of her late husband, and Ms Reay is  
not included as a party. However, the document has clearly  
been drawn up informally by persons not familiar with such  
matters. Something was made of the fact that Mr Ayres wishes  
to have the lease assigned to himself and Ms Reay but there is  
no reason why the assignment, if it is to occur, could not be  
to them both. Mrs Donaldson was on the lease but actually had  
no interest in the Club or the airfield. 30 40

Turning then to the matters which are said to have caused the  
management committee to refuse to consent to the transfer of  
the lease. 50

The first is the installation of a door in the rear of the

hangar and some landscaping and fill associated with it  
without permission. The second, and flowing from that event,  
is Mr Ayres being untruthful or misleading about that work.  
Another is the "defacing" of the contract of sale between Mr  
Ayres and Mrs Donaldson in that the purchase price was  
deleted. Mr Porter, for the Club, concedes that the purchase  
price is not something which the Club could demand to know, at  
least for assignment purposes. Another complaint is that Mr  
Ayres brought his pet dog onto the land in defiance of several  
notices prohibiting animals. Another complaint is that he  
moved taxiway markers without discussion with a management  
committee member, and painted a boundary fence post without  
permission. He is also said to have consumed alcohol whilst  
working on an aircraft and it is complained that the hangar  
was not kept in a state of cleanliness.

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At the management committee meeting on the 23rd of November  
2009 a number of concerns were raised which Mr Muir deposes  
caused the committee to decide unanimously not to consent to  
the assignment of the lease. Mr Muir sets the reasons out at  
paragraph 27 of his affidavit. These have been addressed  
fully in the affidavits filed and I will return to them in  
more detail.

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To complete the chronology, on the 27th of November 2009,  
Mr Foy, as secretary, informed Mr Ayres in writing that the  
application by Mrs Donaldson to transfer the sub-sublease to  
him was refused. Thereafter there were numerous efforts to

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resolve matters which it is unnecessary to detail in these reasons.

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Mrs Donaldson declined to attend a particular meeting with the management committee to discuss the refusal owing to her health and general frailty. Eventually the Club served her with a notice to remedy breach requiring her to reinstate the hangar to its condition prior to the emergency door being installed, requiring her to eject Mr Ayres from the hangar, and to regain possession of it.

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That has not occurred but, at least at this hearing, Mr Ayres offered to reinstate the hangar to its previous condition, not to bring his dog to the airfield, and addressed the other concerns, but the management committee decline that open offer on the day of hearing.

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The principal concern of the management committee is clearly the back door in the hangar which was installed without prior approval, and the management committee's perception, at the time, that Mr Ayres had been deceitful with them about what he was doing. That came about in this way. Mr Muir received a complaint that work was being undertaken at the rear of the hangar on Sunday 26th of October 2009. The next day Mr Muir, writing as the Club, sent an e-mail to Mr Ayres in these terms:

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"On Sunday 25 October 2009, it was noted that there had been work carried out on Club land at the rear of Vera

Donaldson's hangar M which you occupy. Are you aware of this and if so, could you please advise what was done."

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Mr Muir discussed the works with Mr Williams, a Club member who had carried out some of the turfing work at the back of the hangar, and he e-mailed Mr Ayres on Tuesday the 27th of October to that effect.

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Mr Ayres responded on the 27th of October in the morning:

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"Sat.October 24, I laid down 20 square metres of turf over a small amount of rocky fill that I had Nev [Williams] put there for me beforehand. I had no idea that there would be any problem with my improving the Club's land since I have noticed other areas of Club land with turf laid on it. Hoping this answer is satisfactory for the committee."

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On the 27th of October at about 20 to 11 in the morning

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Mr Muir wrote on behalf of the management committee by e-mail to Mr Ayres as follows:

"We have read your response and find it unsatisfactory. The grass at the rear of hangar M was in good order and needed no top dressing. Therefore it is not an issue about you improving Club land, but something you have done on Club land for your own benefit and without Club

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consent. As you may or may not be aware, turf was laid elsewhere on top of graded land to assist with erosion control and to promote new growth. This is not the case here. And the use of rocky fill would indicate that you are building up the area either for a ramp into the hangar or drainage purposes. It is certainly not a good medium for top dressing.

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We have now been advised that you wish to install a door at the rear of the hangar. If true, are you proposing a standard door or a larger one. It is a condition of lease that no alterations can be made to a hangar without the consent of the Club, Seawater and Council. At the least, the management of the Club will need to assess any alterations in the first place.

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You should not confuse this with the building project currently being undertaken. That is being done with all the relevant consents in place and will be signed off by a registered building certifier.

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We would also remind you that in the Club records, the hangar is still held by Mrs Donaldson and there has been no approach to the Club to transfer the lease. Accordingly, all dealings we will have must be with the lessee holder.

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Please ensure no further work is undertaken till the committee has an opportunity to assess the matter."

Mr Ayres had the door installed after Mr Muir had sent the  
above e-mail. He said subsequently that he had access to the  
internet only at his workshop and had not opened e-mails for  
two days. His explanation is in a subsequent e-mail of the  
16th of November. That e-mail is not included in Mr Muir's  
e-mail traffic log exhibited to his affidavit but it is  
Exhibit B to Mr Ayres' affidavit.

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On the 29th of October at 11.34 Mr Ayres responded two days  
later to Mr Muir's concerns:

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"Yes you are correct about the emergency exit door in the  
rear wall of hangar M, because I was completely unaware  
that Club permission was required for this, I had already  
installed said door before I read your e-mail. However,  
because of the misunderstanding on my part, I now am  
asking for the Club consent to the exit door which I have  
had certified by a structural engineer [whom he  
identifies with his qualifications and registered  
building number] and has issued a certificate of  
inspection no. 16. I also feel that this door will bring  
hangar M more into line with other hangars which have  
more than one exit, for reasons of safety."

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The Club, through Mr Muir, responded shortly afterwards on  
that day:

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"Your e-mail was discussed at length in Committee  
tonight.

Your response is not accepted. When this matter was first brought to your attention, you advised that the ramp you built was to improve the Clubs land with turf. When asked if it was for another reason such as rear access or drainage purposes, you advised that it was to install a door and that in fact you have gone ahead and installed it. This is in spite of advice that no further work was to be undertaken. You advised that it was completed prior to reading the Committee's e-mail. We are sorry, we do not accept that.

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There was and is no misunderstanding. Any alterations to hangars requires the approval of the Committee and in some cases Seqwater and Somerset Regional Council. The request must be submitted by the sub sub lessee and the committee can only deal with that person. As you know, you are not the sub sub lessee, just the occupier. We have received no advice from the owner.

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We also do not accept your reasoning that this door will bring the hangar more into line with other hangars. This is quite irrelevant. The issue is that you have altered the structure on someone else's hangar without approval.

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Accordingly, Club consent is refused and you are required to immediately return the hangar and the grounds to the rear of the hangar to its original condition.

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Failure to do so will be dealt with by the Committee."

On Monday the 2nd of November the Club wrote formally to  
Mr Ayres in a letter attached to a covering e-mail:

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"We have had no response from you in relation to non-  
approved work carried out to the rear of and on hangar M.

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It seems you have been attempting to create an illusion  
by stating that it is a vendetta against you by Club  
President Doug Muir. You have stated this openly and it  
is what the owner of the hangar said to one of the  
Committee members based on your conversation. This will  
be discussed with you personally, but understand that  
unsubstantiated allegations of this nature will not be  
tolerated.

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For your information, the Club is run by a committee of 4  
and all decisions are discussed in committee and only  
actions which have the support of the majority of the  
committee members are activated.

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In your case, the course of action being undertaken in  
this matter is unanimous.

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We know you have been briefed on the workings of the Club  
by Treasurer Dick Hay. It is really a simple task to  
follow those simple rules which are put in place for the  
benefit of the whole membership.

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You are not the owner of Hangar M. The committee has

not received any request for alterations to the hangar. 1  
The Committee is also concerned that you deliberately  
tried to put misleading information forward to hide the  
real agenda.

The decision of the WHOLE Committee is therefore 10  
unchanged and you are advised to return the hangar to its  
original condition immediately.

Should the Club receive an application from the hangar  
owner, it will be dealt with on its merits. 20

You are a relatively new member, and the committee seems  
to be spending a lot of time dealing with your actions.  
Remember, membership of the Club is a privilege and not a  
right. Should this conduct continue, the committee will 30  
have to discuss the options available in the  
constitution.

You are reminded that the committee is in place to run  
the Club and the aerodrome facility for the benefit of 40  
the membership as a whole. This is done while balancing  
the responsibilities placed on us by Council and  
Seqwater.

For some time, the Committee has been concerned about the 50  
activities of a few and their disregarding due process  
and acting without consultation. Your activities and  
that of some others is the catalyst for the meeting next

Sunday. If the committee lets this conduct continue, it could result in it getting out of hand and the Club being "show caused" by the Regulators as to why we should be allowed to remain at the airstrip."

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By the 30th of November the management committee had received Mrs Donaldson's request of the 8th of November 2009 for the assignment of the lease to Mr Ayres and notified Mr Ayres that the committee was considering the request. That letter reverted to the issue of the door:

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"You said you have a structural engineers certificate for the integrity of the installation. Please forward this to the committee so it can be reviewed.

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It is noted that the door you have installed without approval is larger than a normal exit door, so we need to ensure it is structurally adequate and that modifications to the walls have not prejudiced the structural integrity of the hangar.

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You seem to be resisting the lawful requests of the committee and have been playing a game of personalities and clouding the issue with misleading statements.

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The committee will not tolerate this behavior and as you should have deduced from the meeting Sunday conduct like this is not acceptable."

Mr Hay had been speaking to Mr Fowler, a Club member, about Mr Ayres' earlier interest in his hangar. As a consequence, as Mr Hay has deposed, he had concerns about Mr Ayres' capacity to pay the purchase price to Mrs Donaldson, and the ongoing rent. He conveyed these concerns to his fellow management committee members. Mr Ayres' and Mr Fowler's affidavits make it plain that they each have different understandings of their arrangements and each perspective is sensible enough.

There are numerous disputed issues of fact in this proceeding, but the parties have decided that the costs of a trial should not be entertained, and, I comment as an aside, that that seems to be a wise course. However, it does have some difficulties for this application.

The dispute with Mr Fowler may be put to one side except that Mr Hay seems to have rushed to judgment without analysis of the respective positions, and it is just silly to suppose that a Club member well known as a motor mechanic in Kilcoy could not meet the \$65 quarterly rent, and the contract with Mrs Donaldson is with her.

Again, the committee seems to have acted on complaints about the consumption of alcohol in the hangar and assumed that Mr Ayres was working on an aircraft, from what the committee was told. The dismantled aircraft, as I have mentioned, belonging to Mrs Donaldson is in the hangar.

Mr Ayres says that he was not working on an aircraft, and indeed that much social drinking occurs in other hangars. 1

Mr Ayres says he saw Mr Shipton, a management committee member, with his dog on the airfield on a number of occasions. Mr Ayres says that he does not recall seeing the signs prohibiting animals. 10

Mr Ayres says that he was unaware of moving taxi-way markers except when slashing and mowing the airfield grass. He agrees that he painted a tyre yellow and hung it on the top of a post because the boundary fence post was difficult to see against the grey/brown grass and constituted a hazard, particularly for visiting pilots. It was removed and he painted the post yellow in order to highlight what he saw as a hazard. 20

Mr Ayres denies occupying the hangar to the exclusion of Mrs Donaldson. He was there with her permission. Any untidiness came from the past and he was endeavouring to clean it up. 30

Mr Porter said that the Club no longer pressed certain of the minor matters of complaint, but the management committee cannot walk away from them because they informed their decision to refuse the consent to the assignment. 40

Mr Ayres may or may not be found to be creditworthy if a full trial were held, but his position that he had not viewed the sub-sublease's terms prior to going into the hangar and carrying out the work; that he was concerned for a safety exit 50

at the back of the hangar in circumstances where there were safety exits installed in other hangars on the airfield; and his contention that he had email access only in his workplace, are not by any means inherently unlikely explanations.

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Mr Gordon Bretag's affidavit supports some of the contentions of Mr Ayres. Mr Bretag is a member of the Club. He has significant pilot experience and is a sub-sublessee of a hangar at the airfield. He particularly supports Mr Ayres' contentions about the safety doors and deposes in paragraph 6 of his affidavit:

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"Mr Ayres fitted an escape door to Mrs Donaldson's hangar without prior committee approval, yet this door is identical in construction and similar in location to doors fitted to many other hangars on the airfield, including many new hangars recently erected as a committee initiative to expand the Club."

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Mr Porter submitted that I should not have regard to the many references that Mr Ayres has obtained testifying to his suitability for holding the sub-sublease. That is so, as it is what the management committee knew at the time it made its decision which is relevant. See the discussion of Thomas J, as his Honour then was, in *Daventry Holdings Proprietary Limited -v- Bacalakis Hotels Limited* [1986] 1 QR 406.

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The management committee says it was concerned that Mr Ayres was a person who would not observe rules and that accordingly,

both safety and the Club's sublease would be thereby placed at risk. That is a proper concern, but the management committee also has considerable power which it is obliged to exercise reasonably.

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Mrs Donaldson wished to sell a valuable asset which Mr Ayres wished to buy. It was incumbent upon the management committee to analyse the events calmly and to allow Mr Ayres an opportunity of addressing the concerns rather than acting on a one-sided, perhaps ill-informed and ill-natured comment or complaint. It is true that Mr Ayres was not prompt in his responses but from his perspective he was acting with Mrs Donaldson's full permission to do what he was doing to a hangar which he understood was hers.

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Furthermore, the management committee came to its decision informed about breaches of the rules by other Club members and what was done with respect to other hangars. Ultimately, the concern of the Club seems to me to be failure to seek prior permission, and Mr Ayres offered the management committee a reasonable explanation. By then, it seems the atmosphere had become, it might be said, poisoned.

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Had the committee fully informed itself, as it could have done, it would have agreed to the assignment, for to do otherwise would not have been reasonable, whether the test is under the terms of the sub-sublease or section 121 of the Property Law Act. Accordingly, I make the declaration sought, and the order.

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It seems to me that there is no reason why the costs ought not to follow the event in this case. Indeed there have been ample opportunities for the management committee to step back, as it were, take a deep breath and have a look at this issue a little more objectively than I think has occurred after things got underway and these costs therefore have, in that sense, been incurred unnecessarily and the applicant has been required to come to the Supreme Court to seek the orders that he has obtained. So the costs - Mrs Donaldson does not seek any costs of her representation by Mr Clough, which in a sense merely supported the application.

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So the order is that the second respondent Club pay the applicant's costs of, and incidental to, the application on the standard basis, to be assessed unless otherwise agreed.

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