



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00HE/LBC/2013/0003

Property : 8 Tamar Cottages, Honicombe Manor, St Annes Chapel, Callington Cornwall PL17 8JW

Applicant : Honicombe Limited

Representative : Fursdon Knapper (Solicitors)
Charles Knapper and Marjorie Creek

Respondent : Raymond Memmott and Juliette Susan Memmott

Representative : Peter Lavers

Type of Application : Application under Section 168(4) of the Commonhold & Leasehold Reform Act 2002 (CLARA)

Determination as to whether there has been a breach of covenant

Tribunal Members : Judge Cindy A Rai (Chairman)
Timothy N Shobrook BSc FRICS Chartered Surveyor

Date and venue of Hearing : 15 May 2013 at Honicombe Manor

Date of Decision : 29 July 2013

DECISION

Summary of Decision

1. The Tribunal determines that the Respondents are not in breach of any covenants in the Lease of the Property. The reasons for its decision are set out below.

Background

2. An application was submitted by the Applicant to the Tribunal on the 4 January 2013 for a determination that the Respondent was in breach of a covenant (or covenants) in the lease of 8 Tamar Cottages, Honicombe Manor, St Annes Chapel, Callington Cornwall PL17 8JW, (the "Property").
3. The Lease of the Property is dated 5 May 1989 and made between Domaine Leisure Limited (1) Peter Williams (2), (the "Lease"). In that Lease the Development is referred to as being "the Lessors property of which the Property forms a part" and as Honicombe House, but in the Application and the majority of written evidence the Development is consistently described as Honicombe Manor or Honicombe Holiday Park.
4. Directions were issued by a procedural chairman of the Tribunal on 1 February 2013 (the Directions), which consolidated the Application and joined it with five other similar applications made by the Applicant in respect of other property located within Honicombe Holiday Park.
5. The Directions stated that the Application would be determined following an oral hearing. The Applicant was directed to submit a written statement setting out the specific clauses in the Lease which it alleged to have been breached and explaining why with a bundle of supporting documents and correspondence.
6. The Respondents were directed to indicate if they wished to oppose the Application, or if they did not, to admit some or all of the alleged breaches of the Lease and to submit a written statement in response to the Applicant's statement with a bundle of supporting documents and correspondence.
7. Following correspondence with the Tribunal it was agreed that the Respondents case would be heard first and separately from the other five similar cases.
8. Both parties have submitted written bundles including statements, documents, copy correspondence and photographs to the Tribunal largely in compliance with the Directions.
9. Just prior to the scheduled Hearing date the Applicant attempted to introduce further evidence and the Respondents objected to the submission of such further evidence.

The Inspection

10. On the morning of the Hearing but prior to it, the Tribunal inspected the Property. Neither party accompanied it although following its inspection the Applicant's Representatives Charles Knapper and Marjorie Creek walked past the Property on their way to the Hearing.
11. The Tribunal looked at the exterior of the Property; an extension to it carried out by the Respondent; other properties which had been extended in similar way and the roads surrounding it and noted Park signage adjacent to the road relating to dogs and dog litter bins.

The Hearing

12. As it became clear prior to the commencement that the Applicant wanted to introduce late additional evidence to which the Respondent objected all members of the public attending the Hearing were asked to leave the Hearing room to enable the Tribunal to agree certain matters privately with the Applicant its Representatives and the Respondents.
13. The Respondents were critical of the Applicant because in their view it had had plenty of time to submit all of its evidence prior to the Hearing. However it was agreed that two further pieces of correspondence could be accepted from the Applicant. Both parties also agreed that certain other sensitive correspondence, which the Tribunal advised the Applicant was not relevant to the Application, would not be referred to or discussed during the Hearing.
14. As the Applicant had only produced its skeleton argument at the beginning of the Hearing the Respondents were given time to consider it prior to the commencement of the Hearing.

The Applicant's Case

15. In its written statement the Applicant alleged eight breaches of the covenants in Lease by the Respondents.
16. Mr Knapper told the Tribunal that the Applicant no longer wished to pursue three of the alleged breaches listed in its statement.
17. The remaining alleged breaches referred to in that statement are:-
 - a. A breach of the Lessee's covenant to observe stipulations in the 4th Schedule and Restrictions in the 5th Schedule to the Lease. (Clause 3), the **general covenant** to comply with specific covenants.
 - b. A breach of the covenant to comply with the provisions and requirements of the Planning Acts preventing occupation of the Property during January and February. (Paragraph 7 of the 4th Schedule), the **planning covenant**.

- c. A breach of the covenant requiring the Respondent to only use the Property as a holiday home. (Paragraph 1 of the 5th Schedule) the **user covenant**.
 - d. A breach of the covenant not to make or permit or suffer to be made to the Holiday Home (as the Property is described in the Lease) or any part or any material change or addition thereto whatever. (Paragraph 6 of the 5th Schedule), the **change covenant**.
 - e. A breach of the covenant not to keep a bird or dog or other animal which would or might cause a nuisance annoyance or inconvenience to owners tenants and occupiers of any other holiday home comprised in the Development. (Paragraph 14 of the 5th Schedule), the **nuisance covenant**.
18. Mr Knapper stated that a copy of the planning consent authorising the current use of the Park which is numbered 5/32/80/00964/F and dated 4 June 1981, (the Planning Consent), contained conditions which prevented the Property from being occupied during January and February. He referred to conditions 9 and 10 (although the page containing condition 9 was missing from the Applicant's bundle. (A copy was later supplied by it).
 19. Condition 9 states: - "The Holiday Bungalows (42 in number) and terraced Holiday Villas (65 in number) hereby permitted shall be used for holiday purposes only and shall not be used for permanent residential accommodation". Condition 10 states that "the holiday accommodation referred to in condition 9 above shall not be occupied during the months of January and February in each year".
 20. It is the Applicant's case that the Respondents had made it apparent that they always intended to stay in the Property for the whole of January and part of February (2013). He referred to this as being an "expressed intention", which would breach the user covenant.
 21. The Lease contains a covenant by the Lessees to comply with planning requirements. It is the Applicants case that the Respondents did not, because they remained in occupation for the whole of January and February and thus were in breach of the planning covenant.
 22. Mr Knapper referred to a letter dated 7 February 2013 sent by Mrs Memmott, (one of the Respondents), to his firm in which she confirmed that the Respondents had spent Christmas at the Property and indicated that they intended to stay until mid February.
 23. The Applicant's case is that the letter simply confirms factual occupation and breach of the covenant in the Lease. He was unable to explain why he relied upon that letter in support of the Application as it was written after the Application had been made.
 24. Mr Knapper said that the use of the Property as a "UK base", an expression used by Mrs Memmott in the letter referred to in paragraph

- 22 above is inconsistent with the permitted use of the Property as "holiday accommodation". He described the Respondents occupation of the Property as use as a second home which, he said, was completely different from their using it as a holiday home.
25. Mr Knapper referred to another letter dated 28 August 2012, written by Mrs Memmott and sent to Ian Read the Managing Director of the Applicant in which she had written, "we intend to live in our property for approximately 26 – 30 weeks a year". He said that such intention was inconsistent with the Property being used as a holiday home. He maintained later, in response to questioning by the Respondents, that this expressed intention was sufficient evidence that they intended to flout the occupancy restriction relating to the Property during January.
 26. He also referred to another letter in the Respondents' bundle which was a letter from a hospital from which Mr Memmott had been discharged, following recent inpatient treatment, in which the address of the Property was shown in a box as the "discharge address".
 27. He said that the Respondents had also used that address when making their planning application for consent for the extension to the Property
 28. Mr Knapper alleged that the address on the tenancy agreement relating to a property in Callington owned by the Respondents but currently let, (page 23 of the Respondent's bundle), would have shown their address as the Property had it not been copied in a way which obscured the address of the Landlord.
 29. It was his submission that such use of the address was evidence that the Property was not being used, and had not been used, as a holiday home. This was a breach of the user covenant.
 30. He has calculated that the Respondents spent 374 days at 8 Tamar Cottages which he regarded as evidence that the Property not their Spanish property is actually their home. He conceded that this period of occupation coincided with Mr Memmott's recent illness.
 31. He said that the Applicant wants to maintain the dynamic of Honicombe Manor as a holiday park. The Landlord never intended to forfeit the Lease and the Application was made only to obtain clarification as to whether or not there is an existing breach or several breaches of the Lease.
 32. The Applicant contends that the alteration works carried out to the Property breach paragraph 6 of the 5th Schedule to the lease. It is immaterial whether or not the Respondents have obtained planning consent. He seemed to suggest that the works had not proceeded. He said that the footprint of the Property is not relevant. The Lease prevents the Respondents from making a material alteration and thus the Applicants case is that the Respondents have breached the change covenant.

33. It was also suggested to him that a letter dated 28 August 2012 from Mr Read to the Respondents, sent in response to Mrs Memmott's letter of the same date, and in response to her request for permission to carry out an alteration to their Property (pages 71 and 72 of the Applicant's bundle), was misleading. Although Mr Read said he would wish to look at the Lease he also referred to "other Tamars which may have set a precedent where the bedrooms have been extended to the full footprint of the Property". Mr Read had also suggested that "we would wish to know that you had enquired of Cornwall Council about any Planning restrictions for this sort of building work, before we agreed to it".
34. The next alleged breach, which he described as a "minor breach", related to the Respondents keeping a dog. He accepted that it was not being alleged that anyone had complained but said that the dog might cause a nuisance. Later, following consultation with his client, this allegation of breach was withdrawn
35. He was questioned by the Respondents about the timing of the Application and the continuing application of condition 9 of the Planning Consent referred to in paragraph 18 above. Mr Knapper refused to clarify when he had been instructed by the Applicant but admitted that he had been advising it during the six months before the submission of the Application. He also referred to a planning refusal for a relaxation of the Holiday use occupancy condition for 3 Tamar Cottages in 2005. (Page 65 of Applicant's bundle).
36. Mr Knapper was asked whether other property on the Park and in the vicinity of the Property had been let during both January and February and advertised as being available for letting during those periods by the Applicant.
37. In response to questions from the Respondents regarding advertisements for letting property on the Park during January and February, (Page 27 of the Respondent's bundle), he said his instructions were that that these advertisements were placed by the prior owner and were historic. It was eventually acknowledged that the Applicant had let property, similar to the Property, to the National Trust during both January and February.
38. Following questions relating to the copies of two planning consents dated 11 May 1989 and 16 May 1989 being numbered 5/89/00163/F and 5/89/00164/F respectively, (the 1989 Consents), which appeared to relax the occupancy condition in the Planning Consent and some discussion between Mr Read and Mr Knapper, the Tribunal were told that Mr Knapper's instructions had been incorrect. The Applicant no longer contended that the Respondents' occupancy in February was in breach of the Planning Consent.
39. Mr Knapper also suggested that a change of use of the Property would also be a material alteration. He suggested to the Respondents that holiday occupation would of necessity be short term and lacking in permanence and would be determined as a question of fact. He

attached much importance the Respondents' description of the Property as their "UK base".

40. In summing up the Applicant's case Mr Knapper stressed that such a long period of occupation as that of the Respondents during 2012 and 2013 was not holiday use regardless of whether or not such use was intended or planned or actually the result of unforeseen circumstances such as Mr Memmotts' illness.
41. As far as he is concerned the removal of an external wall is a material change and therefore constitutes a breach of the Lease.

The Respondents Case

42. Mr Memmott objects to the way in which the Applicant has suggested that it was the Respondents' intention to breach the occupancy condition in the Planning Consent. He was also unhappy at the way in which the Applicant presented its case submitting documents in an incomplete and in his view "uncoordinated way".
43. The Respondents bought the Property on 2 April 2012 but did not immediately furnish it with their own belongings. He believed that the Applicant acquired the Park on 17 August 2012, which was why Mrs Memmott had written shortly afterwards to Ian Read Managing Director of the Applicant, (document 2 in the Respondents' bundle). His letter dated 28 August 2012 previously referred to above, (see paragraph 36 above), prompted the Respondents to seek advice from a planning officer at Cornwall to establish if there was a need for planning permission to authorise the extension of a bedroom within the footprint of the Property by moving a wall outwards.
44. The Applicant made no attempt to suggest or follow up on that correspondence and the Respondents had assumed that was because there was no requirement for planning consent. It was only following the commencing of building works that the Applicant had objected to the works following which they made an application for planning permission to Cornwall Council, obtained planning permission even though Sarah Page, a planning enforcement officer for Cornwall Council, advised that it was unnecessary and completed the works. They remain unconvinced that there has been any material alteration to their Property or any resulting breach of the Lease because the extension was within the footprint of the building and several other similar properties on the Park have already been extended in the same way.
45. The Respondent's view is that any suggestion that their use of the Property address as evidence or proof of their using it as a second or permanent home lacks credibility. Furthermore the number of days quoted by Mr Knapper spans a two year period during both 2012 and 2013 and is in any case irrelevant.
46. It is accepted that the Respondents were in occupation in January 2013 but had only been so for four days when the Application was submitted.

They honestly believed that the 1989 consents had removed the occupancy condition for both January and February. In any case other properties were occupied during those months and in particular, both 9 and 15.

47. Further questioning of the Applicant revealed that Mr Read had let property for occupation by or on behalf of the National Trust for periods which included both January and February 2013.
48. The extension to the bedroom simply replicates similar extensions to other villas on the Park which was acknowledged by Ian Read, and the Application is an attempt to victimise them.
49. The letter from the Applicant's Representative threatened forfeiture as did subsequent correspondence received by them from that firm.
50. The Respondents have no desire to let the Property which they always intended to use exclusively or with or by their family.
51. Mr Memmott said she had assumed that the 1989 Consents relaxed the condition preventing occupation of the Property in both January and February. Only at the Hearing had it been clarified that the effect of the first consent removed the occupancy condition for the Bungalows during January and that the later consent removed the occupancy condition for the Villas during February. The removal of the planning conditions during both January and February from the Planning Consent was actually in relation to different classes of Property in each of those months.
52. The Lease refers to the Property as a Holiday Home and there is a difference between occupation of a Holiday Home and a permanent home. The number of days of their occupation, whilst not disputed, is not relevant as it spans two different years.

The Law

53. A determination by a Leasehold Valuation Tribunal under section 168 of the Commonhold and Leasehold Reform Act, ("CLARA"), is a prerequisite 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. The jurisdiction conferred by CLARA was transferred to this Tribunal on 1 July 2013 by the Transfer of Tribunal Functions Order 2013 [SI 1036].
54. The Application seeks a determination that a breach of the Lease has occurred under section 168(4) of CLARA which provides that: -

"A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."
55. Other parts of section 168 of CLARA are set out below:-

168(1)

“A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1825 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection 2 is satisfied”

168(2)

56. *This subsection is satisfied if:-*

“it has been finally determined on an application under section (4) that the breach has occurred, the tenant has admitted the breach, or a court.....has finally determined that the breach has occurred”

The Lease

57. **Clause 1(3)** of the Lease defines “Holiday Home”, a term used throughout it. “The Holiday Home shall mean the property and premises described in the First Schedule together with all additions and improvements at any time and from time to time made thereto and all fixtures of every kind
58. In **Clause 3** “The Lessee covenants with the Lessor that the Lessee will at all times during the said term perform and observe the provisions and stipulations set forth in the Fourth Schedule hereto and observe the restrictions set forth in the Fifth Schedule hereto”.
59. **Paragraph 7 of the 4th Schedule** states “To comply in all respect with the provision and requirements of the Planning Acts whether as to permitted user or otherwise insofar as the same relate directly to the Holiday Home”.
60. **Paragraph 1 of the 5th Schedule** states “Not to use or occupy the Holiday Home or permit or suffer the same to be used or occupied for any purpose whatsoever other than holiday accommodation.
61. **Paragraph 6 of the 5th Schedule** states “Not to make or permit or suffer to be made to the Holiday Home or any part thereof any material change or addition thereto whatsoever.

Reasons for the Decision

62. Neither party disputes that at the date of the Application the Respondent was in occupation of the Property. Neither party seemed to understand what occupancy conditions actually regulated the use of the Property during January and February prior to the Hearing. The Respondents had taken legal advice when it purchased the Property and obtained copies of the 1989 Consents. The Applicant was apparently unaware of their existence, initially denied that the Property was a Villa, and then amended its allegation of breach of the Planning Acts, **Paragraph 7 of the 4th Schedule**, to exclude February. However the Applicant was represented at the Hearing and according to its Representative in receipt of advice during the six months prior to

the Application. That did not prevent it letting other property within the Park during both January and February 2013.

63. On the basis of what was disclosed at the Hearing the Tribunal believes that the Respondents honestly believed that there was no planning condition which prevented it occupying the Property during January and February and therefore there was no deliberate attempt to breach the covenants in the Lease. They had only been in occupation for four days in January before the Application was made. Although the Applicant has stated that forfeiture was not the intended objective the letters sent to the Respondents and its advisors at the time do not support such a statement.
64. The Applicant's attempt to use a letter written by the Respondent after the Application was submitted is unhelpful.
65. For all of those reasons the Tribunal does not find that there is a breach of the planning covenant in the Lease. Any breach of the occupancy condition was accidental and not intentional as has been suggested and the Applicant's actions in failing to update advertisements offering availability during January and February and then letting other properties on the Park makes it inequitable in all of the circumstances peculiar to this case that the Tribunal make a finding of breach. Any alleged breach would have been temporary and not continue after the end of January.
66. The second allegation of breach is that the Respondents by extending a bedroom within the existing footprint of the Property have made a material change or addition to it. There was no breach of planning legislation and although planning consent was obtained it was unnecessary. Therefore the Tribunal concludes that the alteration carried out was not a material change as it did not require planning consent. Furthermore the Tribunal is not persuaded by any of the Applicant's evidence that the extension of a bedroom within the footprint of the Property constitutes an addition to the Property. It therefore does not fall within the wording of Paragraph 6 of the 5th Schedule to the Lease. Other property within the Park had previously been similarly altered, as acknowledged by both parties which set a precedent with regard to the Park owners approach in relation to such an alteration not being regarded as a material change. For all of those reasons the Tribunal determines that the change covenant has not been breached.
67. The Property is defined in the Lease as being a Holiday Home. The permitted use of it is as holiday accommodation. The Applicant argued at some length that there is a difference between a second home and a home used for transient holiday periods and that use for an extended period must somehow change the nature of occupation from being for a holiday into occupation of a home.
68. The Tribunal was not generally persuaded by any of the Applicant's arguments. The Applicants written statements identified eight breaches of lease three of which were withdrawn at the beginning of the Hearing

and one of which was withdrawn during the Hearing. The Applicant's statement did not refer to all of those alleged breaches. The skeleton argument only considered one case relating to an interpretation of holiday accommodation in a planning condition.

69. Chichester District Council v. SOS for the Environment and another 1992 3 PLR 49 referred to in the Applicant's Skeleton Argument was an appeal against the validity of a planning condition which stated that the chalets shall be used for holiday accommodation. In that case it was suggested that it would be impossible to detect an infringement of the condition and therefore it would be practically difficult to enforce and should not be imposed. The Tribunal found it of no assistance with regard to the interpretation of the Lease.
70. The Applicant's Representative doggedly contended that by using the Property address on official forms the Respondents had altered the nature of their use of the Property and even transferred their "main residence" from their Spanish property, which they always described as their "home", to the Property so that their use of it could no longer be interpreted as being for "holiday accommodation".
71. Arguments put forward by the Applicant's Representative that the dynamic of the Park would or could be changed by the Respondents use of their Property sit uneasily with the stated permission in the Planning Consent which includes residential occupation of static vans within the Park, thus suggesting that it was always acknowledged that there would be mixed use of the different properties within the Park. Indeed the Applicant acknowledged that it has let property in breach of the Planning Consent.
72. For all of these reasons the Tribunal find no breach of the covenant by the Respondents of the user covenant in the Lease.
73. Having concluded that none of the specific covenants in the lease have been breached by the Respondents they cannot be in breach of the general covenant as they have complied with their obligations in the Lease.

Costs

74. In their written statement the Respondents requested that they be awarded costs of £360 being legal costs incurred in taking advice when the Application was submitted. They repeated this request following the withdrawal by the Applicant of all of the other five similar applications.
75. The Applicants Representative did not address the costs issue in its written statement or at the Hearing. However following receipt of a copy of the Respondents repeated request for costs after the Hearing it suggested that the Tribunal could not award costs other than within the parameters of rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

76. Rule 13 provides that the Tribunal may make an order in respect of costs in various specified cases including 13(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in, (amongst other jurisdictions) a leasehold case. An order may be made on an application to the Tribunal or on its own initiative.
77. Taking into account the ever decreasing allegations of breach the Tribunal determines it appropriate to grant the Respondent's request and orders that the sum of Three Hundred and Sixty Pounds, (£360), [Page 33 of Respondents bundle], be paid to the Respondents by the Applicant within the next 14 days. In the absence of evidence of the claimed disbursements referred to in correspondence sent to the tribunal after the hearing no sum is awarded.

Judge Cindy A. Rai

Appeals

1. **A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.**
2. **That application must arrive at the Tribunal within 28 days after the date upon which Tribunal sent written reasons for the decision to the person making the application.**
3. **If the party wishing to appeal does not comply with the 28-day time limit, he shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.**
4. **The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.**