FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HE/LBC/2019/0020
Property	**:**	10A Victoria Place, Penzance TR18 4DD
Applicant	**:**	Malcolm Darwen
Representative	**:**	Nalders LLP Solicitors
Respondent	**:**	1) Stefan Piasecki 2) Sheila Piasecki
Representative	**:**	
Type of Application	**:**	Determination of an alleged breach of covenant
Tribunal Member(s)	**:**	Judge Tildesley OBE Mr R Brown FRICS
Date and Venue of Hearing	**:**	Truro Magistrates' Courts 30 August 2019
Date of Decision	**:**	15 October 2019

DECISION

Decisions of the Tribunal

1. The Tribunal is satisfied that a reasonable person having all the background knowledge which would have been available to the parties would have understood that holiday lets were not permitted by the covenant at paragraph 13 of the 4th schedule to the lease.

2. The Tribunal finds that the Respondents did not commit a breach of breach of the covenant at paragraph 13 of the 4th schedule to the lease by using the property for holiday lets prior to 7 April 2019 which included those lets for the period 7 April 2019 to 30 September 2019, the contracts for which were made prior to 7 April 2019.

The Application

3. The Applicant landlord seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act) that a breach of covenant contained in the Respondent's lease has occurred.

4. Mr Malcom Paul Darwen owns the freehold of the property under title number CL210950, and the leasehold of 10 Victoria Place under title number CL199563. He has a lease of 999 years made between Malcom Joseph Ridgeway of the one part and Victoria Allan of the other part dated 16 July 2004.

5. Mr Stefan Piasecki and Mrs Sheila Piasecki are the leasehold owners of Flat 10A Victoria Place Penzance TR18 4DD. The title of which is registered under title number CL210948. They have a lease of 999 years made between Malcom Joseph Ridgeway of the one part and Nicholas Martin Cook of the other part dated 3 October 2003 (the Lease).

6. The property is a Grade II Listed Georgian Townhouse believed to date from around 1829. The property was converted around 2002 into two flats with separate entrances. Flat 10A is a two bedroom flat occupying the ground and lower ground floors. Flat 10 is a one bedroom flat occupying the first floor.

7. The Applicant asserts that the Respondents have breached paragraph 13 of the 4th Schedule to the lease by allowing the demised premises to be used as a commercial holiday letting and marketed as such.

8. Paragraph 13 of the 4th Schedule to the Lease read as follows:

> "Not to use the demised premises and all buildings for the time being standing thereon otherwise than as a private dwellinghouse or flat only in the occupation of a single family and not to allow the demised premises to become over crowded."

9. The Respondents accepted that Flat 10A was used as a holiday let when they were not in occupation of the property. The Respondents, however, disputed that holiday letting was prohibited by paragraph 13 of the 4th Schedule to the lease. The Respondents also asserted that the Applicant had agreed to them using the property as a holiday let.

10. On 3 July 2019 the Tribunal issued directions to progress the application. The Tribunal initially directed that the matter be dealt with on the papers but the Respondents requested an oral hearing. The parties were required to exchange their statements of case.

11. The hearing was held on 30 August 2019 at Truro Magistrates Court. Mr Rawdon Crozier of Counsel appeared for the Applicant. Mr Darwen and his partner Ms Delagh King were called as witnesses. Mr Stefan Piasecki and Mrs Sheila Piasecki attended in person and gave evidence in support of their case. Mr Piasecki presented the case for the Respondents.

12. The Applicant prepared the bundle of documents which was admitted in evidence. The page number of documents referred to in the decision are in [ ].

13. Counsel submitted a brief skeleton argument at the hearing.

14. The relevant legal provisions are set out in the Appendix to this decision.

The Evidence

15. The Respondents spent a lot of time in Cornwall and as a result they purchased Flat 10A in December 2015 as a second home and as a holiday let when they were not in occupation. The Respondents stated that they did not make a profit from the holiday letting because the monies received were put back into the refurbishment of the Flat which required substantial works.

16. Before the Respondents purchased the property, they made enquiries about using it as a holiday let. The previous owner of the Flat and the leaseholder named on the lease, Nick Cook, confirmed in an email dated 23 April 2019 [128] that he openly made the property available for holiday letting without any suggestion that he was breaching the terms of the lease. Mr Cook also said that he had conversations with Mr Ridgeway the original grantor of the lease who indicated that he was happy for anybody to live there both long term or short-term holiday lets.

17. The Respondents stated that the property was advertised as a successful holiday let by the Estate Agents which sold them the property. The Respondents supplied a copy of the Estate Agents

Listing for the property dated 3 September 2015 which said "successfully run as a holiday let on Air B&B" [41].

18. The Respondents also made it clear to their conveyancing solicitor, a partner in a local well known firm of solicitors, about their intention to use the property as a holiday let and she did not raise any issues associated with holiday letting. In this regard the Respondents produced an email from their solicitor dated 12 November 2015 [43] which said that "*As you are intending to use the property as a holiday let it is advisable to obtain specialist advice to ensure that all statutory requirements for the letting can be met*".

19. After the Respondents purchased the property they openly let the property for holidays in full knowledge of the then freeholder, Ms Allan, who lived in the Flat upstairs. Ms Allan sent an email in support of the Respondents' assertion dated 24 May 2019 [44]:

> "I was the freeholder at 10 Victoria Place between 2004 and 2016.
>
> I can confirm that during that time I was fully aware that both Nick Cook and the Respondents let 10A Victoria Place to holidaymakers. This did not cause any problems at all.
>
> I can also confirm that it was done openly and we did not consider short-term holiday letting to be a breach of the lease".

20. The Applicant explained that his partner, Ms King, dealt with the purchase of 10 Victoria Place in August 2016 and handled all matters relating to the property. The Applicant said that he let 10 Victoria Place to tenants under assured shorthold tenancies, which he said was allowed under the lease. Ms King indicated that the property had been bought as an investment.

21. The Respondents asserted that the Applicant and Ms King were aware that they were letting the property to holiday makers. The Respondents pointed out that the Applicant purchased 10 Victoria Place in August 2016 from the same estate agents that sold 10A Victoria Place to them. The Respondents exhibited the sale particulars for 10 Victoria Place which said that the property "would make a great AirBnB" [46]. The Respondents also produced an email from the Estate Agent which indicated that she would have told Ms King that 10A had been previously used an AirBnB [45]. Ms King said she was shown two properties by the Estate Agent and that she regarded the reference to AirBnB as "marketing fluff".

22. The Respondents exhibited nine e-mails between themselves and the Applicant and Ms King in the period 14 September 2016 to 24 August 2018 in which "guests" were mentioned in relation to 10A Victoria Place [48-53]. Mrs Piasecki said that they visited the Applicant and Ms King in their home and discussed holiday lettings.

23. Mr Piasecki stated that he had communications with Ms King regarding the insurance for the property and making sure that it provided for cover for use as holiday accommodation. Mr Piasecki said that Ms King told them that all residential uses were covered including holiday letting. In September 2016 Ms King made a request for a contribution towards the property insurance which was paid by the Respondents. Ms King accepted that the conversation with Mr Piasecki about the insurance covering holiday letting took place.

24. Throughout 2018 Mr Piasecki raised various matters with the Applicant about the alleged disrepair of the building and the behaviour of the Applicant's tenants. The dispute eventually culminated with Mr Piasecki issuing a Notice under section 22 of the Landlord and Tenant Act 1987 for the appointment of a manager in March 2019.

25. The Applicant said that while reviewing the leases of 10 and 10A Victoria Place as part of his response to the section 22 Notice, he realised that short term or holiday lets were prohibited by paragraph 13 of schedule 4 of the lease for 10A Victoria Place. As a result, the Applicant sent a letter dated 7 April 2019 to the Respondents stating that *"they were required to cease advertising 10A Victoria Place as a holiday let and cancel any and all future short term lets. The Applicant asked for the Respondent's confirmation that this had been done within 30 days"*.

26. The Applicant stated that he received no substantive response to the letter of 7 April 2019. The Applicant instructed Nalders solicitors to send a letter to the Respondents on 13 May 2019 advising them of the potential breach of the lease which if proved may give rise to a right to forfeit. The solicitors requested that the Respondents admit their breach of the lease, and if they did so and undertook not to do it again the Applicant would consider no further action. The solicitors said that if they admitted it but did not undertake not to do so again, the Applicant would take action which may include re-entry. Finally, the solicitors informed the Respondents that if they did not admit the breach, the Applicant would seek a determination of the Tribunal that a breach has occurred. The solicitors requested a response within 14 days.

27. On 29 May 2019 the Respondents acknowledged receipt of the letter (13 May) which they said was received on 17 May 2019. The Respondents indicated that they were taking legal advice and anticipated providing a response within the next 28 days. On 19 June 2019 the Applicant applied to the Tribunal for a determination under section 168(4) of the 2002 Act. On 28 June 2019 the Respondents supplied a response to the 13 May 2019 letter from Nalders stating that they considered the Applicant's actions retaliatory in response to their Application for appointment of manager.

28. On 12 July 2019 the Applicant's solicitors sent the Respondents an extract from Sykes Cottages which appeared to show that the property was available as holiday let and that it was fully booked for July and marked as very popular. The solicitors encouraged the Respondents to admit the breach and avoid the costs of proving it. On 9 August 2019 the solicitors again asked the Respondents to concede that there had been a breach of the lease and to save the costs of a hearing.

29. The Respondents asserted that the property was their private dwelling house which they occupied on a regular basis. They accepted that they let the property for holiday visitors which was limited to summer months (April to September) fitted around times when they were not there. They had a contract with Sykes Homes to advertise the property for holiday lettings which they said was fully flexible with no restrictions on when they could occupy the property. The Respondents maintained that the property was only ever let to two people and never to multiple groups. The Respondents stated that there had been no complaints about the behaviour of the visitors to the property. Mr Piasecki contended that the Respondents' holiday letting did not amount to a breach of the lease.

30. The Respondents said on receipt of the Applicant's letter dated 7 April 2019 they cancelled their contract with Cornish Cottage Holiday Homes (part of the Sykes group) on 17 April 2019 and blocked out the availability to prevent potential future bookings. The cancellation of the contract was substantiated by an exchange of emails exhibited at [54]. Mr Piasecki also stated that he cancelled the bookings that had been made for 2020. Mr Piasecki said that they had honoured the bookings already in place to the end of September 2019 because if they cancelled they would have to return the monies paid.

The Findings

31. The Tribunal makes the following findings of fact;

    a) The Respondents believed from their enquiries before purchase and their conveyancing solicitor that they were entitled to use their property for holiday lettings.

    b) The previous leaseholder made the property available for holiday lettings all year round.

    c) The freeholder of the property from 2004 to 2016 did not consider holiday lettings a breach of the lease.

    d) After the purchase of the property in December 2015 the Respondents used the property as their private residence when they were in Cornwall and for holiday lettings.

e) The Respondents advertised the property for holiday lettings from April to September in any one year with a well known marketing agency for holiday cottages. The property was advertised as the "ideal couples getaway" and children were not accepted. The website described the property as very popular.

f) The Applicant delegated the purchase and management of the freehold and leasehold property to his partner, Ms King, and held out Ms King as his agent.

g) When the Applicant purchased 10 Victoria Place he knew that the Respondents used 10A for holiday lettings.

h) The Applicant positively acknowledged the existence of such use by accepting the Respondents' contribution towards the cost of insurance and by ensuring that the insurance was covered for holiday use.

i) The Applicant agreed to the Respondents' use of the property as holiday lets from the time of purchase in August 2016 to April 2019. During that time the Respondent continued to let the property to holiday visitors.

j) On 7 April 2019 the Applicant gave notice that the Respondents were in breach of their lease and gave them 30 days to cease the advertising of the property as holiday lets and cancel any and all future short term lets.

k) Within the 30 days of 7 April 2019 the Respondents ended the contract marketing the property for holiday lets, blocked all future bookings of the property on the internet and cancelled the bookings made for 2020. The Respondents, however, honoured the bookings already made for 2019 because of the adverse effects of cancellation on them and their guests. The Respondents at the time they took this decision believed that they were not in breach of their lease.

Consideration

32. The purpose of bringing proceedings under section 168(4) is to enable a landlord under a long lease of a dwelling to serve a section 146 notice to forfeit the lease for breaches of covenant by the tenant other than non-payment of rent. If proceedings are brought the Tribunal is required to determine whether the tenant has committed an actionable breach of covenant. A finding against a tenant potentially could result in the tenant losing a valuable asset and in this case their home.

33. The term actionable breach was considered by Judge Huskinson in *Swanston Grange (Luton) Management Limited v Eileen Langley*

Essen LRX 12/2007 and confirmed in *Roundlistic Limited v Nathan Russell Jones and Aideen Mary Seymour* [2016] UKUT 0325 (LC). Essentially the Tribunal's jurisdiction under section 168(4) is limited to a finding of fact on whether a breach has occurred. Judge Huskinson added that the Tribunal can decide whether the landlord was estopped from asserting the facts on which the breach of covenant is based. Judge Huskinson, however, went on to say the Tribunal's jurisdiction did not extend to determining whether the breach has been remedied. This was a question for the court in an action for forfeiture.

34. In the Tribunal's view, the structure of section 168 is such that an action under section 168 (4) should only be brought if the tenant does not admit the breach. In the Tribunal's view, it follows from the structure of section 168 and the potential severe consequences for the tenant, the landlord is responsible for proving the breach on the balance of probabilities. It also follows the landlord should give the tenant an opportunity to admit the breach and put matters right before bringing proceedings under section 168(4) of the 2002 Act.

35. In this case the Applicant gave the Respondents an opportunity to put matters right but the Respondents denied that they had breached the covenant in the lease.

36. Before considering the issues in this case, the Tribunal notes that the relationship between the parties had broken down with each party blaming the other for the deteriorating situation. The Respondents believed that the Applicant's action was in retaliation to their application for appointment of manager. The parties' respective motives and their failures to resolve their differences were not relevant to whether the Respondents had breached their terms of lease. Ultimately the parties will have to find a solution themselves to their present difficulties.

37. Mr Crozier for the Applicant submitted that there was not any issue as to whether a breach had occurred. The substantive issue was whether the breach was an actionable breach. Mr Crozier contended that the facts demonstrated the ingredients to establish an actionable breach, naming the holding out of a promise or expectation, reliance and detriment had not been made out. At best there may be evidence of some forbearance which might render the more historic holidays lets unactionable but that did not apply once the Applicant withdrew his refrain when he sent the notice of 7 April 2019.

38. Mr Piasecki did not accept that holiday letting constituted a breach of the lease and even if holiday lettings was against the terms of the lease the Applicant had consented to the Respondents using the property as holiday lets. Further Mr Piasecki contended that as soon as they received the notice to cease marketing and using the property for holiday lets they did so except for the lets that had already been

agreed to September 2019 which could not be cancelled because of the adverse consequences to themselves and their visitors.

39. The Tribunal starts with the issue of whether holiday lets as understood in the factual context of this appeal constituted a breach of the lease.

40. The Tribunal reminds itself of the wording of paragraph 13 of the 4th schedule:

> "Not to use the demised premises and all buildings for the time being standing thereon otherwise than as a private dwellinghouse or flat only in the occupation of a single family and not to allow the demised premises to become over crowded."

41. Mr Piasecki pointed out that the property was used as a private dwelling house for the Respondents and their family. The fact that they had a home elsewhere was immaterial because the covenant did not require them to occupy it as their primary residence. Mr Piasecki relied on the fact that the covenant did not expressly prohibit holiday letting and he saw no difference between the Applicant's use of his property for assured shorthold tenancies and their use as holiday lets. Mr Piasecki maintained that private dwelling was directed at preventing the property from use as a business. Mr Piasecki did not consider the Respondents' use of the property as holiday lets constituted a business. They only let the property for holiday lets during the months of April to September and did not let it for more than 210 days per year which was the threshold for change of planning use, and also for furnished holiday lettings for tax purposes. The property was only ever occupied under the holiday lets by two adults sharing a double bedroom. Finally, Mr Piasecki stated that the original parties to the lease believed that holiday letting was permissible under the terms of the lease.

42. The first issue turns on the proper construction of the covenant at paragraph 13 of the 4th schedule and whether holiday lettings constitute a breach of that covenant. The leading modern authority on the construction of leasehold covenants is the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36.

43. Lord Neuberger summarised the principles of construction which is applicable to all contracts at paragraph 15:

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words… in their

> documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'

44. The Tribunal is required when discerning meaning of the covenant to take into account the 'documentary, factual and commercial context' of the words of the relevant covenant. Context is not, however, everything. In the passage immediately following his statement of principle, Lord Neuberger emphasised at paragraph 17 that:

> "…the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision".

45. The Tribunal starts with the wording of the covenant in question. It limits the use of the demised premises to a private dwelling house by a single family suitable for the size of the premises. The Tribunal construes the term private dwelling house word as meaning a residence in which someone lives. The covenant, however, places no restriction on the identity of the person who can occupy the premises. Similarly, there is no restriction on whether it should be used as someone's sole or main residence. The Tribunal is satisfied that the covenant gives considerable scope to the leaseholder's use of the property provided it meets the threshold of "some-one living there".

46. The Tribunal's construction is supported by considering the lease as a whole. The covenant is contained in a lease granted for a term of 999 years at peppercorn rent in return for a premium. The First Schedule of the lease describes the demise as a self contained *residential* (Tribunal's italics) flat. The Fourth Schedule contains no restriction on assignment, underletting or parting with possession of the whole demise except for the last ten years of the term when the consent of the landlord is required. This means that persons other than the

leaseholders can live there. Thus the other terms of the lease are consistent with the Tribunal's construction of the covenant that the use of the premises is confined to "some-one living there".

47. The Applicant's letting of the first floor flat to tenants under an assured shorthold is permitted under the covenant. The lease of the first floor flat contains identical covenants to those found in the lease for the ground floor flat.

48. The question is whether the Respondent's use of the ground floor flat for holiday lets also falls within the purview of "some-one living there".

49. Mr Piasecki relied on the evidence of the original leaseholder and the previous freeholder who said that they believed holiday lets were permitted under the lease. The Tribunal acknowledges the genuineness of their beliefs, the principles of construction, however, require the Tribunal to assess the intentions of the parties from the actual words used in the document and to disregard evidence of subjective intention. The Tribunal considers the statements of the original leaseholder and the previous freeholder fall within the category of subjective intention. The Tribunal also considers the fact that the lease contained no express prohibition on holiday lets did not assist with the construction of the covenant.

50. Before reaching a conclusion on whether the covenant permits the use of the property for holiday lets, it is necessary to return to the facts. The Respondents used the property for their own use which was clearly permitted under the lease and for holiday lets. The Tribunal is satisfied that the holiday letting comprised a significant use of the property particularly during the period of April to September in any one year and was not incidental to the Respondents' use of the property as their second home. The Tribunal accepts the Respondent's evidence that the holiday lets were to couples, and not to groups of individuals.

51. The Tribunal, however, finds that the nature of a holiday let is qualitatively different and distinct from the nature of an assured shorthold tenancy. The holiday let is geared to visitors to the area who will stay in the property for a short period of time measured in days and unlikely to exceed a fortnight. In contrast a tenant under an assured shorthold will be living there for at least six months and will be treating the property as his/her residence rather than a place to visit. In the Tribunal's view the transient nature of the holiday let, and the high turnover of occupiers are inconsistent with the use of the property as a private dwelling house only in occupation of a single family. The occupiers of holiday lets are visitors to property. They are not living there.

52. **The Tribunal is satisfied that a reasonable person having all the background knowledge which would have been**

available to the parties would have understood that holiday lets were not permitted by the covenant at paragraph 13 of the 4th schedule to the lease.

53. The next question is whether the Respondents have committed a breach of the covenant at paragraph 13 of the 4th schedule to the lease. The Respondents accepted that they used the property for holiday lets which is not permitted by the covenant. The Respondents, however, maintain they did not commit an actionable breach.

54. Judge Huskinson in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX 12/2007 explained the term actionable breach:

> "The purpose of a determination under section 168(2)(a) is in my judgment to bring the parties to the same position as would be reached if section 168(2)(b) was engaged by reason that "the tenant has admitted the breach". This contemplates an admission by a tenant that it has committed an actionable breach of covenant. Paragraph (b) does not contemplate an admission by a tenant that it has done an act which, judged strictly, would be a breach of covenant but which the tenant asserts the landlord is not entitled to complain about for reasons of waiver/estoppel" (para 17).

> "These passages show that if a landlord has waived or become estopped in the foregoing sense from relying as against a tenant upon a covenant, then for so long as this waiver or estoppel operates the obligation is suspended. It is wrong to conclude that a tenant who performs acts which strictly would be a breach of the suspended covenant has breached this covenant. Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non- compliance with the terms of the covenant)" (para.19).

> "For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable" (para.23).

55. The Tribunal refers back to its findings at [30], and in particular (g) to (k):

> g) When the Applicant purchased 10 Victoria Place he knew that the Respondents used 10A for holiday lettings.
>
> h) The Applicant positively acknowledged the existence of such use by accepting the Respondents' contribution towards the cost of insurance and by ensuring that the insurance was covered for holiday use.
>
> i) The Applicant agreed to the Respondents' use of the property as holiday lets from the time of purchase in August 2016 to April 2019. During that time the Respondents continued to let the property to holiday visitors.
>
> j) On 7 April 2019 the Applicant gave notice that the Respondents were in breach of their lease and gave them 30 days to cease the advertising of the property as holiday lets and cancel any and all future short term lets.
>
> k) Within the 30 days of 7 April 2019 the Respondents ended the contract marketing the property for holiday lets, blocked all future bookings of the property on the internet and cancelled the bookings already made for 2020. The Respondents, however, honoured the bookings already made for 2019 because of the adverse effects of cancellation on them and their guests. The Respondents at the time they took this decision believed that they were not in breach of their lease.

56. The Tribunal is satisfied that the above facts justify the finding that the Respondents acted upon the Applicant's representations and conduct and continued to use the properties for holiday lets, and that it would be unconscionable for the Applicant to now insist upon his legal rights under the term of the covenant.

57. The Tribunal does not consider the fact that the Applicant and Respondents may have been operating on a common assumption that the lease permitted holiday lets affected the analysis that the Applicant was estopped from asserting his rights under the lease. Mr Crozier submitted that the parties did not operate from a common assumption, and that the Respondents were acting upon their own independent view of the matter. The Tribunal is satisfied that Mr Crozier's submission is not substantiated on the facts. The Tribunal refers to its findings at [30h) & i)].

58. The next question is whether the waiver or estoppel is restricted to the periods of holiday letting prior to the 7 April 2019 when the Applicant gave notice that he no longer consented to the breach of covenant. In this regard the Tribunal refers to its findings at

paragraph 30k. On receipt of the Applicant's letter 7 April 2019 the Respondents cancelled their marketing contract, blocked all future bookings and cancelled bookings already made for 2020. The Respondents', however, honoured the bookings for 2019 because of the adverse consequences to them and their visitors. The Respondents took these actions despite their belief that they were not in breach of the covenant.

59. The Tribunal finds that it would be unconscionable for the Applicant to insist upon its legal rights in respect of those booking honoured by the Respondents' for the remainder of the 2019 season. The Tribunal is satisfied that the contracts for the 2019 bookings were made before 7 April 2019 and the Respondents would suffer detriment if the bookings were now cancelled. The detriment comprised return of monies, consequences for the holiday visitor which may give rise to an actionable claim for losses and potential loss of reputation if it later proved that there was no breach of covenant. The Tribunal understood that the Respondents would not suffer the same detriment by cancelling the bookings made for 2020.

60. **The Tribunal finds that the Respondents did not commit a breach of breach of the covenant at paragraph 13 of the 4th schedule to the lease by using the property for holiday lets prior to 7 April 2019 which included those lets for the period 7 April 2019 to 30 September 2019, the contracts for which were made prior to 7 April 2019.**

RIGHTS OF APPEAL

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. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person 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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 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 1925 (c 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.

Section 169

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).