FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/19UC/LBC/2021/0023
Property	**:**	Flat A, Trocadero, 14 High Street, Swanage, Dorset, BH19 2NT
Applicant	**:**	Trocadero Flats (Swanage) Limited
Representative	**:**	Ms Rachel Coyle of Counsel at the hearing and the directors/ company secretary (written submissions)
Respondent	**:**	Mr Geoffrey Holdham and Mrs Sharon Holdham
Representative	**:**	Mrs Sharon Holdham at the hearing and Mr Montgomery Palfrey of Counsel (written submissions)
Type of Application	**:**	Breach of Covenant. Section 168(4) Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	**:**	Judge J Dobson Ms J Coupe FRICS Mr L Packer
Date of Hearing	**:**	6th December 2021
Date of Decision	**:**	3rd February 2022

DECISION

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Summary of the Decision

1. **The Tribunal determines that the Respondents breached the covenant contained in paragraph 1 of the Fourth Schedule to the Lease from summer 2019 to 4th September 2021 and the covenant contained in paragraph 10 of the Fourth Schedule to the Lease to 6th September 2021.**

2. **The Respondent is ordered to pay the application and hearing fees incurred by the Applicants in the sum of £300 within 28 days.**

3. **The Respondent's application for an order pursuant to section 20C of the Landlord and Tenant Act 1985 is refused.**

The Property

4. The Property is a three- bedroom flat situated on the top floor of a converted building known as Trocadero ("the Building") containing ten flats accessed from a communal entrance and stairwell and two commercial units to the ground floor.

5. The freehold of the Building is owned by the Applicant. The Applicant is a lessee-owned company which acquired the freehold in 2000, being registered as owner on 18th December 2010. Each lessee or set of lessees of a flat in the Building is a member of the Applicant, including therefore jointly the Respondents.

6. The Respondents own the leasehold interest in the Property pursuant to a 999 years lease dated 1st September 2011 which extended the term of- but did not vary to a material extent- the original lease dated 29th August 1986 which was surrendered (the latter individually and the two in combination insofar as relevant being referred to as "the Lease").

Application and History of Case

7. The Applicants made an application dated 8th September 2021 for a determination by the Tribunal in which they alleged various breaches of covenants of the Lease by the Respondent. Specifically, those were the following:

    1) Use of the Property for holiday lets in breach of permitted use of the Flat and from which a nuisance can arise
    2) Causing a potential or actual increase in the costs of insurance (to summarise)
    3) Failing to ensure floor coverings of the nature permitted- carpets or, in respect of kitchen and bathroom, other appropriate material

8. Directions were given on 19th October 2021 and subsequently for steps to be taken to prepare the application for hearing.

The Law

9. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002, most particularly section 168(4), which reads as follows:

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

10. The Tribunal must assess whether there has been a breach of the Lease on the balance of probabilities.

11. A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to the question of whether or not there has been a breach. As explained in *Vine Housing Cooperative Ltd v Smith* (2015) UKUT 0501 (LC), the motivations behind the making of applications, are of no concern to the Tribunal, although they may later be for a court.

12. The Lease is to be construed applying the basic principles of construction of such leases as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (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] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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.

15. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "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 likely

to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.

16. Various other decisions of courts and tribunals have dealt with uses of properties for short-term/ holiday lets (in this instance the two terms are used inter-changeably below) and are considered further where appropriate in the relevant parts of this Decision.

The Lease

17. The relevant covenants by the Lessee are contained in the Fourth Schedule to the Lease.

18. The Applicant relied in its application on the following provisions of the Fourth Schedule (referred to below as "the Regulations"):

> 1. Not to use the said Flat .....nor to permit the same to be used for any purpose whatsoever other than as a private flat in the occupation of one family only or for any purpose from which a nuisance can arise to the owners lessees and occupiers of the other flats comprised in the Building or of in the neighbourhood or for any illegal or immoral purpose.
>
> 2. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on any flat in or part of the Building or may cause an increased premium to be payable in respect thereof.
>
> 10. To keep the flat including the passages thereof substantially covered with carpets except that in the kitchen and bathroom allover rubber covering or suitable material for avoiding the transmission of noise may be used instead of carpets.....

19. The Fourth Schedule also contained the following provision, relevant to arguments by the Respondent as to estoppel and waiver:

> 11. These regulations are intended for the common benefit of all occupiers of the Building and the Lessors reserve the right to make further regulations or to vary or amend any of the aforementioned regulations for the common benefit of all occupiers of the Building PROVIDED THAT such further varied or amended regulations shall not be binding on the Lessees until the same shall have been notified to the Lessee in writing

20. The Tribunal has considered the Lease as a whole but it is not considered necessary to set out any more of the provisions of the Lease in this Decision than those quoted above and referred to specifically below arising from the Applicant's Counsel's Skeleton Argument.

The hearing and various written submissions

21. The hearing was conducted as a hybrid hearing on Monday 6th December 2021. Judge Dobson sat in person. Mrs Coupe and Mr Packer sat remotely.

22. Ms Coyle of Counsel represented the Applicant and attended remotely. The other participants were in person. Mrs Holdham represented her husband and herself. The Tribunal was grateful to both for their assistance and for the case authorities put before the Tribunal, which the Tribunal carefully considered.

23. There were several other attendees, including Mr Tom Bullock and Mr Brian Levy on behalf of the Applicant company and Mr Holdham and Ms Evans in support of the Respondents.

24. Ms Coyle filed and served a document headed Skeleton Argument dated 2nd December 2021, together with a bundle of twelve case authorities. The document itself was some 21 pages long, where it would be quite a stretch to find it skeletal. Rather it was a detailed written argument. Mrs Holdham had also filed a document, although the Tribunal were unaware of that at the hearing- see further below.

25. Ms Coyle relied in her Skeleton Argument- see below- on clause 4(3) of the Lease in respect of insurance, although that was the first mention of reliance on that clause. No point was taken about that. The clause fits with paragraph 2 of the Fourth Schedule save that relates to the flats or parts of the Building, whereas clause 4(3) relates to the Building itself. The Tribunal inferred that the Applicant had always meant to rely on that clause or such of the insurance clauses as were relevant, which is consistent with the way in which the Applicant's case is presented, and indeed in which the Respondent has responded to it.

26. The clause reads:

> 4(3) not to do or permit anything to be done any act or thing which may render void or voidable the policy or policies of insurance of the Building and other parts of the Building herein before referred to..... or which may cause any increased premium to be payable in respect of any such policy.

27. Given that the parties were well aware that impact on insurance was in issue, the Tribunal did not consider that reliance on that clause where not previous explicitly identified added any new issue or caused any prejudice.

28. Ms Coyle also relied in her Skeleton Argument on four other points, as follows:

i) clause 3(g) of the Lease prevents assignment, underletting or parting with possession of part only, without prior consent in writing of the lessors such consent not to be unreasonable withheld";
ii) an argument that there had been a change of use of the Property because of it's letting for commercial hire- the argument was that the Property had therefore been used for an illegal purpose;
iii) in that regard, it was additionally fleetingly asserted- in a single sentence- that operating a holiday let during pandemic lockdown

restrictions- no explanation was advanced as to the period or level of restrictions relied on or as to any other basis for the argument; and

iv) she sought to expand on the reliance on paragraph 2 of the Fourth Schedule, in respect of nuisance, by also relying on paragraph 4 in relation to the playing of music such as to cause annoyance or audible by others between the hours of 11pm and 9am.

29. No point was taken in relation to those four new arguments either, although the Tribunal was mindful that the Respondents were representing themselves and had been provided with a long written argument and the electronic equivalent of a ring-binder of case authorities on the Friday before the hearing. The Tribunal found it unsurprising that they did not take the point amongst other matters and not, of itself, a reason to allow the new points to be advanced.

30. The Tribunal considered that Ms Coyle had introduced new points and not identifiable from the Applicant's case as previously presented- whilst the commercial hire point, for example, plainly had as its foundation the holiday lets, there was no hint of it at any earlier stage in the proceedings. The Tribunal declines to permit those points, although insofar as the substance of them was considered, the Tribunal's initial view was that in light of the minimal, if any, supporting evidence, they added nothing substantive to the determination. Accordingly, the Tribunal has not considered those matters for the purpose of this Decision and did not, given the determination that in the event the points added nothing substantive, find it necessary to seek additional submissions on the points before taking that approach.

31. Mrs Holdham sought permission to rely on a witness statement from Ms Judith Evans, the lessee of another flat in the Building, dated 30th November 2021. Such statements were directed to be served by 16th November 2021. In the event the statement was served on 2nd December 2021**.** Mrs Holdham also sought to rely on a timeline prepared. Ms Coyle accepted having seen that. She more strongly objected to the admission of the witness statement.

32. The Tribunal retired to discuss the Respondents' application. The decision reached was that the statement would not be admitted late but that the timeline would be. It was apparent that the timeline was referred to in the Respondents' Statement of Case and that it was intended to be attached. The lack of attachment was found to be an oversight, which the Applicant had not alerted the Respondent to and which the Respondent had not realised. It had therefore not been rectified. Nevertheless, the Tribunal found that the timeline was always intended to form part of the Respondents' case, although it added little to other documents.

33. The Tribunal heard oral evidence from Mr Bullock, the Company Secretary of the Applicant, very briefly from Mr Levy, another Director of the Applicant, and Mrs Sharon Holdham, separate to her role as advocate for her husband and herself.

34. It was established only after the hearing that the Respondents had prepared written submissions entitled "Points of Response to Applicant's witness evidence and other evidence filed on 1st December 1/12/21 and to Skeleton Argument of Applicant of 2/12/21" ("Points of Response"). That was emailed to the Tribunal at 12.58pm on the day of the hearing. The email was copied to the Applicants. The Tribunal noted that in the hearing Mrs Holdham referred to sending an email to the Tribunal at lunchtime: it was not explained that such email attached a lengthy written submission. The Tribunal understands that Ms Coyle had seen the document, albeit no doubt had little time to deal with it, much as that is not so different from the position with Skeleton Arguments provided on the day.

35. There were also a number of supplemental representations following the hearing from both parties in respect of certain matters which arose and require such additional representations. The written submission were prepared on behalf of the Applicant by, the Tribunal understands, one or more of its officers and on behalf of the Respondents by Mr Palfrey of Counsel. Their contents have been considered in reaching the determinations below and are specifically referred where required.

36. The first set related to a query raised by the Judge at the hearing as to the potential effect of paragraph 11. of the Fourth Schedule to the Lease in light of an agreement in April 2019 ("the Compromise", or Compromise agreement as the Applicant has termed it). That issue is referred to in relation to the alleged breach of user covenant below. The paragraph was referred to in the Respondents' Statement of Case, although not orally expanded upon by Mrs Holdham in the hearing. Mr Palfrey's submissions went somewhat beyond that narrow point and into wider questions as to breaches being actionable. They were considered only insofar as they related to the matters for which written submissions had been allowed. The Directions 7th December and subsequent Directions 9th December 2021 were specific as to the two limited points on which submissions would be received. The time for provision of the submissions was originally 10th December 2021 but extended to 5pm on 14th December 2021.

37. The second point related to the discovery by the Tribunal of the Respondents' Points of Response, to which the Applicants were permitted to reply to indicate any contents which they asserted to amount to new evidence served late, which the Tribunal would not, if it accepted the Applicant to be correct, consider. Having considered the Respondent's document and the response to it by the Applicant as part of the document dealing with both points, the Tribunal identified nothing of note which was not dealt with elsewhere.

38. Separately, the Tribunal provided for written submissions as to whether the Applicant should be prevented from charging the costs of the proceeding as service charges, pursuant to section 20C of the Landlord and Tenant Act 1985. The Respondents had sent in an application to the Tribunal case officer in the week before the hearing. The Respondent was asked to take the application to the hearing and did so but in the course of the other matters which arose it was overlooked.

39. The net effect of all of the above was that there were a myriad of legal arguments about a variety of issues, combined with a number of factual disputes, requiring determination or potentially doing so in the event relevant to the outcome.

40. The Tribunal was unable to consider the case on the day and following the hearing firstly because the hearing took rather longer than anticipated. It started slightly late as a consequence of the morning session over-running a little and was not helped by an issue arising during a break which the Judge was required to attend to. Secondly, because written representations were awaited. The Tribunal reconvened to discuss the case, initially in very general terms on the Wednesday after but overwhelmingly on Friday 17th December 2021. Further communication was required in respect of the section 20C application following the Applicant's written response to that and brief comments of the Respondents on 23rd December 2021.

Consideration of the parties' cases and the Lease

41. To the extent that the parties were in dispute as to the construction of the Lease, the decision needs to be made in each case in the appropriate context for that case, including the known factual background in the given instance. The Upper Tribunal in *Nemcova v Fairfield Rents Limited* [2016] UKUT 303 (LC) made the point that each case is fact- specific such that caution is required in considering decisions where the Lease and the clause are different and that even the same wording in another lease entered into different context may be construed differently.

42. There was no evidence advanced as to any relevant factual background in 1986 or the commercial context at that time. There was no evidence as to the circumstances known to the parties nor any submissions as to circumstances which can properly be assumed to have been known by the parties. Neither was anything advanced in relation to commercial common sense. If such highlighting were needed, those matters go to emphasise the key importance of the words used by the contracting parties. In the circumstances, the Tribunal considered that the correct approach was to consider the natural and ordinary meaning of the specific wording actually used in the relevant clauses, any other relevant provisions of the Lease and draw such assistance as properly could be drawn from decisions reached in other cases, in which inevitably the wording of the relevant covenant and/ or the factual matrix was not identical.

43. Before proceeding to the breaches, the Tribunal briefly addresses the first argument advanced in the Respondent's Statement of Case. That was a query as to whether the board of the Applicant was authorised to bring the application to the Tribunal. The Applicant's Reply asserted that its directors were authorised. The Tribunal determined that matter to be one of company governance and beyond the jurisdiction of the Tribunal.

44. The Tribunal does however, for the avoidance of doubt, consider that the question of the authority of the board in relation to matters relating to

variation of the Lease- and impacting on the question of breach- to be well within the jurisdiction of the Tribunal to determine, as a matter necessary to determine in the course of deciding whether actionable breaches, occurred.

Were there breaches of the Lease by the Respondents?

a) Was there a breach in relation to nuisance?

45. The Tribunal was concerned that the wording used in paragraph 1 in respect of nuisance, and in contrast to the clearer wording in respect of user, provided for "any purpose from which a nuisance can arise". There is little from which nuisance cannot ever arise, including normal family life which is plainly permitted and necessarily so for the Property to be usable.

46. The Tribunal considered that it was therefore appropriate to construe that wording somewhat restrictively and to consider not whether nuisance could entirely theoretically arise but whether it has been demonstrated that any specific action can cause nuisance by identifying whether it in fact did so. The Tribunal did not accept Ms Coyle's submission of "potentiality not actuality". In any event, the best evidence that there is use from which nuisance can arise, is that it did so. Where any use did not actually cause nuisance, there is a lack of evidence as to whether in principle it could or could not.

47. The Tribunal found that one instance of nuisance arose in July 2021. The Tribunal accepts that there was a report by another resident as to noise nuisance from 22nd July 2021 for a period. There is no reason to treat that report as incorrect. Indeed, the Respondents appear to have accepted it because they relied upon it in communications with the occupier available on Booking.com. It is notable that in combination, issues with that occupier is stated on the site to have led to the deposit paid being retained by the Respondents, which may have encouraged good behaviour from other later occupiers but does not prevent a breach having occurred

48. The Tribunal accepted the Respondent's case that whilst there had been a complaint made in August 2021, the wording of the complaint indicates it related to the July incident and at least does not demonstrate another incident. The Tribunal also accepted that the Respondents apologised in relation to the nuisance. There was insufficient evidence to prove any other nuisance arose from use of the Property.

49. However, that did not alter the fact of a breach, which is the only matter for determination by the Tribunal. The fact that there may have been issues arising in other flats let on assured shorthold tenancies assuming, but making no specific finding, that Mrs Holdham was correct in that regard, was not relevant.

50. The Tribunal further found that the matter relied on by the Applicant that an occupier under a booked short-term let in or about late June 2021 intended to arrive in the early hours of the morning, at 2am, which the

Respondents agreed to and could have caused nuisance by way of the noise caused at that hour was not proved. Most significantly, there was no evidence as to whether the occupier did arrive at that sort of time and therefore whether anything occurred from which nuisance could arise. As to whether that is because the occupier did not arrive at such a time, or it is because the occupier did but no-one was aware because no-one heard, is not a point on which any evidence was provided, such that no finding even of arrival at a time capable of causing nuisance could be made.

51. Necessarily the Tribunal found the Applicants had not shown the Respondents to be in breach in that instance. As to whether time of arrival constituted use did not need to be determined. The Tribunal found no other instance of nuisance had been demonstrated.

52. The Applicant's application also indicated an argument that nuisance had been caused by lack of suitable flooring- see iv) below. The Tribunal perceives that may have related to additional noise because of the hard, wooden floor. There was passing mention of that several years back. However, there was no witness evidence advanced and nowhere near sufficient other information for the Tribunal to find that any instance of nuisance had been proved. The allegation with regard to flooring more generally is dealt with below. Applying the reasoning explained above, the Tribunal found insufficient evidence that the flooring could cause nuisance where it had there was a lack of evidence that it had done so.

53. It follows that one single breach of this covenant was found.

b) <u>Were the Respondents in breach of the insurance clause?</u>

54. The Tribunal also had some concern at the wide drafting of the provisions of clause 2 of the Fourth Schedule. That precludes anything which "may cause an increased premium". Such wording could cover an array of acts, where there is no requirement that they actually cause an increase in the premium, simply they might do so. The Tribunal accepts the provision not to be in exceptional terms but adopts a similar approach to that taken in respect of nuisance, namely that the Applicant demonstrates that use may cause an increased premium where it actually does so cause but where no increased premium is caused there is insufficient evidence as to whether the activity could have caused an increased premium and so the Applicant does not prove its case on the balance of probabilities.

55. The Applicant's case as advanced by Ms Coyle in writing was that the insurance premium for the Building had increased. It was further asserted that the Respondents admitted that. However, that was not the approach taken by Mr Bullock when giving evidence. Rather the evidence was that less cover was provided because there was no cover for damage by holiday let occupiers, or he thought for a related reason which he could not recall. Similarly, the Applicant's Reply, whilst apparently asserting an increased premium, only referred to reduced cover.

56. The evidence demonstrated that the insurer accepted covering the Building, including holiday letting to the Respondent's flat subject to the above limit. Email correspondence with the insurance brokers from October 2020, regarding the last renewal prior to the application, explained that. Whilst one other potential insurer had declined to quote and there was a figure from a third, no detail was provided as to the level of the quote absent holiday lets by the Respondents. An email from the brokers in 2018 had indicated that the same position a to limit on cover would arise if a second flat holiday let and again made no mention of an increased premium.

57. The Respondents had, it was common ground, offered to pay any increase in the insurance premium. If that offer had been accepted, it may have amounted to a waiver by the Applicant or given rise to an estoppel argument, were that relevant. An alternative quote at higher cost had been received by the Respondents including damage arising from holiday lets, although as Mr Bullock pointed out when cross-examined, and the Tribunal accepted, the cover was not the same. That may have been fortuitous for the Respondents given the need for caution in comparing two policies providing different levels of cover. It may otherwise have been persuasive evidence that the current insurer would increase the premium in the event of providing the same cover. As it was, it appeared to the Tribunal quite plausible that the premium would increase in that event but where there was nothing tangible to demonstrate the reliability of that assumption.

58. The Tribunal was not persuaded that there was sufficient evidence that the insurer would have increased the premium if matters had come to that, at potential risk of losing the business for the Applicant to succeed on that argument, although the margin was a fine one.

59. It was also of some relevance, although not alone determinative, that the Applicant's case was premised on short term holiday letting not being permitted at all, whereas the Compromise allowed holiday lets by the Respondent subject to various conditions, which did not themselves necessarily affect the premium, or have at least not been demonstrated to. A finding that the Respondents were in breach for doing something which may cause an increased premium but which they were expressly permitted to do by the Compromise would be a perverse finding to make. The Tribunal considers that the high likelihood, had it been required, is that the Tribunal would have found the Applicant to have waived the ability to rely on the covenant and/ or to be unconscionable for the Applicant to rely on it. Such issues are addressed in respect of the user provision below. The Tribunal declines against the background of the Compromise to find that the fact of holiday letting was in itself a breach of this provision.

60. The part of the application related to the insurance covenant fails.

c) <u>Were the Respondents in breach in respect of the floor coverings- paragraph 10 of the Fourth Schedule?</u>

61. The Tribunal found the clause in the Lease- paragraph 2 of the Fourth Schedule to be expressed in clear terms and very common terms. In the Tribunal's experience such clauses are a regular feature of leases of flats, where there is concern as to noise from a flat causing nuisance, inconvenience or annoyance to other flats and there is a need for a suitable floor covering which does not exacerbate that and which should assist with reducing it.

62. It is abundantly clear that the Flat did not have such a covering on floors of areas of which photographs were provided. The Respondents admitted in their Statement of Case that they were advised that carpets were required as long ago as 2010. The Respondents said that some areas were carpeted but the living room and one bedroom had "large heavy rugs" over original floorboards. The Respondents also said that they understood that there were two separate floor structures within a void below the floor and they were told constituted a soundproof floor. No evidence was provided of the basis for that asserted understanding and no evidence was provided that any such structures provided such a floor, or who may have told them and when. There was far from being sufficient evidence on which the Respondents could have argued an entitlement to rely on being so told, even if by an officer of the Applicant, or how that may have assisted them in this instance, although no such assertion was made in any event. The Lease requirements were specific as to carpeting. The accuracy or otherwise of the belief as to the floor structure was not relevant.

63. The Tribunal also accepted that the Applicant had requested that floor coverings be attended to since at least 2013, being the specific subject of correspondence in April of that year, although at that time hard flooring was agreed to be acceptable where a full acoustic floor was fitted below it and prior approval was obtained. The Tribunal noted and accepted the Applicant's assertion that the issue was raised at least from the 2012 AGM onwards. The Respondent's Statement of Case suggested that the issue was not raised again after 2010 until the AGM in 2021.

64. The Respondents stated in March 2021 that suitable acoustic flooring would be fitted, to which the Applicant agreed by email 26th June 2021. It is common ground that no such flooring was then fitted during the subsequent months up to the end of summer 2021. The Respondents stated in their Statement of Case, and it was not disputed, that a contractor was booked in early August and cancelled because of a stock supply problem. That may well be the case but does not alter the question for the Tribunal, simply of whether the Respondents were in breach or were not. The Tribunal notes that the Respondents arranged for suitable flooring to be fitted to the kitchen and bathroom week commencing 6th September 2021.

65. The Applicant accepted that carpets had been fitted since the issue of its application. Mrs Holdham said that the flooring and carpeting had been dealt with by 7th September 2021. Mrs Holdham more specifically said that she emailed the Applicant on 7th September to say that carpets were

fitted that day, with photographs sent the following day- the bundle certainly included some photographs- showing all areas with carpet or lino, the latter being said to be "allover rubber covering or other suitable material" the Tribunal perceives. The Applicant did not contend otherwise.

66. The Tribunal finds that the Respondents were in breach of the covenant from 2010 until 6th September 2021. The breach was resolved just before the application being issue, although the provision of evidence of that appears to have been slightly later than issue.

d) Were short- term, holiday, lets an actionable breach of the user covenant as contained in the Lease- paragraph 1 of the Fourth Schedule?

i) Did the Lease permit short-term, holiday, letting?

67. The Tribunal was mindful that both the drafting of leases and many other matters had changed significantly since 1986. It is stating the obvious to say that AirBnB and similar did not exist in 1986- and so the particular use for facilitating short- term holiday lets could not have been in the minds of the contracting parties in 1986. AirBnB existed in 2010. However, only limited changes were made to the terms of the Lease and insofar as necessary for the specific purpose of extending the term: the user covenant is not said to have altered. The Tribunal therefore found there to be no reason to draw any conclusions as to the parties' intentions in 2010 from the particular provisions remaining the same, notwithstanding that was argued and is discussed in ii) below.

68. No evidence was advanced as to what the actual position was in 1986 in respect of the letting of flats for holiday use. Similarly, seeking to determine the clause which might have been agreed in 1986 in the event that AirBnB or an equivalent had existed, which would be a matter of complete speculation, is no part of the proper exercise to undertake.

69. Ms Coyle relied on the judgments of the Upper Tribunal when considering terms such as "private dwelling- house" and "private residence", being *Newcova* and *Triplerose Limited v Beattie and Beattie* [2020] UKUT 180 (LC) respectively.

70. Mrs Holdham stated that the question of breach of the Lease or otherwise was not the basis of her argument for their being breach which could be relied on by the Applicant- focusing on the argument that short- term letting had been permitted even if the wording of the Lease itself prevented it. However, her Statement of Case made the argument that there was no breach in the first place and Mrs Holdham did not in terms accept a breach. Consequently, the Tribunal does consider it appropriate to explain why it found a breach of the Lease covenant to have occurred. The question of whether it can be relied upon is dealt with further below.

71. Whilst it is right to say that the meaning of the phrase used in the lease in *Nemcova* does not determine the meaning of the same words in this Lease, and would not do so even if the exact same phrase had been used, HHJ Bridge undertook a characteristically careful and thorough examination of the previous Court of Appeal and other authorities in respect of "private residence" and "private dwelling-house" before reaching his judgment in that case that the user clause had been breached, where there were also short-term lets. HHJ Bridge said (paragraph 53):

> "It does seem to me that in order for a property to be used as the occupier's private residence, there must be a degree of permanence going beyond being there for a weekend or a few night in the week. In my judgment, I do not consider that where a person occupies for a matter of days and then leaves it can be said that during the period of occupation he or she is using the property as his or her residence. The problem in such cases is that the occupation is transient, so transient that the occupier would not consider the property he or she is staying in as being his private residence even for the time being."

72. Similarly, the phrase "private dwelling-house" was found in *Triplerose* to have the same effect in a clause similar, albeit with some differences, and where the issue was essentially the same thing as in *Nemcova*. Martyn Rodger QC stated at paragraph 20 of his judgment;

> "But short-term occupation by paying strangers is the antithesis of occupation as a private dwelling-house. It is neither private, being available to all comers, nor use as a dwelling-house, since it lacks the degree of permanence implicit in that designation."

73. Ms Coyle also referred to *Bermondsey Exchange Freeholders Ltd v Ninos Koummetto* (as trustee in bankruptcy of Kevin Conway) [2018] 4 WLUK 619, a County Court case, in which the term used in the relevant lease was "residential flat". That is not binding authority on the Tribunal and even were Ms Coyles' submission that "residential flat" is akin to "private flat" correct generally, which the Tribunal did not accept, the phrase "residential flat" used in a different lease does not determine the correct construction of "private flat" in this Lease. However, it is worthy of note that the court found that the phrase "residential flat" prevented AirBnB lettings/ similar lettings. The District Judge, in a judgment upheld on the appeal to HHJ Luba QC, referred to a "qualitative difference" between an assured shorthold tenancy and the sort of short-term lets through AirBnB and other websites.

74. The Tribunal considers the word "flat" to be a simple and easily understood term which conveys exactly what the Property is. Insofar as any specific definition might be required, the simple definition in the Oxford Dictionary is a noun for a "set of rooms usually on one floor as a residence". That definition reinforces the assistance which should be drawn from the use of "residence" in *Nemcova* and equivalent terms in other cases.

75. Ms Coyle also referred to the definition of flat in section 101 of the Leasehold Reform, Housing an Urban Development Act 1993, which is

quite similar to the dictionary definition. The Tribunal is mindful of the need for caution in applying the meaning given in one statute to other situations, definition of the same word or term not always being consistent from one statute to the next. However, there is nothing in the definition within that section to detract from the more widely recognised meaning of the word.

76. The Tribunal finds that the use of other nouns to describe the given property rather than flat in other instances does not prevent case authorities which use such essentially equivalent words from being of some assistance. The Tribunal therefore makes careful allowance for some of the facts of both *Nemcova* and *Triplerose* being different to those of this case- notably there were short- terms lets but not, or principally not, for holidays, for example- and the word following the word "private" is different, although it is notable there was consistent treatment of the word "private" and the effect of that.

77. The Tribunal does find the use of word "private" was significant in this Lease and that it precludes short- term letting such as holiday lets. The Tribunal does not accept the term simply denotes use by an individual rather than a company as asserted in the Respondents' Statement of Case.

78. The Tribunal concluded that private use by the lessee properly included allowing friends and relatives to stay. In addition, the Tribunal found that private use allowed for such use by a tenant of the lessee who occupied the Property as a home, it did not prevent letting by the Respondent for such use. In contrast, the short- term holiday lets permitted by the Respondent involved just the sort of occupation which was held in *Nemcova* to be so "transient" that the occupier could not regard the given property as his or her private residence "even for the time being"- the phrase in that case. It was just the sort of occupation that was determined in *Triplerose* "lacks the degree of permanence".

79. Whilst Mrs Holdham was plainly correct in submitting that the outcome in *Nemcova* was not known when this Lease was entered into, the Tribunal found that did not aid her. The Tribunal determined the meaning of the terms used in the Lease, gaining some assistance from the determinations in both *Nemcova* and *Triplerose* but not regarding them as providing a definitive answer to the question of interpretation in this case.

80. In respect of the subsequent words in the clause "in the occupation of one family" the Tribunal determined those add to the interpretation of "private flat". They do so such that the Tribunal finds them to support longer term occupation and to weigh against short term occupation by a whole series of family groups for short term holiday and similar purposes.

81. Having considered the words chosen to be used the contracting parties in their context, the Tribunal has concluded that the phrase "private flat" precludes the use of the Property for short-term holiday lets of the nature of the use admitted to have been permitted by the Respondent. Short- term holiday use by unconnected third parties is use which is inconsistent with a

"private flat". In that regard, all of the periods of such lettings permitted by the Respondent, are found by the Tribunal to constitute such inconsistent use. For the avoidance of doubt, the Tribunal did not find any distinction in that regard between holiday lets to family groups or to groups of friends, although the Tribunal found that letting to groups of friends would specifically breach the requirement for the Property to be occupied by one family.

82. Insofar as the Applicant relied on additional cases to support its case in relation this aspect the Tribunal did not find those to either be directly relevant or otherwise to add anything to the authorities discussed above and so does not consider it necessary to refer to them. For the avoidance of doubt, the Tribunal has taken the same approach to the other case authorities referred to by one or other party and not mentioned in this Decision.

83. It follows from the above that short-term holiday letting breaches the user covenant unless anything prevents reliance on it by the Applicant.

ii) <u>Does that provision apply and can the Applicant rely on such breaches of the Lease?</u>

Representations prior to purchase?

84. The Respondents contended that there was a reason why breach of the provision as expressed in the Lease could not be relied upon by the Applicant, namely that there had in any event been a representation at the time of purchase that holiday lets were permitted and which they remained able to rely on. The Respondents asserted that they could let the Property on short- terms lets because of the representation.

85. The Respondents raised waiver, estoppel and reliance being unconscionable. It was contended that in the event of any breach of the provisions of the Lease at any time, such breach was not an actionable one.

86. The Respondents relied in that regard on *Swanson Grange (Luton) Management Limited v Eileen Langley Essen* [2008] L and TR 20 (LC) and on a case from this Tribunal, *Darwen v Piasecki* (CHI/00HE/LBC/2019/0020), a decision of a tribunal chaired by Regional Tribunal Judge Tildesley OBE, where the question of waiver or estoppel were dealt with in another breach of covenant application involving holiday lets. The former is binding if the same point as arises here arose there. The latter demands appropriate respect, albeit that it is not binding on this Tribunal. The Applicants also referred to *Swanson Grange.*

87. It was held in *Swanson Grange* that if there was a waiver of breach of covenant or otherwise the Applicant is estopped from asserting its rights, then the obligation on the lessee is suspended and hence there was not an actionable breach and so no proceedings could be founded on any such

asserted breach. The decision of this Tribunal in *Darwen* applied that judgment to the facts of the particular case.

88. The Applicant's argument was, however, that the words of HHJ Huskinson in *Swanson Grange* below apply:

> "23. 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"

89. The Tribunal does not as a matter of fact find there to be any such promise or representation made.

90. The Respondents relied on wording provided in a reply to pre- contract enquiries. The question asked, barely legible on the image provided, was "Is there any information which you think the buyer may have right to know e.g., negotiations to purchase the freehold?" The answer read as follows:

> "NO PETS OR ANIMALS AS
> PER LEASE
> NO HOLIDAY LETS
> THIS WILL RE WRITTEN IN NEW 999 LEASE"

91. It is apparent from the wording that the words were not written with great care or formality. There are no full sentences and there is no punctuation.

92. The words were written by Mr Levy. Mr Levy may have been able to confirm about them. However, neither side sought during the hearing to ask Mr Levy what he meant by those words.

93. The Applicant asserts that the words meant that it was anticipated there would be a more express statement of the existing position. The Respondent asserts that the words meant that the prevention of holiday lets would be provided for when new leases were written. The Respondents also pointed to the words "AS PER LEASE" following the comment about no pets and animals but not the words "NO HOLIDAY LETS".

94. The Respondents contended that the wording recorded above as "RE WRITTEN" was in fact "be written" that there is a "B" and not an "R". They contended that the last sentence does not make sense if the words are "RE WRITTEN".

95. There is no evidence from a forensic document examiner or similar appropriate handwriting expert, whereas the Tribunal does not claim to possess such expertise. The relevant page of the bundle on which the page of the replies to enquiries is shown does not obviously contain another

word which includes a "B". There is an "R". To admittedly untrained eyes but doing the best possible on the evidence presented, the Tribunal considers that the word is "RE" and not "BE".

96. The statement immediately above reads simply "NO HOLIDAY LETS". That is unequivocal. It would be difficult to interpret it as meaning any other than exactly what it says, namely that there were permitted no holiday lets. Whilst the Tribunal accepts the Respondent's contention that the words "AS PER LEASE" do not follow those in the way that they do with pets and animals, the Tribunal does not find the style of the comments to be nearly so precise that the omission of those additional words should be treated as significant in construing the phrases.

97. The phrase written below and which is the subject of dispute, "THIS WILL RE WRITTEN IN NEW 999 LEASE" must be read in the context of the clear phrase preceding it. In order for it to make perfect sense, the Tribunal finds that "be" would need to be inserted before "RE". On the other hand, in order to make perfect sense, the word "year" would need to be inserted between "999" and "LEASE". The imprecise language used demonstrates that any attempt to construe the phrases by treating the wording as if it were precise would be mistaken.

98. Whilst the answer is by no means perfectly clear, the Tribunal nevertheless prefers the Applicant's interpretation. Given that the Respondents' assertions of an ability to rely on the words stated necessarily required the Tribunal to find those words to say what the Respondent contended them to whereas the Tribunal did not, it is unnecessary to go further in respect of the particular argument.

99. More significantly and in any event, the Respondents' case is that it was represented, that they were positively told, that there could be holiday lets. Even if the Tribunal had agreed with the Respondent as to "be" rather than "re", the Respondents' case at its highest would be that a ban on holiday lets was intended to be written into the leases.

100. The Tribunal agrees with Ms Coyle's submission that it would nevertheless not amount to an unequivocal positive representation that holiday lets were permissible. Whilst the Tribunal accepts that the Respondents may have taken the brief words as indicating short- term holiday lets to be permitted at that time, there is no way of considering the words used which amounts to a positive statement that holiday lets could take place.

101. The evidence of Mrs Holdham, which the Tribunal accepts insofar as it goes, is that when preliminary enquiries were returned prior to the Respondents' purchase and it was understood that a new lease was to be created with no holiday letting written into it, that the Respondents then reduced the purchase price they were willing to pay. It is common ground that there was a vote, the outcome of which was to keep the Lease the same- the Applicant asserts because it would add to cost and the Applicant's members accepted the effect of the existing wording- and the

Tribunal accepts that the Respondents increased their offer and the transaction proceeded. That is consistent with the Respondents believing that there would be a change made to holiday lets being explicitly precluded an amended lease and then to being re-assured by the fact that had not happened.

102. However, the Tribunal finds that a vote in which the Respondents were not involved and before their purchase involved no promise or representation to the Respondent. Leaving matters as they were and with nothing specific directed to the Respondents was also not on any level found to be unconscionable conduct.

103. Rather, to use Mrs Holdham's own words, the Respondents "assumed" holiday lets were allowed. They did not, on the evidence advanced, seek more specific clarification as they might have chosen to where the issue was significant to them.

104. Mrs Holdham also asserted that when new leases were drafted, the provisions in respect of user were unchanged and that was because holiday lets were intended to be allowed. However, on the one hand no evidence has been provided of such intention- on either side, the Applicant's case also relying on what it is asserted was "evidently decided"- and on the other, and the relevant point in law applying *Arnold v Brittan,* is that the Tribunal must disregard subjective evidence of any party's intentions.

105. The Respondent's case is therefore limited to the fact that no change was made to the Lease terms as and when the new longer leases were drawn up and entered into. The Tribunal finds that involved no promise or representation made by the Applicant to the Respondent that holiday lets were allowed. It simply left the position intact There was also not in any way any unconscionable conduct in relation to permitting holiday lets which might have had the same effect, such that the user covenant could not be relied on.

106. The Respondent's case is a long way from *Darwen*, in which the original lessor was recorded as having specifically said that he was happy with short-term holiday lets. The Tribunal accepts it to be very unfortunate if the Respondents always, wrongly, understood holiday lets to be permitted, but that does not assist the Respondent in this case.

107. The Tribunal determined that even if the above elements argued by the Respondent were taken cumulatively rather than individually, that still does not assist the Respondents. An accumulation of points which individually fail, does not produce something which collectively succeeds, certainly not in this instance.

108. Consequently, the Tribunal finds the Respondent would be in breach of the covenant in respect of the use of the Property in respect of any short-term lets, over and above any use by friends and family members.

Compromise/ other representation in 2019

109. The Tribunal has taken account of the subsequent written representations made on the specific point further to the representations at or before the hearing.

110. The Tribunal first sets out the factual background.

111. On 6th April 2019 at its Annual General Meeting ("AGM"), the Applicant discussed whether to permit holiday lets, irrespective of the term of the Lease and other leases of flats in the Building. Interestingly, that is stated in the Minutes of the meeting to have been prompted in part by the perceived ambiguity of the Lease.

112. It is said in the Minutes that the attendees at the Meeting agree to vote on a compromise which would allow holiday lets on certain conditions, namely:

> "Holiday lets to be allowed during a trial period until the end of 2019, with a review to take place in December 2019 in which it would be extended if successful.
> Any owners wishing to let their flat as a holiday let must obtain agreement from the management company first so that the management company can ensure that the building is properly insured.
> Any owners wishing to let their properties as a holiday let must ensure tenants are suitably vetted and will be responsible for their own insurance.
> As per the terms of the lease, the flat must be occupied by one family only.
> Each year, insurance quotes to be obtained based on assumption of no flats being let as a holiday let. The difference between the amount quoted and the actual amount charged after holiday lets are taken into account will be split evenly between owners who use their property as a holiday let.
> No more than 1 booking per week
> The management company must have a 24 hour point of contact (i.e. letting agent) so that any problems can be resolved swiftly.
> all [the original does not start with a capital] other terms of the leases and of the Trocadero management company to be adhered to, including no smoking an no animals
> An additional £15 (£390 per annum) maintenance charge per fortnight to be made to cover additional cleaning and wear and tear (it was agreed the extra cleaning will be scheduled when premises are holiday let)
> It is to be understood that this is being agreed on a trial period and is not intended to set a precedent. There should be no assumption that holiday lets will be allowed beyond 2019 until the trial has been reviewed."

113. That vote was passed by ordinary resolution. There was no suggestion that such a resolution was not properly passed or could not be passed. It is the terms of that resolution which constitute the Compromise. For the avoidance of doubt, the Tribunal accepts that no other document was produced, although the terms of the resolution were circulated to the members, providing the written notification required by the Lease.

114. The Applicant, through Ms Coyle, submitted the Applicant would not have entered the into the Compromise but for the Respondent's assertion of receipt of advice that they could let as short- term lets and set out other

observations. The Tribunal has taken note of those but does not accept that it would, if correct, prevent the Respondents relying on the Compromise. No finding is therefore required as to whether that basis for entry into the Compromise is correct. Mr Bullock in evidence said that the Compromise sought to strike "a happy medium" between allowing holiday lets and not doing so.

115. The Tribunal determined that the Compromise amounted to a variation or amendment of the Regulations contained in the Fourth Schedule of the Lease. The Applicant had a unilateral power in regulation 11 of the Fourth Schedule to vary the Regulations. The regulation was part and parcel of the suite of regulations in that schedule.

116. Whilst the Applicant asserted that regulation 11 was a general sweeping up clause designed to cover unforeseen items of expenditure, the Tribunal found nothing in the wording of the paragraph or wider Lease to support that. The Tribunal determines that the wording of the regulation enabled the variation of the user covenant, where the clear wording of the Compromise does change the relevant Regulation as to holiday lets. The Tribunal rejects the Applicant's argument that the Compromise was something separate.

117. The Tribunal has again taken the required approach to the construction of the wording used. The natural and ordinary meaning of all of the words used is, the Tribunal finds, perfectly clear. The variation benefitted the occupiers of the Building by providing a compromise to a dispute which may otherwise be time-consuming and expensive- indeed the Applicant subsequently gave just those reasons- and which was notified in writing.

118. There was not therefore a matter of waiver, estoppel or unconscionability. The obvious and significant difference between *Swanson Grange,* and similar situations, and this case is that in the instant case there were documents specifically setting out that a different approach would be taken to that required by the Lease in 2019 via the Compromise. The contractual basis of the relationship between the parties was altered.

119. The Tribunal found the correct construction to be that the Compromise did not vary the Lease for good- it was not a Deed of Variation- and that the original provisions remained, save that they did not apply whilst the Compromise applied. The Tribunal found that the Regulations were so varied by the Compromise for such time as the Applicant did not reverse or otherwise alter that variation, although it retained the ability to do that.

120. The Tribunal noted the oral evidence of Mr Bullock that the Applicant did not intend to change the terms of the Lease. The Tribunal has considered whether the result is that it did not so amend and vary, lacking the necessary intention to do so. The Tribunal finds that whilst the Applicant failed to appreciate that it was able to amend or vary the Regulations, any subjective intention of the Applicant, not least based on a misunderstanding of its role, is not determinative of the answer to the

issue of the construction of the words. Insofar as the Applicant had perceived that it could not alter the Lease, that the Lease terms could still be relied upon and it had so stated to the lessees, it had made those comments referring to itself as the management company, whereas it was the successor in title to the original lessor and held the rights of the lessor accordingly, including therefore the ability to vary the Regulations with the Fourth Schedule in the manner set out in the Lease, and so the Applicant was wrong in any such perception.

121. The Tribunal also noted that it was asserted that the Lease terms took precedence over the terms of the Compromise, including in the words of the Compromise. However, the Tribunal considers that the Applicant's argument wrongly assumed the Compromise to fall outside of any powers within the Lease and in any event such an outcome would be nonsensical for the life of the Compromise. A Compromise which permits holiday lets but which is outranked by a lease which prevents them is pointless. The Tribunal cannot accept that such an effect was caused.

122. In terms of the general ability in principle for there to be holiday lets and for the Applicant to be able to pursue a breach of the Lease because of those, the Tribunal finds that such lets as took place within the four corners of the provisions of the Compromise were permitted and so cannot be relied on by the Applicant. However, the Tribunal agrees with the Applicant's case that the Compromise required not only that certain specific matters were complied with but also that all other terms of the leases be adhered to. As demonstrated by the other breaches found above, the Respondent did not comply with the other Lease terms.

123. The Tribunal has found breaches in respect of the floor-coverings from at least 2012 through April 2019 and onward. On a lesser note, the Tribunal has found a breach in relation to nuisance in July 2021. It necessarily followed that the Respondents did not meet the requirements set out in the Compromise and cannot rely on it.

124. The Applicant argued that other conditions which were required to be complied with in order for holiday lets to be permitted were not met. However, the Tribunal found that the Applicant did not demonstrate that the Respondents had breached any other conditions in the Compromise. Whilst assertions were made in its Reply, there was a lack of adequate supporting evidence.

125. It was apparent that the Applicant had agreed to short- term holiday letting by the Respondents. That was the background to the Compromise. Its actions in respect of insurance for the Building also amply demonstrate agreement, specific provision being made.

126. The Compromise is explicit in stating that occupation for a holiday let must be by one family group only. It was suggested by the Applicant that letting may not have all been to one family only. The Tribunal finds that the advertising of the Property included use by groups of friends and that any such use would have amounted to a breach of the conditions on which

holiday lets were permitted by the Compromise. However, the Tribunal found no actual letting to any group of friends to have been proved. In relation to the terms of variation of the Regulations, there was either an actual breach or there was not.

127. The Applicant provided no evidence of letting to groups of friends and no admission of such was made by the Respondents. The point was not put to Mrs Holdham in cross- examination. The Respondents asserted in their "Points of Response" that they had turned down a non-family group and that a third party included wording referring to groups of friends on their website of which they were not aware, although that was new evidence and not submissions. That is not relevant in the event because the Applicant's point was not proved on permitted evidence.

128. A similar position applies to each of the other remaining conditions said to have been breached. As nothing turns on those, the Tribunal does not address them individually.

129. In light of the above and given that the Respondents did not comply with the terms of the Compromise and so cannot take the benefit, the question of whether the Compromise remained applicable as at the date of issue of proceedings or ceased on an earlier date did not take on the significance it appeared that it might. Indeed, nothing turns on the point. If the Respondents had complied, the question may have taken on considerable significance, but the Respondents did not.

130. Whilst it is therefore tempting to leave it firmly to one side, as the matters was raised in the hearing and was the subject of submissions, the Tribunal considers it appropriate to address the issue to an extent.

131. The Tribunal recognises that the trial period was limited to the end of 2019 and infers that it was anticipated would be considered at the next AGM in March/ April 2020, the temporary suspension contended for by Ms Coyle. However, that was subsequently extended to April 2021, no AGM having been held in 2020 due to the Covid -19 pandemic. Neither party argued that any issue arose with the extension. At the 2021 AGM, no change was made. The variation was left in place until a barrister's opinion was received. The Tribunal accepted the Respondents assertion that a vote was taken in relation to the Applicant obtaining advice but not action beyond that.

132. The Tribunal was not persuaded on the evidence presented at the final hearing that the Compromise had ever been properly ended.

133. In its written submissions on the specific question of whether variation or amendment of the regulation had been rescinded or otherwise varied, titled "Replies from Applicant for Case……", the Applicant referred to the Articles of Association and attached what it described as a page of that omitted from the bundle in error. The page was headed "Extract page from…… Memorandum of Association (Table A)." and so there appears to have been a clerical error in referring to the Articles, but no matter. It is

apparent that page fitted between other pages of the Memorandum which were in the bundle.

134. Nevertheless, that was to the Tribunal new evidence. The Respondent's Counsel had understandably made no reference to it in submissions either and the Tribunal has little doubt that was because it was not in the bundle. The Applicant has argued that the Directors had authority to take any steps, amongst other arguments about why the Compromise was not in force of varying merit: the Respondent's Counsel argued not. On the information in the bundle, the latter would have been preferred. If anything had turned on the matter, the Tribunal may have needed to obtain further submissions and there may even have been other evidence required, with complications and costs.

135. However, even if the Tribunal found in favour of the Respondents on the point, it would not aid the Respondents because of their breach of the conditions included in the Compromise. Nothing therefore turns on whether the provision of the Memorandum in the bundle might have produced one finding or another.

136. The point may have practical significance if the Respondents seek to let as holiday lets but in compliance with the conditions of the Compromise and the other requirements of the Lease. On the other hand, if the Applicant passes a further appropriate resolution in respect of the variation of the Regulations, the original terms of the Lease will come back into operation. That may already have happened.

137. It seems unlikely that the current status of the Compromise agreement will prove significant in practice and so ought to be determined against the background of the above complications and where there is no impact on the outcome of this application.

138. For completeness, the Tribunal records that the Applicant also attached further new evidence, being the contents of an email said to have been sent by the Respondents prior to the AGM in 2019. The Tribunal also disregarded that because of the steps which may otherwise have been required, similar to the page of the Memorandum.

139. The Tribunal also noted that Mrs Holdham said in evidence that she was not a party to the agreement and had never accepted it because she was always allowed to let for holiday lets from the outset. However, the Tribunal understood the evidence of Mrs Holdham, when viewed against the remainder of the case, as amounting to a lack of acceptance that the Compromise altered the position to permit holiday lets because she asserted that was already permitted, which the Tribunal has found incorrect. In any event, the Regulations gave the Applicant the unilateral power to vary. The agreement of any given lessee where there had been sufficient support for the Applicant to pass a resolution exercising that power was of no matter. Neither was it relevant that the Respondents did not attend the AGM.

140. In relation to any wider argument as to waiver or estoppel for the period April 2019 onward, the Tribunal considers there to be none and, in any event, can discern nothing which would advance the Respondents' position beyond the variation effected by the Compromise. There was a clear representation that holiday lets were permitted but it is equally clear that the representation was that they were permitted on the conditions. There were no other identified representations. The Tribunal finds no basis for determining there to have been any waiver or estoppel to which such conditions did not apply.

141. If the Tribunal had found there to have been a representation which could give rise to an estoppel, the Tribunal would not have found the Respondents to have acted to their detriment in reliance. The Respondents undertook what were presumably profitable short- term lets- at the very least there is no evidence advanced by the Respondents that they somehow changed their position such that they lost out.

142. The Tribunal also notes that the email of 16th July 2021 from the Applicant's Board may have been sufficient to bring any waiver or estoppel to an end, such that the Respondents would- subject to other arguments- have been in breach thereafter. The point raised on behalf of the Applicant about the judgment in *Swanson Grange* would have applied. That is irrespective of the power to end the Compromise or not.

143. In light of the above determinations, the Tribunal does not consider it necessary to say any more about that or to make any specific further determinations.

144. The Compromise did not have the retrospective effect of permitting short- term lets from 2018 until April 2019, even assuming compliance with the conditions stated. The Tribunal finds that the wording of the Compromise made no reference to the position at any earlier date and in any event the conditions would have applied and the flooring breached them. Indeed, it was the Respondents' own case that the Applicant wrote in 2018 stating that the Lease did not allow holiday lets. Although the Respondents replied asserting that it did, there is no suggestion of a consequent change in the Applicant's position at that time, whereas the Tribunal has found the provisions of the Lease to apply and that those do not permit holiday lets. Consequently, any earlier breach by the Respondents would not have been waived or quashed by the Compromise.

145. The Tribunal also considered an argument raised that the Respondents were permitted by the communications in 2021 to continue with holiday lets until 7th September 2021. The Applicant case, which the Tribunal accepts as correct, was that the email written on behalf of the Applicant dated 24th August 2021 Lessees to confirm that they would permanently cease holiday lets and stating that proceedings would otherwise be commenced 7th September 2021, did not at any point say that holiday lets were permitted until that date.

146. Even if the letter could somehow have negated the need to comply with the conditions set out in the Compromise, the Tribunal would have found that the Respondents were not permitted to let as short- term, holiday lets until 7th September 2021 and so the Respondents were in breach for a short time by continuing to let. The Tribunal finds that the Respondents did not reply until 11.02 pm on 7th September 2021 and then did not so confirm in any event, only rather more generally expressing a desire to resolve matters. The Applicant gave the Respondents an opportunity to avoid proceedings, but which was not taken. In the event, the Tribunal found that the conditions set out in the Compromise remained and any letting which failed to comply with those, as the Respondents' lettings did, remained a breach.

iii) **Application of the facts- the breach**

147. The Respondents have admitted letting the Property out for 4 or 5 weeks- indeed in their Statement of Case for 5 or 6 weeks- each year but solely to friends and family. at least up to the point in 2018 at which the Respondents moved out of the Property into a house purchased. The Respondents' case was that they then intended to let to others through a holiday letting agent, but that agent was not interested in taking on the Property. None of that was challenged.

148. There is no evidence as to what letting then occurred or to whom and with no evidence of profit. The written case of the Respondent does not explain, the Applicant's witnesses did not comment as to the occupiers and the Respondents were not cross-examined on the matter. The Tribunal lacks the evidence from the Applicant to make any finding as to the extent, it at all, of letting from 2018 to April 2019 to persons other than family and friends and so in breach of the user covenant. The Tribunal accordingly determines that the Applicant has failed to prove a breach during that period to April 2019.

149. The difference after 2018 was that the Respondents had moved out of the Property and they accepted that they then let the Property more and for profit. Indeed, there was clear evidence of advertisements for such lets, for both families and groups of friends, on internet sites. Nevertheless, the Tribunal has not found actual evidence of letting to groups of friends, which might have been relevant if anything had turned on the matter.

150. The Tribunal has no evidence as to a specific start date but infers from the available evidence that holiday letting for profit by the Respondents commenced in Spring/ Summer 2019, sometime after the Compromise in April 2019. The only evidence given by Mr Levy was to state that the last holiday let by the Respondents that he could recollect was round the end of August 2021. Mrs Holdham clarified that ended on 4th September 2021, which was not challenged. She accepted in response to cross-examination a let for three nights from on or about 31st August 2021 referred to on the Facebook page for the Property. The Respondents' letter dated 11th September 2021 said that there were no lets after 6th September 2021 because of the fitting of new flooring.

151. The exact date of the last letting ending is not completely clear but as Mrs Holdham was best placed to know the answer, the Tribunal takes her evidence as the most cogent and adopts the date given by her.

152. The Tribunal accordingly finds that there were short-term holiday lets from Spring/ Summer 2019 until 4th September 2021 and in breach of the Lease as varied by the Compromise.

Decision

153. The Tribunal determined that there was an actionable breach that the Respondents permitted occupation of the Property as other than a "private flat in the occupation of one family only" where not entitled to do so from around or about mid- 2019 until 4th September 2021 and further that the Respondents permitted nuisance from which a nuisance can (and did) arise on one occasion in July 2021, both in breach of paragraph 1 of the Fourth Schedule to the Lease. In addition, it was determined that the Flat did not have appropriate floor coverings during the period to 6th September 2021 in breach of paragraph 10 of the Fourth Schedule to the Lease. The Applicant has failed to prove a breach in relation to insurance.

Fees

154. The Applicant has incurred the usual fees in order to bring this application to the Tribunal, namely £100 to make the application and £200 for the hearing.

155. The Applicant has plainly been successful in obtaining a determination that there have been breaches of covenant by the Respondents. Further, the Tribunal finds that whereas the Applicant had stated in clear terms that proceedings would be issued in 14 days of 24th August 2021 unless flat owners said that holiday letting would cease, the Respondents had failed to unequivocally do so by 7th September 2021 as asked and the Property remained advertised.

156. The Respondents case is that the next communication by the Applicant after 24th August 2021 stated, "The necessary paperwork pertaining to those breaches is currently being prepared for issue on 8th September 2021 should holiday letting continue and/ or outstanding remedial works to the flooring not be completed beyond this date". As the Tribunal has found, the Respondents dealt with the flooring just before that deadline. The Respondents stated by email 11th September 2021 that "our flat has not been available for holiday lettings after the 6th September 2021, as we were waiting for the specialist acoustic flooring to come in and be fitted..... There are no holiday lets booked after 6th September 2021."

157. There was no statement by the Respondents of acceptance that holiday lets were not permitted or that holiday lets would cease generally, simply that as matters of fact no lettings were arranged. Indeed, the Respondents still asserted that they purchased able to let for holiday lets and references

were made to the instruction of solicitors in relation to that. To the extent that the Respondents could have avoided the application, they failed to take what the Tribunal determines to be appropriate steps to do so.

158. The Tribunal considers that in those circumstances, it was reasonable for an application to be made by the Applicant. The Tribunal notes that the Respondent's then representative stated to the Applicant by email 18th November 2021 that the Respondents agreed not to holiday let pending the outcome of the application. That is not directly relevant to the issue of an application which had already taken place but serves to support the interpretation of the Respondent's previous communications. The Applicant went to succeed with the majority of its case.

159. The Tribunal accordingly determines that the Applicant is entitled to an award of the Tribunal fees paid totalling £300.

Section 20C application by the Respondents

160. The Respondents submitted an unsigned application pursuant to section 20C of the Landlord and Tenant Act 1985 for the Applicant's costs of the proceedings not to be recoverable as service charges by email during the week before the hearing. The Tribunal understands that they were asked to provide a signed application and were to do so at the hearing. However, because of other matters arising at the hearing, the Tribunal understands that the Respondents forgot to hand up the application. The Tribunal admits the application.

161. The application was incomplete and did not give reasons for the application succeeding. The parties made written representations at the request of the Tribunal in respect of the application, again by the Applicant's officers on its behalf and briefly by Mrs Holdham on behalf of the Respondents. The Applicants asserted that the application should not be allowed to proceed at all but, whilst accepting that the Directions gave a last date of 16th November 2021 and the application was made 2nd December 2021, the Tribunal determined it appropriate to deal with the application in its merits. Reliance was otherwise principally placed on the wider merit of the application for determination as to breaches and the email 24th August 2021. The Respondents asserted that they had repeatedly offered compromises and other dispute resolution was ignored.

162. Whilst it is not the sole consideration, it is notable that the Applicant has succeeded in respect of the majority of the breaches and where, as determined above, it was reasonable for the application to be made. The Respondent have failed to persuade the Tribunal that it would be just and equitable to disallow recovery of costs under the service charge in those circumstances.

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