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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**BIR/00CW/LBC/2014/0007 – 0016 (incl)** **BIR/00CU/LBC/2014/0006, 0017 & 0018**
Properties	:	**4, 8, 10, and 12 Bay Avenue, Bilston, West Midlands WV14 0TT** **5, 9, 14, 19, 20, and 21 Loxdale Sidings, Bilston, West Midlands WV14 0TN** **Flats 2, 6 and 8 Southmead Way, Deremede Court, Walsall, West Midlands WS2 8JD**
Applicant	:	**Sarum Properties Limited**
Representative	:	**Mr A Carr of counsel**
Respondents	:	**Wayne Donovan Jones (1)** **Andrea Angela Green (2)** **Dominic Ricardo Green (3)**
Type of Application	:	**Application for an order that a breach of covenant or a condition in a lease has occurred, made pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act")**
Tribunal Members	:	**Judge C Goodall** **Mr S Berg FRICS**
Date and venue of Hearing	:	**12 December 2014 and 23 January 2015 at The Property Chamber hearing centre, Priory Court, 33 Bull St, Birmingham B4 6AF**
Date of Decision	:	**12 March 2015**

DECISION

Background

1. The Respondents in this case are Wayne Donovan Jones ("Mr Jones"), Angela Andrea Green ("Mrs Green"), and Dominic Ricardo Green ("Mr Green").

2. The Respondents are between them the lessees of the thirteen residential long leasehold properties in West Midlands which are the subject of these applications. The Applicant owns the freeholds of these properties.

3. The Applicant alleges that the Respondents, in respect of the properties of which they are lessees, have breached covenants in their leases. It has therefore applied to the Tribunal for a determination under section 168 of the Act that those breaches have occurred.

4. The case has been heard over a two days on 12 December 2014 and 23 January 2015. The Applicant was represented by Mr Carr of counsel. Mr Jones and Mrs Green represented themselves. Mr Green did not appear on the first hearing day, but he was present on the second day. He is Mrs Green's son. The three Respondents clearly have a close working relationship. Mr Jones led the presentation of the case for the Respondents but Mrs Green also contributed regularly. It was clear to the Tribunal that they regarded the issues raised as being relevant to all of them, even though on occasions one of the Respondents was strictly not affected by an issue.

5. The properties about which this case is concerned are located in two different suburban areas of West Midlands about 6 miles apart. The addresses of the properties, and the lessee in respect of each is set out below:

Property	Lessee	Original Plot number
5 Loxdale Sidings, Bilston WV14 0TN	Mr Jones	2
9 Loxdale Sidings, Bilston WV14 0TN	Mrs Green	6
19 Loxdale Sidings, Bilston WV14 0TN	Mrs Green	8
21 Loxdale Sidings, Bilston WV14 0TN	Mrs Green	10
14 Loxdale Sidings, Bilston WV14 0TR	Mr Green & Mrs Green	186
20 Loxdale Sidings, Bilston WV14 0TR	Mr Green & Mrs Green	189
4 Bay Avenue, Bilston MV14 0TT	Mrs Green	25
8 Bay Avenue, Bilston MV14 0TT	Mr Jones	30
10 Bay Avenue, Bilston MV14 0TT	Mr Jones	28
12 Bay Avenue, Bilston MV14 0TT	Mr Jones	29

2 Southmead Way, Walsall WS2 8JD	Mrs Green	167
6 Southmead Way, Walsall WS2 8JD	Mrs Green	165
8 Southmead Way, Walsall WS2 8JD	Mrs Green	164

The odd-numbered flats in Loxdale Sidings are in a single self contained building comprising a total of 10 flats. There is a separate building comprising a further 6 flats being flats 14 – 24, even numbers only, located some 200 yards or so away which contains 14 and 20 Loxdale Sidings. The flats at Bay Avenue are around 500 yards away in a 10 flat building comprising flats 2 – 20 (even numbers only), all three buildings being on a residential estate in Bilston. The properties in Southmead Way are in a 4 flat block containing 2 – 8 Southmead Way, Walsall, on a residential estate known as Deremede Court. The Loxdale Sidings and Bay Avenue flats will be described in this decision as the "Bilston Properties". The Southmead Way flats will be described as the "Walsall Properties", or the block as Deremede Court. [Note: Deremede Court is the spelling used in most of the documentation provided by the Respondents. In the lease of the flats, the spelling is Deermede Court. The correct postal reference might be Deermead Court, as that spelling occurs on web searches about properties on that estate. The Respondent's spelling will be used in this decision.]

6. Prior to the hearing, the Tribunal inspected all the properties externally and viewed the internal common parts and access ways for 5 – 21 Loxdale Sidings and the Bay Avenue properties. The Tribunal was able to view the inside of 5 and 21 Loxdale Sidings and 8 and 10 Bay Avenue.

7. Mrs Green is also lessee of flats 1, 11, and 18 Loxdale Sidings, but these properties are not part of this application. Flat 1 has been repossessed and is boarded up. Possession proceedings in relation to Flat 18 were also taken and solicitors for the applicant in those proceedings stated that possession had been achieved in May 2014.

The law

8. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides:

> (1) A landlord under a long lease of a dwelling may not serve a notice under s146(1) of the Law of Property Act 1925...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-
>
> (b) it has finally been determined on an application under subsection (4) that the breach has occurred.
>
> ...
>
> (4) A landlord under a long lease of a dwelling may make an application to an [appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.

9. Section 146 of the Law of Property Act provides that a right to forfeit a lease is not enforceable unless a notice is served on the tenant specifying the breach and containing certain other details. The precise operation of section 146 is not relevant to this decision, save that it is accepted that service of a s146 notice is necessary before the Applicant can seek to forfeit the Lease.

10. The Tribunal's task in this case is simply to determine whether the Respondents have breached any of the covenants in the lease it is alleged by the Applicant they have breached. The Tribunal is not responsible for determining the consequences of any breach.

The Lease covenants

11. The leases of the Bilston Properties grant a lease of the relevant property to the lessee for a term of 125 years from 1 April 2005 upon payment of an annual ground rent. Lessees are also obliged to pay a management company a service charge and a contribution towards the insurance premium.

12. The leases are structured as tripartite leases; the landlord, the tenant/lessee, and a management company. In respect of the Bilston Properties, the intention in the leases was that the management company would be a tenant owned and operated company called Loxdale Sidings (Bilston) Management Ltd. The Tribunal understands that this management company is still in place and operating as the management company, and it has contracted with an organisation called HLM, a professional property management agency, for HLM to provide management services to the estate.

13. The Walsall Properties are let for a term of 125 years commencing on 1 January 2006. There are three parties to the leases, being the landlord (as freeholder), a management company called Hospital Street (Walsall) Management Ltd, and the lessee. The management company on this development is not intended to be a lessee owned company; rather it is a professional management company which therefore acts on its own behalf in the management of the Walsall estate.

14. The leases of the Bilston properties contain a covenant, at clause 3, to:

> 3. The Tenant ... covenants throughout the term:
>
> 3.2 with the Landlord to observe and perform:
>
> 3.2.1 the obligations on the part of the Tenant set out in Parts 1 and 2 of schedule 4
>
> ...
>
> 3.3 with the Management Company to observe and perform the obligations on the part of the Tenant set out in Parts 1 and 2 of Schedule 4

15. The leases of the Walsall properties contain covenants, at clause 3 and 4, to:

> 3. The Lessee hereby covenants with the Lessor and the Management Company and with and for the benefit of the Owners of the Other Apartments that the Lessee and the persons deriving title under him will at all times hereafter observe and perform the restrictions set out in Part 1 of the Sixth Schedule hereto.
>
> 4. The Lessee hereby covenants with the Lessor and the Management Company that the Lessee will observe and perform the covenants on the part of the Lessee set out in Part II of the Sixth Schedule hereto.

16. The Applicants case is that, in relation to the Bilston Properties, covenants contained in schedule 4 have been breached, and in relation to the Walsall Properties, that covenants contained in the Sixth schedule have been breached. Consideration of the specific wording of those covenants and the evidence for breach of them follows later in this decision, but in general terms, the covenants required the obtaining of consent to sublet in respect of the Bilston Properties, a covenant against user for trade or business (and for the Bilston Properties against using the flats except as a private dwelling house), an obligation to notify and to pay a registration fee in respect of any underlettings, and a covenant not to do anything to void the insurance or to increase the insurance premium in relation to the Walsall Properties. An initial allegation that an insurance covenant in the leases relating to the Bilston Properties had been breached was dropped by the Applicant during the course of the hearings.

The factual background

The Initial Purchases

17. Mr Jones said that he and the other two Respondents purchased their flats at Bilston and Walsall from Bloor Homes in about 2005/2006, with the express aim of letting them as buy to let properties. He said the builders were well aware of this. He and his fellow Respondents were given a clear indication that to purchase the flats, they would need to obtain their mortgages via the builder's preferred mortgage adviser and they would have to use a solicitor acceptable to the builder. They therefore instructed Prescotts Solicitors to act on their behalf in the purchases. It was Mr Jones's understanding that the solicitor at Prescotts wrote to the builder's solicitors requesting permission to let the flats.

18. The Respondents produced a letter dated 30 June 2006 from Freeth Cartwright, Solicitors, who acted for Bloor Homes in relation to the Bilston Properties. In the heading to the letter, 14 properties are referred to, being plots 1, 5, 6, 8, 10, 186, 187, 188, 189, 4 Bay Avenue, 2, 4, 6, 8 Southmead Way. The heading then says "Your client Andrea Green", and at the end of the heading states in capitals "PERMISSION GRANTED".

19. The text of the letter reads:

> "We understand that your client is an investor and is likely to be purchasing the above plots with the intention of letting them out.
>
> We felt it appropriate to issue you with a copy of the subletting guidelines,
> which have been compiled by the management company. The guidelines are made for the benefit of all occupants of the apartments.
>
> Should you have any queries relating to the information provided, please do not hesitate to contact us."

20. The Guidelines attached to that letter included the following requirement:

> "3. The Company will be notified of each tenant and the anticipated length of the subletting within 28 days of completion of the letting. A registration fee of £25.00 plus VAT, payable to Housemans Management Ltd T/a HLM [sic] is required for each subsequent change of tenant."

21. Regrettably, the Tribunal was not supplied with a copy of any preceding letter to Freeth Cartwright that may have prompted the writing of the 30 June 2006 letter.

The initial assured shorthold lettings

22. Having purchased the flats, the Respondents then let a number of them on assured shorthold tenancies ("ASTs"). Details of those ASTs that the Respondents revealed in their documentation are as follows:

The Bilston Properties

a. An AST for 5 Loxdale Sidings to Mr Stephen McIntyre on 8 August 2006. The Respondents say this tenancy terminated on 26 July 2014 when Mr McIntyre left

b. Two AST's for 9 Loxdale Sidings on respectively 17 July 2011 to Dilveer Rayat and 12 November 2012 to Lloyd Mills

c. An AST for 14 Loxdale Sidings to Nicholas Wallace on 19 December 2011

d. An AST for 20 Loxdale Sidings to Emmanuel Lawrence in January 2009

e. Two ASTs for 8 Bay Avenue on respectively 8 March 2006 and 19 July 2011

f. An AST for 10 Bay Avenue to Mr Ian Rees on 8 September 2007, renewed on 1 December 2012

g. An AST for 12 Bay Avenue on 17 November 2011 or 2012 (documentation is inconsistent)

The Walsall Properties

h. An AST for 2 Southmead Way to Anna Skalsa on 11 November 2011

i. An AST for 6 Southmead Way to Mr & Mrs Daniel Holke on 17 December 2011

j. An AST for 8 Southmead Way to Stephen Brookes on 1 March 2013

23. At the commencement of the hearing of this case, the Respondents also accepted that ASTs had at some point been granted over 4 Bay Avenue, but no further details were provided. Further, in their response to the Application, the Respondents accepted (at paragraph 12) that they had been sub-letting "these properties" since 2005 and 2006.

24. No admission of the grant of ASTs over 19 and 21 Loxdale Sidings was made.

25. The Tribunal takes the view that this list is not full disclosure of all the ASTs that the Respondents have created. Whilst some of the flats may have been used for what is described later in this decision as the Internet Business, the Tribunal considers that it is highly likely that there were ASTs or some other form of occupancy of 19 and 21 Loxdale Sidings, there was the admission at the hearing that there had been at least one AST over 4 Bay Avenue, and that it is inconceivable that the earliest tenanting of the Southmead Way flats was delayed until 2011, as they had been purchased by Mrs Green in 2006.

26. In 2009, the Applicant purchased the freehold of the buildings in which all the flats owned by the Respondents were located.

27. In about March 2014, the Respondents formed a right to manage company and claimed the right to manage the buildings in which the Bilston Properties and the Walsall Properties are situated. The Applicant says that a number of concerns were expressed to it about this application as a result of which it took a closer look at the question of compliance by the Respondents with their lease covenants.

28. The Applicant asked the current managing agents of the Bilston Properties whether any consent was granted for sub-lets of Flats 5, 9, 11, 19, and 21 Loxdale Sidings, for 14 and 20 Loxdale sidings and 10 Bay Avenue. The reply was:

"I cannot locate any documentation from the leaseholders requesting consent to let/sublet or from HLM on behalf of the management company consenting to let/sublet any of the below."

29. At the hearing, Mr Jones admitted, as representative for all the Respondents, that in respect of the Bilston Properties and the Walsall Properties, no notice of intention to underlet, or payment of a fee, or notice of completion of an underlet was given to the relevant management company or to the Applicant. He also accepted that no applications for consent to sublet had been made, but he said that consent had already been granted by the blanket consent evidenced by the 30 June 2006 letter from Freeth Cartwright.

The Internet Business

30. The Applicant also carried out investigations into the possible use of flats as short term lets for business or other people needing a place to stay in the area ("the Internet Business"). Ms Tamara Folkesson, the Applicant's main witness at the hearing of this case said her investigations revealed that there were a number of web-sites on which properties at Loxdale Sidings, Bay Avenue, and Southmead Way were being offered on short lets. She said there were three main web-sites set up to market each of these blocks of flats, being www.loxdalerooms.com, www.bayrooms.co.uk, and www.deremedecourtwalsall.co.uk. She assumed these websites were owned by the Respondents.

31. At www.loxdalerooms.com, Ms Folkesson said, six apartments were offered, 5 of which were single bedroom apartments, and one was a two bed penthouse apartment. At www.bayrooms.co.uk, two apartments were on offer, which were said to be facing each other on the first floor. At www.deremedecourtwalsall.co.uk, three apartments were on offer.

32. Ms Folkesson then discovered, by means of a Google search, that there were a large number of hotel booking web-sites under a search of "loxdale rooms" which appeared to offer the opportunity of booking the rooms. When an attempt was made to book via these sites, they defaulted to the web-sites already identified above, where it was possible to establish availability and to book a stay in one of the rooms, or some websites had their own availability pages.

33. Copies of the pages reached when checking some of these websites have been provided to the Tribunal. In September 2014, via the tripadvisor website, apartments at Loxdale Sidings are advertised. The site provides a facility to book accommodation. As an example, a page offering a penthouse apartment, with a picture of the flat the Tribunal inspected, is offered from £128 per night. The owner is described as Andii G, and the property is said to have been listed since August 2013.

34. Another page, also on the tripadvisor site, offers apartments in Deremede Court, Walsall. This is described as "a collection of apartments in a single block and sleeps up to nine guests in total. ... It is situated on a brand new estate off Hospital Street in the Walsall Town Centre. Suitable for working professional on contract work, visiting family nearby, medical professionals, conferencing etc."

35. In its documentation for the Tribunal, and only in response to a specific direction of the Tribunal made at the end of the first hearing day and confirmed in a letter dated 15 December 2014 to the parties, the Respondents disclosed the existence of a contract between Andrea Green and Eviivo Limited, which is a company that will promote accommodation via the internet. This contract is in respect of a property described as "Loxdale Sidings", and the service Eviivo appear to be offering is described as "online booking software". The contract is for 12 months and it sets out various fees payable including set up fees, a PMS service fee, and commission rates of 15% of all bookings taken via Eviivo's own channels, and merchant and payment processing fees. The contract form requires completion of various boxes. One asks for the "Total Number of Rooms" to be specified. Typed into this box is the number "5". The contract was provided in an email dated 5 March 2013 and Mrs Green was invited to reply indicating she wished to go ahead with the contract. A later email that same day from Eviivo thanks Mrs Green for signing up with Eviivo and confirms a training session booked on 6 March 2013.

36. Evidence of a second contract, which this time is between Eviivo Limited and Mr Jones, is shown by a document described as an order form, signed by Mr Jones on 12 November 2013, for a Property Management Service for 12 months in relation to 2 rooms at "Bay Rooms".

37. No contract was provided to the Tribunal relating to the internet advertising of Deremede Court.

38. The Respondents said that they only had a contract with one internet booking company, which was Eviivo Limited. They did not dispute that their properties were available via a large number of websites, but they said the internet practice is that other companies take information about available properties that has become available on the internet (via the Eviivo site) and replicate it on their own sites. That is said to be the explanation for availability on multiple sites.

39. To obtain more evidence of the Respondents use of the flats, Ms Folkesson requested two people to actually stay in a flat. One was called Karen Chiswick, who did not give any evidence at the hearing. She told Ms Folkesson that she had stayed for a night on 3 June 2014 at Apartment 5, Loxdale Sidings.

40. A document was produced by the Applicant described as a "Booking Confirmation" for Karen Chiswell's stay. This showed a stay had been booked from 2 June (check in) to 4 June (check out) at a total cost of £166. The booking terms showed a contract between the person wishing to book the rooms and a company called Eviivo ltd. Ms Chiswell used a travel agent to make her booking, and an email to that agent was also produced by the Applicant from "Andii Green", giving a telephone number for Ms Chiswell to contact to gain access.

41. The numbering system used in the Internet Business for the Loxdale Sidings flats does not, according to the Respondents, match the postal addresses of the Loxdale Properties. It is most likely that the apartments advertised in fact bear no relationship to a physical flat. If a booking is made, it appears that the Respondents simply allocate a vacant flat to the booking. Hence the Respondents denied that Karen Chiswick in fact stayed at flat 5. It was accepted by the Applicant that she stayed in Flat 11, Loxdale Sidings, which is not, of course, a flat which is the subject of this application.

42. The Respondents disclosed some invoices from Eviivo. These appear to be monthly. The invoice for July 2014 confirms receipt by Eviivo of a payment of £166.00 from Karen Chiswick for a stay that commenced on 2 June 2014.

43. The second person who was asked by Ms Folkesson to stay at the flats was a Mr Kevin McKeown. A witness statement setting out his evidence was supplied and Mr McKeown attended the Tribunal hearing to give evidence. He stated that he used a travel agent to book accommodation called Mr Stephen Bellingham of Travel Counsellors Ltd. He had asked Mr Bellingham to arrange a booking at one of the Walsall Properties on Southmead Way in June 2014, but was told by Mr Bellingham that he had tried to make a booking on 16 June, but "the property took an offline booking yesterday and were waiting for payment, so the property still showed available when it wasn't. I had to chase them this morning for confirmation but the offline booking for all of their three rooms has made payment."

44. Mr McKeown asked Travel Counsellors to arrange instead for a stay for two nights at the Penthouse Suite at Loxdale Rooms. The cost was £228 for two nights. Mr McKeown says that he stayed at the room, which was on the top floor of the building, on 19 June, but he decided not to stay for the second night.

45. A copy of the reservation confirmation was provided showing the address of the issuer as 5 Loxdale Sidings. The Eviivo invoices provided by the Respondents confirmed this booking and payment of £228.00.

46. From the inspection it is clear that the top flat of the Loxdale Sidings block (odd numbers) where Mr McKeown said he stayed is flat 21.

Current use

47. From the Tribunal's inspection, it was clear that flat 9 Loxdale Sidings is currently boarded up and unavailable to the Respondents for use. It is said there is a dispute with the mortgage company regarding that flat.

48. The Tribunal viewed flats 5 and 21 Loxdale Sidings and flats 8 and 10 Bay Avenue. The first three were equipped for immediate occupation, with the boiler on, beds made, and the kitchen equipped for use. It is reasonable to assume that these three flats are currently available for use as part of the Internet Business.

49. 10 Bay Ave appears clearly to be occupied by a long term resident. It is reasonable to assume this flat is tenanted on an AST.

Insurance

50. In the leases of the Walsall Properties, the landlord (now the Applicant) covenants to insure all building against loss or damage from certain specified risks and any further risks which it has a right to determine.

51. That insurance has been placed by the Applicant with Zurich Insurance on the basis that the flats are owner occupied or sub-let to tenants on ASTs or tenancies of minimum 6 months, and that there are no DSS, asylum seekers, students, or holiday lets without prior approval of the insurer.

52. On 17 July 2014, Ms Folkesson advised the insurer, through the brokers, that three flats in the block were being advertised on hotel booking websites as serviced apartments for short term stays. A reply was received from the insurers brokers saying:

> "...Zurich have agreed that cover can remain as standard for 60 days as they can appreciate that the Freeholder is doing all they can to resolve this issue, however if this is not resolved after 60 days they will look to increase the rate and also the excess (although the increased excess will only apply to the affected block)."

The alleged breaches and the Tribunal's consideration of each – the Bilston Properties

53. The Applicant claims that the Respondents have breached covenants under paragraphs 24 and 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the leases of the Bilston Properties. Consideration of each follows:

Covenant against underletting without the management company's consent

54. Paragraph 24 of Part 1 of Schedule 4 of the Bilston Properties leases provides:

24 Not at any time during the term:

24.1 to assign charge or underlet or part with possession of any part of the demised premises less than the whole

...

24.4 to underlet the whole of the demised premises without the written consent of the Management Company and (during the first three years after the date of this lease only) the written consent of the Landlord

55. Firstly, the Tribunal does not consider that this covenant is breached by any activity generated by the Internet Business. That activity sought occupation on a nightly basis, akin to a hotel use. It offered a service rather than a lease, and there is insufficient evidence to show an intention to grant exclusive possession. In the view of the Tribunal, occupation was by licence, not lease, and as the covenant only relates to underletting, it is not breached by use for the Internet Business.

56. So far as the granting of ASTs is concerned, however, these undoubtedly do involve an underletting and the Applicant is prima facie on strong ground in alleging that each time the Respondents granted an AST over one of the Bilston Properties, they breached this covenant by failing to obtain consent.

57. The Respondent's response is that the letter of 30 June 2006 was a consent to grant ASTs of the Bilston Properties.

58. The Tribunal needs to consider which of the Bilston Properties were occupied under ASTs. As outlined already, it was admitted by Mr Jones in the hearing that ASTs were granted over eight of the ten Bilston Properties, but no admission was made relating to 19 and 21 Loxdale Sidings. Both of these flats were leased to Mrs Green on 27 May 2005 for use as buy to let properties. In the Respondents submission to the Tribunal, they accept that they have been letting their properties without incident since 2005 and 2006. It is admitted that flats 19 and 21 were used as part of the Internet Business, but that business only commenced, according to the information the Respondents were directed to disclose, in 2013. The Tribunal finds, because it stretches belief to find otherwise, that between 2005 and 2013, flats 19 and 21 Loxdale Sidings were used for residential occupation by tenants on ASTs or similar. Therefore the issue of the possible breach of paragraph 24.4 of Part 1 of Schedule 4 to the leases of the Bilston Properties will apply equally to all ten of those properties.

59. There are certainly flaws in the Respondent's argument that consent to underlet was given by the 30 June letter. Firstly, the plot numbers and addresses given in the heading of the letter (which can be matched using the table shown at paragraph 5 above) do not include 5 Loxdale Sidings, or 8, 10 and 12 Bay Avenue, so only six of the Bilston Properties are referred to. Secondly, only Mrs Green is referred to. Thirdly, we do not know the content of the correspondence trail to show that general consent to sub-letting for

ASTs was being sought, and of course most importantly, the letter does not expressly relate the permission granted to underletting.

60. But on the other hand, the Tribunal has concerns about the Applicant's argument too. It is obvious that the 30 June letter was consenting to something; otherwise it would not have the clear words "PERMISSION GRANTED" on it. Secondly, the letter makes specific reference to the purpose of Mrs Green's purchase being to let the flats she is buying, and underletting guidelines are included as an enclosure. Thirdly, the intervening eight or nine years have seen no concern (that has been brought to the Tribunal's attention) by HLM or the lease management company Loxdale Sidings (Bilston) Management Company Limited regarding compliance with this covenant. Although the covenant is owed to the Applicant, enforcement of it is the responsibility of the management company or its agent. It is clear that one or other of them knew the purpose of the purchases by the Respondents, yet they took no measures to enforce the obtaining of consent. And Mr Jones's stated that the letter was the consent to sublet to the best of the Respondent's knowledge.

61. The Tribunal notes that the flats listed in the heading to the consent letter are the flats in this case that are owned by Mrs Green – either alone or jointly with Mr Green. The four Bilston Properties not listed in the 30 June letter are the four flats owned by Mr Jones. Nothing has been produced by Mr Jones indicating that he was granted consent to underlet. Mr Jones asked the Tribunal to accept by inference that the consent related to all the Bilston Properties.

62. It stretches the Respondent's argument too far to say that the 30 June letter grants consent for letting of properties that are not referred to in the letter, which are owned by a person who is not referred to in the letter. The Tribunal considers that Mr Jones's argument that he must have been given consent to sublet by inference because Mrs Green was, is unconvincing. Covenants in leases are important legal obligations, and Mr Jones is a multiple owner of investment properties. It is unsatisfactory to simply infer that Mr Jones must have had consent to sublet.

63. Taking these points into account, the Tribunal is persuaded, on balance, that the 30 June letter did evidence consent to grant the ASTs that were created over Mrs Green's Bilston Properties. It is not willing however to extend that decision to flats not referred to in the 30 June letter. It therefore determines that in respect of 8, 10 and 12 Bay Avenue and 5 Loxdale Sidings, there is no evidence that consent to sublet was ever granted, and therefore that Mr Jones is in breach of the covenant contained in Schedule 4, Part 1, para 24 of his leases of these four properties.

Allegation that the Respondents breached a covenant to serve notice of the grant of an AST and to pay a fee etc.

64. Paragraph 25 of Part 1 of Schedule 4 of the Bilston leases provides:

25 Within twenty-one days after every assignment devolution charge or underlease of the Demised Premises whether by express deed or otherwise to give to the Management Company notice in writing specifying details of the same including the name and address of the assignee or other person in or to whom the Term or any part of it may have become vested or charged and to produce a certified copy of the relevant document for registration together with any deed of covenant required pursuant to clause 24.2 and (in the event of any assignment) in application for the assignee to be registered as the owner of the Tenant's shareholding in the Management Company and to pay the Management Company's reasonable fee in respect of such registration

65. For the same reasons that were given in the previous section of this decision, the Tribunal considers that this covenant applies to all ten of the Bilston Properties, all of which were at some point subject to ASTs.

66. There is no doubt that an AST is an underlease of a flat. This covenant requires notice to be given to the management company of the grant of an AST, that a copy of the tenancy is provided, and that a reasonable fee is paid. The Respondents accepted when presenting their case that no such notice was ever given in relation to the Bilston Properties. The 30 June letter referred to above cannot assist the Respondents on this point as the guidance note attached to it made express mention of the need to provide notice and a fee of £25 each time an AST was granted.

67. The Tribunal determines that in respect of all the Bilston Properties, on each occasion that a new AST has been granted, the Respondent owning the specific flat has breached the covenant contained in paragraph 25 of Part 1 of Schedule 4 of the leases.

Allegation that the Respondents breached the covenant to use the Bilston Properties only as private dwelling houses and not to carry on any trade, business or profession

68. Paragraph 2 of Schedule 4 Part 2 of the Bilston leases provides:

2 Not to use or occupy nor permit the Demised Premises to be used or occupied for any purpose whatsoever other than as a private residence not to carry on or permit to be carried on any trade business or profession in or from the Demised Premises

69. The Applicants allege breach of this covenant by the Respondents who own flats 5, 9, 19 and 21 Loxdale Sidings and flats 8 & 12 Bay Avenue. The allegation is that by permitting these flats to be used for occasional occupation by customers of the Internet Business, these Respondents have breached this covenant. The question is whether occupation by customers using the flats to stay the night, or several nights, is use as a business or trade.

70. There is no doubt that the Internet Business exists. The Respondents admitted as such, but were coy about which flats were part of it. They did not

accept that flats 5 and 9 Loxdale Sidings were part of the Internet Business, but they did at the hearing accept that the other four flats were.

71. The Applicant accepted that the evidence for use of flat 9 was insufficient and Mrs Folkesson agreed to drop the breach of this covenant claim for flat 9.

72. This leaves flat 5 unresolved. The Applicants argument is that the loxdalerooms website described the availability of six flats in total as at 8 July 2014. Between them, the Respondents own or owned flats 1, 5, 9, 11, 19 and 21. On another website called easytobook.com, a description of Loxdale Rooms includes the sentence "5 rooms can be found". This extract is dated in September 2014. In addition, Mrs Green's contract with Eviivo Limited refers to the availability of 5 rooms at Loxdale Sidings. Neither of these claims can be squared with the suggestion by the Respondents that only 19 and 21 Loxdale Sidings were used for the Internet Business.

73. On the other hand, the Respondents have produced an AST for 5 Loxdale Sidings to Mr Steven McIntyre together with an email purporting to come from Mr McIntyre dated 27 October 2014 in which he gave a moving out date of 26 July 2014. There is no evidence of, or suggestion by the Respondents that a further AST was granted over flat 5 after 26 July 2014.

74. The Tribunal inspected flat 5 on the first hearing day and found it equipped and ready for occupation.

75. Rules of evidence in proceedings before the Tribunal are more informal in nature than in court proceedings. Witnesses do not normally give evidence on oath. The Tribunal is often asked to take into account evidence that would not be admitted in a court, as it is based on hearsay. Much of the evidence relating to the use of flat 5 falls into this category. Nevertheless, the Tribunal must make the best decision it can on the basis of all the documents and submissions it has seen. In the view of the Tribunal, and on the balance of probabilities, flat 5 was used by the Respondents as part of their Internet Business at least after 26 July 2014.

76. The second question therefore is whether such use breaches the covenant. There are two elements to the covenant. The first is not to use the flats except as a private residence. The second is not to use them for a trade or business.

77. On the first element, Mr Carr referred the Tribunal to the Court of Appeal case of *Caradon District Council v Paton and Bussell (2001) 33 HLR 34*. In this case, a covenant in virtually identical terms to the covenant in this case was imposed on certain properties owned by the respondents, namely not to use the properties "for any purpose other than that of a private dwelling house and no trade or business or manufacture of any kind shall at any time be permitted to be set up or carried on on any part of the property ..." In alleged breach of this covenant, the respondents were said to be using the properties for short term holiday letting for a week or two at a time.

78. The Court of Appeal only considered the question of whether the properties were being used as a private dwelling house and concluded that they were

not. They considered that use of a property as a private dwelling house required that the occupant should be in occupation of the house as their home. Occupation as a home required a degree of permanence and an intention that the property should be a home. Holiday lettings did not have those characteristics and therefore letting for holidays was not use of the properties as private dwelling houses.

79. The Tribunal sees no real distinction between the use of a property for a holiday and the use of a flat for a short term stay for whatever purpose the proposed occupant wished. The description of the flats said they were "created as an alternative to a hotel". They were bookable by the night and clearly intended for short stays. The Tribunal determines that their use for the Internet Business is a breach of the covenant not to use the flats other than as a private residence.

80. The second limb of the covenant relates to use as a trade or business. The Tribunal was not referred to any specific authority on this wording. In the view of the Tribunal, the object of such a covenant is to prevent the flat being used otherwise than as a dwelling. There is no sensible distinction between the word "dwelling" and the phrase "private dwelling house" as used in *Caradon*. Accordingly, the Tribunal considers that use of the flats for short term lets is also a breach of the covenant against use for trade or business.

81. The Tribunal also notes that many elements of a business were apparent in the operation of the Internet Business at the Bilston Properties. There was clearly an intention to make a profit, commercial contracts were placed, and regular contractual transactions occurred.

82. In the light of these findings, there is an important subsidiary question. Is the Tribunal only able to make a breach of covenant finding in relation to the flats that were actually occupied by customers, or does their apparent availability for use constitute a breach of the covenant. The Applicant has only established with certainty that flat 21 Loxdale Sidings was actually occupied by a customer of the Internet Business, this being the stay at that flat by Mr McKeown on 19 June 2014.

83. The Tribunal takes the view that it is not necessary for it to be convinced of actual use in order to find that there has been a breach of this user covenant. It is quite satisfied that 5, 19 and 21 Loxdale Sidings and 8 & 12 Bay Avenue have all been made available for use by the Internet Business, and that is sufficient to be a breach of the covenant. In effect, the Respondents have been carrying on a business in or from the flats, by making them available for commercial short term lets.

84. But in case it is wrong on this point, the Tribunal has also considered the evidence of actual use. The Respondents were directed to produce documents evidencing bookings of flats by letter from the Tribunal dated 15 December 2014. In the disclosure produced as a result, the Respondents provided invoices from Eviivo for Loxdale Rooms covering the period July and November 2013, and Feb to October 2014. Invoices were also produced

for the Bay Rooms flats for the period December 2013 to September 2014 (May missing).

85. The invoices show bookings online that have been placed through the Eviivo platform, including bookings via other websites. The Respondents, of course, also have the opportunity to taking bookings directly via their own websites, or off line via their own contacts.

86. There is sufficient activity shown on these documents to clearly establish to the satisfaction of the Tribunal that at least one of the Bay Rooms flats was used for the Internet Business as there are 14 online bookings alone shown on those invoices. There is also sufficient activity disclosed in the Loxdale Sidings invoices to show that at least one other flat was used, as the September invoice shows two bookings for the same day.

87. On the balance of probabilities, the Tribunal finds that it is unlikely that only one additional room in each block of flats was used, and it a reasonable conclusion that all of the flats available for use were in fact, at some point during the period August 2013 to December 2014, used for occupation by customers of the Internet Business.

88. The Tribunal determines that in respect of 5, 19 and 21 Loxdale Sidings and 8 & 12 Bay Avenue, there has been a breach of paragraph 2 of Part 2 of Schedule 4 of the leases of the Bilston Properties.

The alleged breaches and the Tribunal's consideration of each – the Walsall Properties

89. The Applicant claims that the Mrs Green, who is the owners of the Walsall Properties, has breached covenants 2, 3, and 44(b) and (c) of the Sixth Schedule of the leases of the Walsall Properties. Consideration of each follows:

Covenant against use for a trade or business

90. Paragraph 2 of the Sixth Schedule – Part I of the leases of the Walsall Properties provides:

> 2. Not to use the Premises or any part thereof for any illegal or immoral purpose or for any purpose from which a nuisance can arise to the Lessor or the Management Company or to the Owners or occupiers of the other Apartments and not to carry on therein any trade or business

91. The Applicant says that the Respondents have used the Walsall Properties for the Internet Business in breach of this covenant. The Respondent says that they have never accepted a booking for the Walsall Properties via the Internet Business.

92. It is the case that the Applicants have not produced any evidence of actual occupation of any or the Walsall Properties by customers of the Internet

Business. There is however evidence that the Walsall Properties were made available for occupation, shown by the advertising of them for short term occupation on the Respondents own website, www.deremedecourtwalsall.co.uk. Evidence also exists, as described above in paragraph 34, that other websites were advertising these flats for short term lets.

93. The Tribunal is concerned that full disclosure has not been made of any contracts with internet booking sites for these flats. The Tribunal's directions, dated 15 December 2014, were to disclose the contract terms and conditions relating to internet sites for any flats in issue in the case. That produced the disclosure of the two Eviivo contracts described in paragraph 35 above, but no disclosure of any contract relating to the Walsall Properties. Yet it is extremely unlikely that there is no contract. Deremede Court was advertised on at least ten websites, including Eviivo and tripadvisor, in September 2014.

94. There is also evidence from Mr McKeown that he tried to book accommodation at Deremede Court in June 2014. He says he failed to do so because he was told that an off line booking had been taken, and as payment for that booking had been received, his own booking could not proceed.

95. Mr Jones said that all the flats at Deremede Court are now empty. They have intentionally left Deremede Court empty since February 2014 in order to await the outcome of these proceedings. Mr Jones denied that they had taken an off line booking at the point when Mr McKeown's own attempt to book failed. When cross-examined about the sense of keeping these flats unoccupied in a time of financial stringency, Mr Jones said that the mortgage rate was low and they were able to afford to do so. He explained the continued advertising activity for the flats on Google by saying that was the way Google worked, and it was not their doing.

96. After careful consideration of this evidence on this issue, the Tribunal are or the view that the Walsall Properties continued to be available for customers of the Internet Business throughout the period Feb 2104 to December 2014. If this is not right, Mr McKeown's agent was being given incorrect information for no obvious reason. It also seems difficult to accept that these flats would stay vacant for such a long period of time. This application to the Tribunal was not made until July 2014, and the suggestion that leaving the flats vacant was to await the Tribunal's decision does not seem credible. The Tribunal finds that the Walsall Properties were part of the Internet Business at least from February 2014 onwards.

97. Is this a breach of the covenant? The Tribunal adopts the same approach it adopted in relation to the Bilston Properties, as set out in paragraph 83 above, namely that making the flats available for letting is a breach of the covenant. If this approach is wrong, there is no more evidence of actual occupation for the Internet Business apart than the evidence that is reviewed above. The Tribunal does consider that disclosure has only been partial, and considers that it is more likely than not that the Walsall Properties have been used to generate some income for Mrs Green during 2014. As there is a

complete denial that the flats have been let on ASTs during that period, the most likely activity is short term lets, and the Tribunal therefore finds that on the balance of probabilities, the Walsall Properties have been used as part of the Internet Business during Feb 2014 to December 2014. The question of whether use by the Internet Business is use for the carrying out of a trade or business has already been discussed above.

98. The Tribunal determines that in respect of 2, 6 and 8 Southmead Way, Walsall, between February 2014 and December 2014 there has been a breach of Paragraph 2 of the Sixth Schedule, Part I of the leases of the Walsall Properties in that they have been used for the carrying on of a trade or business.

Covenant against any act or thing that voids insurance

99. Paragraph 3 of the Sixth Schedule, Part 1 of the leases of the Walsall Properties provides:

> 3. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance of the Estate or any part or parts thereof or may cause an increased premium to be payable in respect thereof

100. As has been identified in paragraph 52 above, the insurers of the Walsall Properties have indicated that if the Internet Business continues at the Walsall Properties, this will result in both the premium and the excess being increased. It is clear to the Tribunal that offering the use of the Walsall Properties for the Internet Business may cause an increased premium to be payable. This covenant has been breached.

Covenant against alienation without prior notification and payment of fee etc.

101. Paragraph 44 of the leases of the Walsall Properties provides:

> 44 (a) Not at any time during the Term to assign underlet or part with possession of part only of the premises
>
> (b) Not to offer to assign underlet or otherwise part with possession of the premises without first notifying in writing the Management Company and paying to it a transfer fee of 0.1% of the gross sale price or open market value (which in default of agreement shall be referred to arbitration under the provisions hereinafter contained) of the premises whichever sum shall be the greater sum by way of an administration fee and such administration fee shall be paid to the Management Company within seven days of the completion of the assignment underletting or parting with possession and if such fee shall not be paid within such period of seven days the said fee shall be due and payable by the assignee undertenant or occupier as the case may be PROVIDED ALWAYS that no transfer fee shall be payable on the grant of an AST for a term not exceeding 3 years

102. There are two alleged uses of the Walsall Properties in this case, namely use for letting on ASTs, and short term lets as part of the Internet Business. Dealing with the Respondents use for letting on ASTs first, the allegation relates to the failure to comply with paragraph 44(b) at the point that the ASTs were granted. The last two lines of the covenant exempt Mrs Green from paying a notice fee, as none of the ASTs were granted for a term exceeding 3 years. There is a question though as to whether the covenant requires two acts; notification in writing of a proposed underletting, and payment of a fee, or whether those two phrases should be read as one obligation, so that the covenant does not apply at all to an AST not exceeding 3 years.

103. The Tribunal prefers the second interpretation. The whole essence of this covenant is to impose an obligation upon a lessee to make a payment if the lessee is intending to assign or underlet for a term in excess of 3 years, or otherwise part with possession. Where the lessee intends to offer his or her flat on the market for letting via an AST for 3 years or less, there would be no obligation to make a payment. In that situation, what is the purpose of notifying the landlord or the management company in advance? Neither can do nothing about it, as there is no obligation to obtain their consent. It is a process which would have no purpose and no value, and the Tribunal does not accept that the intention of the covenant is to require a purposeless and valueless act to be carried out, where the covenant is aimed at different kinds of transactions.

104. In respect of the ASTs, the Tribunal does not find there to be any breach of paragraph 44(b).

105. The second issue is whether the offering of the Walsall Properties for occupation via the Internet Business, or the take up of that offer by a customer, might be a breach of paragraph 44(b). Neither of those activities would amount to an assignment or an underlet, so the covenant would only apply if those activities might constitute a "parting with possession".

106. Volume 62 of Halsburys Laws of England (2012), at paragraph 631, states, in relation to commentary about a covenant 'not to assign or part with the possession of the premises':

> "... a tenant who retains the legal possession of the whole of the premises at all material times does not commit a breach of the covenant by allowing other people to use the premises."

107. Note 7 of that paragraph says:

> "A covenant against parting with possession may, therefore, not be effective in preventing a tenant from allowing other persons to occupy the premises as licensees."

108. In the view of the Tribunal, allowing occupation of a fully furnished and equipped residential flat by a businessman or holiday maker for a few days,

akin to hotel use, does not constitute a parting with possession of the flats, and is not a breach of this covenant. The occupant is in truth a licensee. The right to occupy is derived via an internet booking similar to booking a hotel. The Deremede Court Terms and Conditions on the Respondents website describes the occupants as "guests", talks of a check in and check out system, and retains the cleaning responsibility for the Respondents. There is clearly therefore no exclusive possession as the Respondents will access the property for cleaning, changing towels and linen etc.

109. The Tribunal finds that there is no breach of Paragraph 44(b) of the leases of the Walsall Properties as a result of the use of the Walsall Properties for the Internet Business.

Covenant to give notice of alienation etc.

110. Paragraph 44(c) of the leases of the Walsall Properties provides:

> 44 (c) Upon every underletting of the demised premises and upon every assignment transfer or charge thereof and upon the grant of probate or letters of administration affecting the Term and upon the devolution of any such term under any assent or other instrument or otherwise howsoever or by any Order of the Court within one month thereafter to give to the Management Company or its solicitors for the time being notice in writing of such underletting assignment transfer charge grant assent or Order with full particulars thereof and to produce to the Management Company or its Solicitors every such document as aforesaid and to pay to the Management Company a reasonable fee for the registration of the said notice (not being less than £50.00) plus any Value Added Tax or similar tax payable thereon at the rate for the time being in force and to deliver to the Lessor and the Management Company the deed of covenant referred to in paragraph 39 of this Schedule

111. Neither offering the Walsall Properties for use in the Internet Business, nor allowing a customer of the Internet Business to stay in the Walsall Properties constitutes, in the opinion of the Tribunal, an act which is engaged by this covenant. The covenant is limited to acts which deal in some way with the legal title, so transfers, underlettings, charges, assents, or court orders apply. As has been discussed above, the Internet Business does not, in the view of the Tribunal, concern an interest in law in the Walsall Properties as occupants are mere licensees, and is therefore not caught by this covenant.

112. Underlettings, on the other hand, are most certainly covered in this covenant. Bearing in mind the acceptance that ASTs were granted over the Walsall Properties (see paragraph 22 above) and the admission made by Mr Jones on behalf of Mrs Green, recorded at paragraph 29 above, to the effect that no notices were served in respect of those ASTs, it is clear to the Tribunal that this covenant has been breached in respect of those ASTs.

113. The Tribunal determines that in respect of 2, 6 and 8 Southmead Way, Walsall, there has been a breach of 44(c) of the leases of the Walsall Properties in that in relation to the grant of ASTs over these flats, Mrs Green has not given notice of underletting or provided a copy of the AST for registration or paid the required fee to the management company.

Summary

114. As a result of the discussions and determinations made by the Tribunal above, it is determined that:

a. 5 Loxdale Sidings, Bilston WV14 0TN

The Tribunal determines that a breach of paragraphs 24 and 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the lease dated 17 June 2005 and granted to Mr Jones has occurred

b. 9 Loxdale Sidings, Bilston WV14 0TN

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule of the lease dated 27 May 2005 and granted to Mrs Green has occurred

c. 19 Loxdale Sidings, Bilston WV14 0TN

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the lease dated 27 May 2005 and granted to Mrs Green has occurred

d. 21 Loxdale Sidings, Bilston WV14 0TN

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the lease dated 27 May 2005 and granted to Mrs Green has occurred

e. 14 Loxdale Sidings, Bilston WV14 0TR

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule of the lease dated 3 August 2006 and granted to Mr Green and Mrs Green has occurred

f. 20 Loxdale Sidings, Bilston WV14 0TR

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule of the lease dated 7 August 2006 and granted to Mr Green and Mrs Green has occurred

g. 4 Bay Avenue, Bilston MV14 0TT

The Tribunal determines that a breach of paragraph 25 of Part 1 of the Fourth Schedule of the lease dated 3 August 2006 and granted to Mrs Green has occurred

h. 8 Bay Avenue, Bilston MV14 0TT

The Tribunal determines that a breach of paragraphs 24 and 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the lease dated 21 December 2005 and granted to Mr Jones has occurred

i. 10 Bay Avenue, Bilston MV14 0TT

The Tribunal determines that a breach of paragraphs 24 and 25 of Part 1 of the Fourth Schedule of the lease dated 21 December 2005 and granted to Mr Jones has occurred

j. 12 Bay Avenue, Bilston MV14 0TT

The Tribunal determines that a breach of paragraphs 24 and 25 of Part 1 of the Fourth Schedule and paragraph 2 of Part 2 of the Fourth Schedule of the lease dated 21 December 2005 and granted to Mr Jones has occurred

k. 2 Southmead Way, Walsall WS2 8JD

The Tribunal determines that a breach of covenants 2, 3, and 44(c) of the Sixth Schedule of the lease dated 21 December 2005 and granted to Mrs Green has occurred

l. 6 Southmead Way, Walsall WS2 8JD

The Tribunal determines that a breach of covenants 2, 3, and 44(c) of the Sixth Schedule of the lease dated 21 December 2005 and granted to Mrs Green has occurred

m. 8 Southmead Way, Walsall WS2 8JD

The Tribunal determines that a breach of covenants 2, 3, and 44(c) of the Sixth Schedule of the lease dated 21 December 2005 and granted to Mrs Green has occurred

Costs

115. The Applicant asked the Tribunal to order that the Respondents should pay their costs of this case.

116. In proceedings before the First-tier Tribunal, orders for costs are not normally made. However, the Tribunal may order one party to pay the

other's costs if that party has acted unreasonably in bringing, defending, or conducting proceedings before the Tribunal.

117. The Tribunal considers that there are strong grounds for allowing the costs application, at least in part. The Tribunal takes the view that the Respondents between them have acted unreasonably in three respects. The first is to have refused until the last possible moment to acknowledge the strength of the application and to admit breaches where they have been obvious. A good example is the failure ever to give notice of the grant of ASTs. The covenants to do so are clear, and in Directions dated 18 August 2014, the Respondents were directed that they should in their statement of case indicate whether they accept that the breaches of the lease had occurred. The Respondents failure to do so on the example quoted until the admission was finally conceded after lengthy cross-examination by Mr Carr was unreasonable.

118. The second reason why the Tribunal considers conduct of the defence to have been unreasonable is the failure to make full disclosure. The Tribunal has considered, as has been explained in the decision above, that there was failure to disclose the existence of ASTs that it is inconceivable were not granted, and a failure to disclose all contracts relating to the Internet Business, particularly contracts for the advertising of Deremede Court.

119. Finally, in their submissions, the Respondents made a number of irrelevant accusations regarding the motive of the Applicant in this case, and in particular alleging that the application was vexatious, malicious, and designed to scare and annoy the Respondents. The Tribunal does not accept the validity of these accusations. They were unhelpful and distracting in the consideration of the evidence in the case.

120. On the other hand, the Applicant has not succeeded on every point, and this type of case requires a determination by the Tribunal (unless the parties resolve issues between themselves), so some costs would have been incurred in any event. The Tribunal also has an element of sympathy with the Respondents in their point made in response to the application for costs to the effect that these proceedings came out of the blue, with no preliminary letter or attempt to resolve matters prior to starting proceedings. The Tribunal considers that the right costs order is to order that the Respondents jointly and severally pay one third of the Applicant's costs.

121. The Respondents have had the opportunity to make representations on the general principle of whether costs should be ordered, but not on the amount that should be paid. This may be assessed by the Tribunal, be agreed, or be subject to detailed assessment. The Tribunal considers that the amount payable by the Respondents should be determined by summary assessment and directs:

a. That the Applicant confirms the amount claimed within 28 days, by providing a schedule to the Tribunal and to the Respondents of the costs claimed in sufficient detail to allow summary assessment

b. That the Respondents should (if they wish) submit any representations they wish to make in response to the Applicant's schedule in writing within 28 days thereafter, by sending those representations to the Tribunal and to the Applicant

c. That upon receipt of submissions, or after the expiry of the time limits set above (whichever is earlier), the Tribunal will determine the amount to be paid by summary assessment on the basis of the written representations actually received and will notify the parties in writing of the outcome as soon as is practicable thereafter.

Appeal

122. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)