FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CJ/LBC/2018/0026**
Property	**:**	**Apartment 86, Hanover Mill, Hanover Street, Newcastle upon Tyne NE1 3AB**
Applicant	**:**	**Triplerose Limited**
Representative	**:**	**Scott Cohen Solicitors Limited**
Respondent	**:**	**Richard James Beattie and Chloe Marie Beattie**
Representative	**:**	**Coles Solicitors**
Type of Application	**:**	**Commonhold & Leasehold Reform Act 2002, Section 168(4)**
Tribunal Members	**:**	**Mr S Moorhouse LLB** **Mr ID Jefferson TD BA BSc FRICS**
Date and venue of Hearing	**:**	**22 May 2019 - Manorview House, Kings Manor, Newcastle upon Tyne**
Date of Decision	**:**	**17 June 2019**

DECISION

DECISION

The Application is refused. No order or determination is made pursuant to section 168(4) of the Commonhold & Leasehold Reform Act 2002 that a breach of a covenant or condition in the lease has occurred.

The tribunal directs that any application to the tribunal related to the recovery of costs in these proceedings shall be submitted within 28 days of the date of this decision.

REASONS

The Application

1. The Application was made on 9 November 2018 under Section 168(4) of the Commonhold & Leasehold Reform Act 2002 ('the Act').

2. Section 168(1) of the Act prevents a landlord of a long lease of a dwelling from serving a notice related to forfeiture under section 146(1) of the Law of Property Act 1925 unless a determination under subsection (4) has been made (or there has been an admission of breach or a relevant decision of a court or arbitral tribunal).

3. Section 168(4) provides: 'A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of covenant or condition in the lease has occurred'. Subsection (6) provides that the appropriate tribunal for a dwelling in England is the First-tier Tribunal.

Hearing

4. The hearing was held in Newcastle upon Tyne on 22 May 2019. Both parties were represented by Counsel, Mr Granby appearing for the Applicant and Mr Royle for the Respondents. Mr Hazon, an employee of Y&Y Management Limited, attended and both of the Respondents were present.

Findings of Fact

5. The Applicant is the leasehold proprietor of the building known as Hanover Mill, Hanover Street, Newcastle upon Tyne NE1 3AB ('the Building'), holding the Building under the terms of a lease dated 30 March 2009 for a term of 125 years plus 10 days from 27 November 2006.

6. The managing agent for the building is Y&Y Management Limited of London ('the Managing Agent').

7. The Respondents are the leaseholders of Apartment 86 within the Building ('the Property'). They acquired the Property on 11 December 2009 by way of assignment of an existing lease, particulars of which are given below ('the Lease').

8. The Respondents marketed the Property for sale in 2016 and 2017 without success. The Property was removed from marketing platforms and remarketed in September 2018. At the date of the hearing it was unsold.

9. The Respondents and their children moved to North Yorkshire, Mr Beattie continuing to work in Newcastle upon Tyne. Mr Beattie would stay at the Property on occasions mid-week.

10. The breaches of covenant alleged by the Applicant relate to the Respondent's arrangements with the company Quality Street Limited and the resulting occupation of the Property on a short-term basis by customers via the Websites 'Airbnb' and 'Booking.com'. The tribunal accepted the following account of the arrangements given by Mr Beattie in oral evidence at the hearing.

    - Mr Beattie confirmed that Quality Street Limited used the Property to provide serviced accommodation, handling check-ins and check-outs and arranging laundry services. The Respondents would receive payment after 30 days. Quality Street would apply a strict policy set by the Respondents, for example limiting occupation to those over 25 years of age and prohibiting occupants from holding parties. Quality Street would raise any questions or concerns with the Respondents but would otherwise proceed with bookings without reference to the Respondents.

    - Mr Beattie stated that Quality Street Limited would only arrange bookings for the times at which the Property was available. Bookings were predominantly at weekends. Mr Beattie would personally use the Property 1 night, possibly 2 or 3 nights each week. Mr Beattie would contact Quality Street in advance to tell them the days the Property would be free, or to tell them not to accept bookings for certain days. Generally Mr Beattie would keep the Property available for personal use on Tuesdays and Wednesdays.

11. The Applicant submitted a copy email dated 2 January 2019 (referred to later). The details of the sender and reference to their apartment number within the Building had been redacted. The email was addressed to the Applicant's solicitor with a subject heading that included '86 Hanover Mill'. The email stated that the sender had been approached by 'both parties' outside her block on 8 September 2018, but did not state who 'both parties' are. It listed numerous issues identified as 'nuisance factors'.

12. The tribunal finds that there is no clear linkage between the matters referred to in the copy email and the Property. The address of the Property does not appear within the body of the email. Its inclusion in the subject line could be indicative that the sender is simply replying to, or forwarding a previous email in which the Property address appeared, it does not demonstrate that the nuisances referred to were caused by an occupier of the Property. It states that the issues referred to 'have all been experienced since absentee landlords have grown in popularity', suggesting the problem is a general one, not one specifically caused by occupiers of the Property.

13. The email is written many months after the events complained of and addressed to the Applicant's solicitor. Whatever the circumstances giving rise to the email, the tribunal finds that the matters complained of are not attributed to the Respondents or any other occupier of the Property.

14. In view of its decision on the Application and the reasons for this given later the tribunal did not need to reach findings of fact in a number of areas. In particular the tribunal did not need to consider, in reaching its decision, whether any covenants had been suspended (for example through waiver or the doctrine of estoppel) therefore it

was unnecessary to reach findings of fact in areas that may potentially have been relevant. Areas not addressed for the reasons given in this paragraph include:

- whether a letter making reference to Airbnb that the Applicant submits was issued to all leaseholders on 12 December 2017 was actually issued or received by the Respondents;

- whether bookings through Quality Street were continuing or had been discontinued at any particular date - the evidence of Mr Beattie and Mr Hazon was in conflict and whilst Mr Beattie's evidence seemed clear and Mr Hazon's less so, it was unnecessary to come to any findings of fact; and

- issues concerning administration fees that Mr Hazon states are automatically raised by the Managing Agent's system if a leaseholder's address differs from that of their apartment within the Building - it was common ground that demands for subletting fees had been issued however it was unnecessary for the tribunal to reach detailed findings of fact in this area.

The Lease

15. The Lease was granted on 20 February 2009 by Bowesfield Investments Limited for a term of 125 years from 27 November 2006. At section 4 the tenant covenants in the terms specified in Schedule 4. The covenants at Schedule 4 include the following:

Para 18. 'not at any time to carry on or permit to be carried on upon the Property any trade or business whatsoever nor to use or permit the same to be used for any purpose other than as a private dwellinghouse for occupation by one family at any one time'

Para 19. 'not to use (or permit or suffer the Property to be used) for any illegal immoral or improper purpose and not to do permit or suffer on the Property any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Landlord to the tenants or occupiers of the other flats or houses in the Estate or to any owners or occupiers of any neighbouring property and to pay all costs charges and expenses of abating a nuisance and executing all such work as may be necessary for abating a nuisance or for carrying out work in obedience to a notice served by a local authority in so far as the same is the liability of or wholly or partially attributable to the act or the default of the Tenant'

Para 21. 'not to do or permit to be done on the Property any act matter or thing which may be or may become a nuisance or cause any annoyance damage or inconvenience to any owner or occupier of the Estate or any other adjoining or neighbouring property or which may lessen the value of such land and buildings'

Para 31.1 'not to assign sublet mortgage charge grant any security interest over or part with possession of part only of the Property'

Para 31.2 'Not to sublet the whole of the Property without the consent of the Landlord, such consent not to be unreasonably withheld or delayed save that the following are permitted without the Landlord's consent

31.2.1 The grant of assured shorthold tenancies for a duration of no more than 6 months; and

31.2.2 The grant of underleases giving effect to a shared ownership scheme, or any similar or equivalent scheme'

Para 32.2 'within one month after the date of any and every subsequent assignment transfer mortgage charge underlease or tenancy agreement including any immediate or derivative underlease or tenancy Agreement of the Property assignment of such underlease or grant of probate or letters of administration order of court or other matter disposing of the Property or other devolution of or transfer of title to the same to give the Landlord notice in writing of such disposition or devolution or transfer of title with full particulars thereof and in the case of an underlease (and if so required by the Landlord) a copy thereof for registration and retention by the Landlord and at the same time to pay to the Landlord such reasonable fees including value added tax for such registration (not being less than £65 plus VAT thereon) in respect of the registration of each document or instrument so produced'

Submissions

16. Counsel for the Applicant referred the tribunal to the Lease, describing it as a fairly standard tripartite residential long lease. Counsel made reference to each of the covenants set out in the preceding section and went on to address these individually.

17. Counsel for the Respondents, in opening remarks stated that the burden of proof was on the Applicant to establish that a breach of covenant had occurred. Counsel made reference to principles of interpretation and relevant case law (referred to later) and drew the tribunal's attention in particular to the contra proferentem rule, requiring that where two interpretations of a provision within the Lease were equally valid, interpretation should favour the Respondents.

18. The submissions of Counsel in relation to each covenant are summarised below.

Private dwellinghouse

19. Counsel for the Applicant submitted that the Respondents' use of the Property breached the covenant (at para 18 of Schedule 4) not to use or permit the Property to be used for any purpose other than as a private dwellinghouse for occupation by one family at any one time. Reliance was placed upon the case of *Tendler v Sproute [1947] 1 All ER 193* in which it was held that the taking in of lodgers or 'paying guests' was a breach of covenant not to use the premises for any business and also of the covenant to keep them 'as a private dwellinghouse only'.

20. Counsel for the Applicant submitted that the closest case before the tribunal to the facts in the present case was *Iveta Nemcova and Fairfield Rents Limited [2016] UKUT 0303 (LC)*. In that case the leaseholder was sometimes in occupation personally and at other times occupation was via Airbnb. There had been a lease covenant 'not to use the demised premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence'. Attention was drawn to the principles around construction of leasehold covenants set out in *Nemcova*, particular reference being made to the decision of the Supreme Court in *Arnold v Britton [2015] UKSC 2 WLR 1593*.

21. Counsel for the Applicant highlighted His Honour Judge Bridge's view in *Nemcova* that the use of the premises as a private residence could be effected by anyone the

lessee permitted to live there (para 42) and that no breach of the private residence restriction would occur if and so long as an occupier (lawfully allowed into occupation in compliance with the lease covenants) continued to use the premises only as a private residence (para 46). It was also the view of Judge Bridge (para 47 & 48) that the ordinary and natural meaning of the words used must be applied, that 'residence' did not necessarily mean 'home' and that the words 'a private residence' were not to be read as 'the private residence' - a person could have more than one residence at any one time.

22. Judge Bridge went on to comment (para 53) that 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 nights in the week - the occupation cannot be so transient that the occupier would not consider the property to be his/her private residence even for the time being. In his conclusion (para 55) Judge Bridge stated that each case was fact specific, depending upon the construction of the particular covenant in its own factual context. Judge Bridge went on to say: *'It is not possible therefore to give a definitive answer to the question posed at the beginning of this ruling save to say somewhat obliquely that 'It all depends'.*

23. Counsel for the Applicant addressed specifically a statement in the Respondents' written statement of case that there was a material difference between the present case and *Nemcova* in that the Lease used the word 'dwelling' and *Nemcova* referred to use as a private residence - the statement of case suggested that 'dwelling' does not carry the same connotations of permanence. Counsel referred to the House of Lords case of *Uratemp Ventures Ltd v Collins [2002] 1 AC* in which Lord Millett states that the words 'dwell' and 'dwelling' suggest a greater degree of settled occupation than 'reside' or 'residence'.

24. In the submission of Counsel for the Respondents, the inclusion of the private dwellinghouse provision at the end of the trade and business restriction was relevant to its interpretation, and the concluding words of Judge Bridge in *Nemcova* referred to by Counsel for the Applicant were shorthand for saying each lease needs to be interpreted on its own facts and in its own words. The *Uratemp* case did not assist because the House of Lords was considering what the word 'dwelling' meant in the context of the Housing Act 1988, with its own legislative context and background.

25. Counsel for the Respondents submitted that paragraph 18 of Schedule 4 to the Lease, in the broadest of summary terms, states ' don't do this, the flat is to be used for this'. The primary part of the paragraph was about business and trade.

26. Counsel for the Respondents referred to *Caradon District Council v Paton and another [2000] 3EGLR 57* in which Lord Justice Latham refers to the notes to the Rent Act 1977 in Halsbury's Statutes which state: 'In its natural state, a dwelling is a place where one dwells or lives, in the sense of making it one's abode as distinct from using it as e.g. an office or warehouse'. It was submitted that the requirement to use the Property as a dwellinghouse in the present case was supportive of the restriction on business or trade, it was not free standing. The purpose of the paragraph was to prevent customers and trade callers coming to the Property and to stop non-domestic things, none of which was breached by allowing short stays.

27. Counsel for the Respondents submitted that there could not be an objection to the apartments in the building being used as a second home by someone who had their principal home elsewhere, as Mr Beattie did. Counsel also commented that it was admitted on the Applicant's behalf that taking a lodger was not prevented by the alienation provisions (addressed later). It was therefore submitted that even if the expression 'dwelling' required permanence in the context of the Housing Acts, that could not be the intention in the Lease. Counsel for the Respondents submitted that in the present context 'dwelling' meant somewhere you might use for domestic purposes.

28. *Caradon* related to freehold covenants imposed under the Right to Buy scheme and did not, in the submission of Counsel for the Respondents, assist with the meaning of 'dwelling'. Counsel referred to a quotation within *Caradon* from the case of *C and G Homes Ltd v Secretary of State for Health [1991] 2 All ER 841*: 'The definition of a private dwelling house given in the Shorter Oxford Dictionary 3rd edn (1944) is: "The dwelling house of a private person, or of a person in his private capacity." Where the owner himself is in occupation it can usually be said that he is using it as *his* private dwelling house. But he can still use it as a private dwelling house without occupying it himself, for example where he lets it to another individual for use as his private dwelling house.'

29. It was submitted for the Respondents that if the Airbnb stays were at least implicitly authorised by an absence from the alienation provisions of the Lease of any restriction on licences, then as a matter of construction and interpretation there could not be a breach of the private dwellinghouse restriction - this would be inconsistent and could not be what the parties intended.

30. In reply Counsel for the Applicant stated that the lease had to be construed in its context, but also in accordance with the words of the Lease. The facts in *Nemcova* and the present case were very similar, both related to flats in purpose built blocks, one lease commencing 1997 and the other 2006. The difference was in the words 'residence' and 'dwelling' but *Uratemp* dealt with this, and as stated by Lord Millet, the words 'dwell' and 'dwelling' were not terms of art with specialised legal meaning, they were ordinary English words.

31. Counsel for the Applicant submitted that if in the context of the alienation provisions it was considered that there had been no subletting and occupancy was by way of licence, the Respondents would certainly have breached the private dwellinghouse restriction. The Respondents could not finesse the categories in a desperate attempt to avoid admitting a breach.

Trade or business

32. Counsel for the Applicant referred to the short term occupancies arranged via Quality Street Limited as an enterprise carried on for profit at the location, on a hotel like function. *Tendler* was cited as authority that use in this way constitutes business activity. In *Tendler* it was held that the taking in of 2 paying lodgers by the tenant constituted the carrying on of a trade or business contrary to a covenant in the tenancy agreement.

33. Counsel for the Respondents referred to his submission (noted later) that the grant of a licence was permitted by the alienation provisions of the Lease, submitting that it

could not have been the intention that the grant of a licence would be contrary to a trade or business restriction - this would be to give with one hand and take away with the other. Reference was made also to the particular wording of the covenant, prohibiting any trade or business 'being carried on upon the Property'. In Counsel's submission the intention was to prohibit business activities carried out upon the Property, not the use of the Property itself for that purpose.

34. *Doe dem. Wetherell v Bird (1834) 2 Ad. & El 161* was cited for the Respondents as authority that a covenant not to carry on a 'trade' only prohibits a business conducted by buying and selling.

35. Counsel for the Respondents went on to submit that the Respondents were not carrying out a business, but rather making use of a resource to cover overheads. *Tendler* was distinguished because that case involved a short term tenant (rather than long leaseholders) and someone remained at the property to provide services. Similarly in the case of *Rolls v Miller (1884) 27 ChD 71* there was a superintendent present to enforce the rules. In the present case the Respondents were allowing others to temporarily stay in the flat and this was subordinate to the Respondents' residential use of the Property.

36. The case of *Florent v Horez (1984) 48 P & CR 166* was cited for the Respondents as authority that a use which is ancillary or subordinate to the residential use of premises would not amount to a business - the question of whether the use in question was more than ancillary or subordinate was one of fact and degree. Counsel submitted that in the present case the primary purpose for the Property was as a place to live when Mr Beattie was working locally.

Nuisance

37. Counsel for the Applicant referred to the wording of paragraphs 19 and 21 of Schedule 4 to the Lease. The wording at paragraph 19 included 'any act or thing which may be or become a nuisance...annoyance or inconvenience to the Landlord to the tenants or occupiers of the other flats.....'

38. Counsel's submission included reference to the email dated 2 January 2019 sent by an anonymous individual to the Applicant's solicitor (considered earlier by the tribunal under 'findings of fact'). It was submitted that intrinsically short term lettings were capable of being a nuisance and that the wording of the relevant paragraphs went beyond 'nuisance'. Counsel's submission reflected in part the view expressed by Mr Hazon within his witness statement that short term lettings and associated activities of increased traffic, noise and rubbish were an annoyance and inconvenience and that these alter the character of the Building and lessen the value of the property which takes on the character of a hotel rather than a residential block.

39. Counsel for the Respondents submitted that there was no evidence whatsoever to support the Applicant's claim that a breach of paragraph 19 or 21 had occurred. The closest the Applicant came to this was to produce the copy email dated 2 January 2019. Counsel submitted that a claim that an act or thing had occurred that might become a nuisance, annoyance etc. would require something more substantial than had been offered by the Applicant in order to establish there was a risk - there must at least be a finding of fact that supported such a contention.

40. It was submitted further for the Respondents that there had been no evidence whatsoever that they had done anything that would lessen the value of adjoining or neighbouring property. The use of the Property by third parties was governed by strict criteria imposed by the Respondents and the overall footfall was likely to be less than that for many other apartments since the Property was often vacant. It was submitted that a nuisance or security risk could not be said to be inevitable and that the Applicant was nowhere near reaching the standard of proof necessary to demonstrate a breach of paragraph 19 or 21 of Schedule 4 to the Lease.

Alienation

41. Counsel for the Applicant referred to the alienation provisions of the Lease set out at paragraph 31 and the notice and registration requirements at paragraph 32. Counsel submitted that no consent to subletting had been sought and no notice of subletting given by the Respondents - consent would have to be given by the Applicant every time the Respondents sublet unless this was by way of an assured shorthold tenancy with a duration of no more than 6 months.

42. It was further submitted for the Applicant that nowhere in the Lease did it say that permission was not required for the grant of a licence - the meaning of 'sublet' in paragraph 31 included a licence, it did not say 'sublet by way of tenancy'. It was acknowledged that paragraph 31.2 would not prohibit the taking of a lodger - this was not contrary to paragraph 31.2.

43. Counsel for the Respondent submitted that the meaning of 'sublet' was to 'grant a sublease'. There was no evidence put forward by the Applicant to support a contention that a sublease had been granted. In the Respondents' submission their occupiers did not have full control of the Property, they had to collect the keys and could be removed. Occupation was by way of licence.

44. It was further submitted for the Respondents that none of the restrictions on alienation at paragraph 31 applied to licensing - it was therefore permitted. It would have been odd, in the submission of Counsel for the Respondents, had licensing for short periods been restricted given that an assured shorthold tenancy could be granted without consent, conferring an interest in land. It was acknowledged for the Applicant that the taking in of a lodger was not prohibited by paragraph 31.2 - a lodger is a licensee.

45. In reply, Counsel for the Applicant submitted that the word 'let' did not have a technical meaning, it was the action of renting out. Reference was made to the admission by Mr Beattie within his witness statement that short term stays in the Property had been allowed by the Respondents.

Reasons for decision

46. Mr Granby described the Lease as a fairly standard tripartite residential long lease. The tribunal considers the provision at paragraph 31.2 of Schedule 4 to be an unusual one. In particular the express authorisation of assured shorthold tenancies for a duration of no more than 6 months would be attractive to buy to let purchasers or investors.

47. This authorisation evidenced an intention on the part of the landlord in granting the Lease, and the other leases of apartments within the Building, that the apartments

should be suitable not just for owner-occupation, but for more temporary occupation by tenants on short-term tenancies.

48. The tribunal considered the submissions concerning each covenant in turn.

Private dwellinghouse

49. The tribunal referred to the principles set out in *Arnold*. Lord Neuberger stated:

> *'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions'.*

50. Lord Millett in *Uratemp* states that the word 'dwelling' within section 1(1) of the Housing Act 1988 should be interpreted as an ordinary English word, suggesting a greater degree of settled occupation than 'reside' and 'residence': Residential accommodation is a 'dwelling' if it is a place of 'abode', the place the occupier lives and makes his/her home (or one of his/her homes) - it is the place where he/she lives and to which he/she returns and which forms the centre of his/her existence.

51. The question for the tribunal is whether such a degree of permanence is intended by the private dwellinghouse provision in the Lease. There are similarities between the present case and the *Nemcova* case and although the covenant in *Nemcova* relates to a 'private residence' Lord Millett's above comments would suggest a greater degree of permanence is implicit in the word 'dwelling'.

52. The tribunal accepts Mr Royle's points that the 'private dwellinghouse' restriction is set in the context of the restriction on trade or business and that the wording refers to 'a' private dwellinghouse not 'his or her' private dwellinghouse.

53. The tribunal considers the inclusion in the Lease of express permission for short term assured shorthold tenancies of a duration not exceeding 6 months to be a significant factor, relevant in determining the intention of the parties. The tribunal's later finding that authorisation for short term licensing is implicit in the alienation provisions and common ground between the parties that the taking of a lodger would not be prevented by the alienation provisions are also relevant.

54. In the light of the above the tribunal does not accept that the intention of the parties was to allow, expressly or implicitly, short term letting, licensing and lodging in the alienation provisions and to then limit or prevent this via a restriction set in the context of a prohibition on running a trade or business.

55. Lord Millett in *Uratemp* describes the ordinary meaning of the word 'dwelling' and indicates that it has no specialised legal meaning. Even so, the interpretation adopted by Lord Millett (suggesting a greater degree of settled occupation than 'residence', in accommodation forming the centre of the occupier's existence) does not appear to the tribunal to represent the intention of the parties in the present case. In the tribunal's view the reference to 'private dwellinghouse' in the Lease has to be seen (i) in the context of the words that precede it, which suggest that the purpose of the clause is to prevent a trade or business being operated from the Property, thereby maintaining residential use, and (ii) in the context of the particular features of the alienation provisions allowing occupancy on terms which suggest that use as temporary accommodation, whether as a tenant, licensee or lodger, is envisaged.

56. The *Tendler* and *Caradon* cases were also cited but the facts in those cases differ significantly from those in the present case. In *Tendler* a tenant took in 2 paying lodgers, the house being in multiple occupation. In *Caradon* the accommodation was used for holiday lets and it was this purpose that was considered to be of particular relevance in determining that there had been a breach of a private dwellinghouse restriction.

57. The tribunal considered the submission for the Applicant concerning the interplay between covenants and the reference to finessing categories. The tribunal's view as to the interpretation of the alienation provisions (addressed later) did not require that the tribunal determine a breach to have occurred in relation to the private dwellinghouse restriction, nor did the tribunal accept any suggestion that if a particular covenant had not been breached another necessarily would have.

58. The tribunal does not consider that the Applicant has established that a breach of the private dwellinghouse restriction within the Lease has occurred.

Trade or business

59. In relation to the prohibition on 'trade', the tribunal accepted the submission for the Respondent citing *Doe*. The tribunal considered that on the facts there was no evidence of a business conducted by buying and selling and therefore no breach of the 'trade' element of paragraph 18 of Schedule 4 to the Lease.

60. In relation to the prohibition against carrying on upon the Property a business, the tribunal considered first the principles established in *Florent*. In that case the tenant fulfilled a community relations remit and in this capacity was visited by committee members, some of whom had keys to the front door to the building, to use the flat to carry out the work of the organisation and for meetings. In that case it was held that the activities of the tenant went beyond the normal domestic and residential activity and that a breach of covenant had occurred.

61. The facts in *Florent* are very different to those in the present case however the following test was established: a spare time leisure activity, hobby, occupation, social duty or other similar activity carried on by a tenant in a dwelling-house does not amount to the carrying out of a business unless there is a direct commercial involvement or the use is more than ancillary or subordinate to the residential use - the question of whether the non-residential use is more than ancillary or subordinate is one of fact and degree.

62. In the present case the Property was acquired for residential use by the Respondents and their children. The family having moved to North Yorkshire, the Property continued to be used for residential purposes by Mr Beattie. His use of the Property took priority. Nobody was operating any kind of business or commercial operation on the Property. Others used the Property for residential purposes when Mr Beattie was not there, contributing to the costs associated with the Property pending its sale, facilitated via an agency and internet sites.

63. The tribunal considered that the *Tendler* and *Rolls* cases related to quite different scenarios, with services being provided by someone on site in each case. The *Florent* case, whilst based on different facts, offers helpful guidance concerning ancillary or subordinate use.

64. The tribunal considered that the occupation by third parties in the present case was both ancillary and subordinate to the Respondent's use of the Property. It was a temporary expedient pending sale and allowed (as noted later) implicitly by the alienation provisions of the Lease.

65. Furthermore, as noted earlier, the alienation provisions evidence an intention on the part of the landlord that the apartments within the Building should be suitable not just for owner-occupation, but for more temporary occupation by tenants on short-term tenancies. The express permission granted for short term tenancies at paragraph 31.2.1 of Schedule 4 would have been pointless had the landlord intended to capture short term occupancy as a business activity and prohibit this at paragraph 18.

66. Taking all of these matters into account, the tribunal considered that the Applicant had not established that a breach of the trade or business prohibition at paragraph 18 of Schedule 4 to the Lease had occurred.

Nuisance

67. In relation to paragraphs 19 and 21 of Schedule 4 to the Lease, the tribunal has already found on the facts that the matters referred to in the copy email dated 2 January 2009 are not attributed to the Respondents or any other occupier of the Property.

68. No other evidence has been submitted to support a contention that there had been a breach of a covenant in paragraphs 19 or 21 save for the witness statement of Mr Hazon in which he expresses a general view as to the impact of short term lettings. Mr Hazon does not distinguish in his statement between short term lettings by way of assured shorthold tenancy or any other form of short term letting.

69. It is relevant to note again here that the context is one in which (as noted later) licensees and lodgers are implicitly allowed by the alienation provisions and assured shorthold tenancies of a duration not exceeding 6 months are expressly permitted - it cannot have been the landlord's intention that these would intrinsically give rise to a breach of paragraph 19 or 21 of Schedule 4.

70. The Applicant has not established that a breach of any covenant within either paragraph has occurred.

Alienation

71. In the absence of any evidence that the Respondents had been granting underleases or tenancies of the Property or intending to grant an interest in land, the tribunal accepts the submission on the Respondent's behalf that the short stays managed by Quality Street Limited were by way of licence to occupy. This also seemed to the tribunal to be the most likely scenario given that bookings were short-term, on standard terms and conditions, via the internet.

72. No authority was offered on the Applicant's behalf for the contention that the word 'sublet' at paragraph 31 of Schedule 4 to the Lease included a 'licence'. It was admitted that lodging was implicitly permitted by paragraph 31.2 and the tribunal accepted the view of Counsel for the Respondents that a 'lodger' was a 'licensee'. The word 'sublet' was not defined in the Lease. The tribunal accepted the view of Counsel for the Respondent that the word referred to the granting of a sublease.

73. Having established that the short stays at the Property were by way of licence to occupy and that the word 'sublet' at paragraph 31 did not include 'licence', the tribunal considered there to be no provision within paragraph 31 restricting the Respondents' ability to grant a licence to occupy. The tribunal reviewed the notice requirements set out at paragraph 32 and considered there to be no requirement to give notice upon the grant of licence to occupy or to register a licence.

74. Accordingly the tribunal considered that the Applicant had not established that a breach of the covenants set out at paragraphs 31 and 32 of the Lease had occurred.

Conclusion

75. For the reasons given above the tribunal makes no order or determination that a breach of a covenant or condition in the Lease has occurred. The Application is refused.

76. The tribunal directs that any application to the tribunal related to the recovery of costs in these proceedings shall be submitted within 28 days of the date of this decision.

S Moorhouse
Tribunal Judge