



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

Case reference : LON/00AN/LBC/2019/0062

Property : Top Floor Flat 47 Agate Road London
W6 0AL

Applicant : Mr D A G Gibbins

Representative : Mr S Newman (in-house solicitor) of D
& S Property Management

Respondent : Mr B C W Gibbins

Representative : Not present

Type of application : Determination of an alleged breach of
covenant under section 168(4)
Commonhold and leasehold reform Act
2002

Tribunal members : Judge Pittaway
Mr P Roberts Dip Arch RIBA

Date and venue of hearing : 14 November 2019
10 Alfred Place, London WC1E 7LR

Date of decision : 11 December 2019

DECISION

Decision

1. The tribunal determines that the respondent has breached the following covenants in his lease;
 - (i) Clause 3(1)(g)(ii), or alternatively, clauses 3(1)(g)(i) and 3(1)(h); and
 - (ii) Paragraph 1 of the Second Schedule.

Background

2. The applicant landlord seeks a determination, under section 168(4) Commonhold and Leasehold Reform Act 2002 (“the **Act**”) that the respondent tenant is in breach of various covenants contained in the respondent’s lease dated 22 March 2005 made between David Alfred Graham Gibbins (1) and Barry Colin William Gibbins (2) (the “**Lease**”).
3. The alleged breaches listed in the application received by the 5 September 2019 are
 - (i) Breaching clauses 3(1)(g)(i), 3(1)(g)(ii) and 3(1)(h) of the lease by using the Property for AirBnB lettings;
 - (ii) Breaching paragraph 1 of the Second Schedule of the lease (by virtue of the Airbnb lettings) by not using the Property as a private dwelling house in the occupation of one family.
 - (iii) Breaching paragraph 1 of the Second Schedule by using the property in a manner which is a nuisance to the owners, lessees, and occupiers of the other flats in the Property and in the neighbourhood by excessive noise and anti-social behaviour.
4. Directions were issued on 5 September 2019 which provided for
 - (i) The respondent’s mortgagee to be notified of the proceedings who may apply to be joined in the proceedings.

The tribunal notified Bank of Scotland plc, Birmingham Midshires Division of the proceedings on 5 September 2019. It has not asked to be joined in the proceedings.
 - (ii) The applicant to prepare a bundle of documents to be sent to the tribunal and the respondent by 3 October 2019.

This bundle has been received by the tribunal on 3 October, under cover of a letter which confirmed that a copy of the bundle had also been sent to the respondent.

- (iii) The respondent to prepare a bundle of documents to be sent to the tribunal and the applicant by 24 October 2019.

The tribunal has received no bundle from the respondent.

- (iv) For the applicant to prepare a brief supplemental reply.

A supplemental statement of case dated 27 September 2019 was included in the applicant's bundle.

5. On 31 October 2019 the tribunal received a Second Supplemental Statement of Case which D & S Management (the applicant's representative) confirmed had been sent to the respondent contemporaneously.
6. Mr Newman, in-house solicitor for D & S Management represented the applicant at the hearing, and provided the tribunal with a skeleton argument. Mr Gibbons, the respondent, did not attend the hearing.
7. There were ten witness statements included in the applicant's bundle. Of these ten witnesses the following attended the hearing and the tribunal heard evidence from them;
 - (i) PC M Holland, Police Officer and dedicated ward officer for Hammersmith Broadway;
 - (ii) Ms G Lightfoot, Principal Anti Social Behaviour Officer within the Community Services at Hammersmith & Fulham Council;
 - (iii) Mr L Kemp of first floor flat 47 Agate Road London W6;
 - (iv) Ms F Short of Coulter Road;
 - (v) Ms P McAndrew of Agate Road; and
 - (vi) Ms Melanie Thaw of Agate Road.

The Law

8. Section 168 Commonhold and leasehold Reform Act 2002 is set out in the Appendix to this decision.

Preliminary Issue

9. After the start of the hearing the tribunal was handed an e mail from the respondent requesting that the hearing be adjourned. The respondent submitted that he had believed that the hearing had been “discontinued”. The tribunal invited Mr Newman to make representations on the respondent’s request. He submitted that the respondent did know that the hearing was proceeding, referring the tribunal to a letter dated 18 October 2019 from Irwin Mitchell, acting for the applicant in another matter, to Royds Withy King, acting for the respondent in that matter, which he submitted made this clear.
10. The tribunal considered the respondent’s e mail and Mr Newman’s representations. It noted that the respondent’s request had been made so late that the hearing had already started. If, as stated by the respondent, his request was being made in response to recent receipt by him of the Second Supplemental Statement of the applicant, the tribunal note that it had received its copy of this on 31 October.
11. Until the date of the hearing there was no request by the respondent for an adjournment nor any suggestion that he was unable to attend a hearing on the designated date. The tribunal noted that the applicant in this case had not sought to withdraw his application and there was nothing before the tribunal to suggest that the matter had been agreed between the parties.
12. The tribunal was also mindful that six witnesses for the applicant have attended the tribunal in the expectation of the hearing proceeding as directed.
13. The tribunal was therefore not prepared to agree to an adjournment of the hearing.

Subsequent Issue

14. After conclusion of the hearing the tribunal received another e mail from the respondent containing a Witness Statement requesting that the Directions be set aside and the Hearing adjourned.
15. As this was received after the conclusion of the hearing it has not been considered by the tribunal.

Reasons for the decisions of the tribunal

Basis of the tribunal’s decision

16. The tribunal makes the determinations in this decision on the basis of the bundles before it at the hearing, the evidence heard at the hearing and the submissions by Mr Newman on behalf of the applicant. While the tribunal has had regard to all the witness statements, it has placed

more weight on the statements of the witnesses who attended the hearing. As appropriate it refers to the bundles, evidence and submissions in its reasons.

Covenants in the lease and whether the alleged facts constitute a breach of the relevant covenants.

17. The tribunal must be satisfied that the Lease includes the covenants relied on by the applicant and that the alleged facts, if proved, constitute a breach of these covenants. The applicant's application identified the covenants in the lease upon which it was relying in relation to each alleged breach. Dealing with these in turn;

Breaching clauses 3(1)(g)(i), 3(1)(g)(ii) and 3(1)(h) of the lease by using the Property for AirBnB lettings;

18. Clause 3 (1)(g) (i) of the Lease contains a covenant by the tenant *"not to assign charge underlet or part with possession of part only of the demised premises"*

Clause 3(1)(g) (ii) of the lease contains a covenant by the tenant *".....upon any underletting to obtain an unqualified covenant on the part of the underlessee with the Lessor not to assign underlet or part with possession of part only of the demised premises and to perform and observe the covenants and conditions of this Lease save for the covenant to pay ground rent and service charges to the Lessor"*

Clause 3(1)(h) of the lease contains a covenant by the tenant *"Not at any time during the term hereby granted divide the possession of the demised premises by an Assignment or Underletting or parting with possession of part only...."*

19. The tribunal heard evidence from Mr Kemp, who lives in the flat below the Property. He believes the flat to be let on AirBnB by reason of it being advertised through AirBnB with reviews on their website referring to "Barry", from a conversation he had with a mother and daughter who complained to him that Mr Break had been trying to enter the room they were occupying in the Property during the night, and from being met at the door of the Property by persons he believes to have been "AirBnB guests" when he has gone to the property late at night to complain about noise. He was not able to say whether the respondent always occupied the Property when there were other people staying there.
20. The tribunal heard evidence from Ms McAndrew, who lives at 40 Agate Road, that she was believed the Property to be let through AirBnB from going on-line; and from her husband speaking to three persons waiting to access the Property on or about 13 July 2019 who told him they had pre-paid to stay at the Property.

21. The tribunal heard evidence from Ms Thaw of 36 Agate Road. She referred the tribunal to a screenshot in the bundle of an advertisement from AirBnB for the Property. She stated that she did not know whether the respondent shared possession of the Property when it was occupied by AirBnB guests, or whether he moved to a separate studio flat, of which he also has possession, in 47 Agate Road.
22. Mr Newman submitted that if the respondent remained in the Property while part of it was let via AirBnB this is a breach of clauses 3(1)(g)(i) and 3(1)(h) of the respondent's lease; and that if he vacated the Property during the lettings via AirBnB he is in breach of clause 3(1)(g)(ii) of his lease.
23. On the basis of the evidence provided to it the tribunal consider that on the balance of probabilities the respondent is letting the Property, in whole or part, via AirBnB. This is in breach of clauses 3(1)(g)(ii) of his lease, if he vacates the Property during such lettings. If he does not vacate the Property then the lettings are in breach of clause 3(1)(g)(i) and 3(1)(h) of his lease.

Breaching paragraph 1 of the Second Schedule of the lease

24. Clause 2 of the respondent's lease is a covenant by the tenant of the Property
"with the Lessor and with and for the benefit of the owners and Lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the tenant and the persons deriving title under him will at all times hereafter observe the restrictions set forth in the Second Schedule hereto."
25. Paragraph 1 of the Second Schedule contains the following restriction;
"Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private dwelling house in the occupation of one family only or for any purpose from which a nuisance can arise to the owners lessees or occupiers of other flats in the Building or in the neighbourhood nor for any illegal or immoral purpose."
26. It was Mr Newman's submission that the respondent letting the property on AirBnB was in breach of the restriction that the Property should not be used other than "as a private dwelling house in the occupation of one family only". He referred the tribunal to the decision in *Nemcova v Fairfield Rents Limited* [2016] UKUT 0303 (LC) ("**Nemcova**") in which it was held that short-term lettings of a flat, availability being advertised on the internet, was in breach of a covenant not to use the flat "other than as a private residence". It was Mr Newman's submission that the duration of any letting is equally relevant to whether a flat can be considered a "private dwelling house" as it is to whether it can be considered a "private residence". He further submitted that if the respondent remained in occupation during short term lettings the property was not "in the occupation of one family only".

27. The tribunal accepts Mr Newman's submission that letting the Property on short-term lets is not using the Property as a "private dwelling house". The tribunal agree that the decision taken by the Upper Tribunal in *Nemcova* that short term lettings are incompatible with the requirement to use a flat as a "private residence" applies equally to a requirement to use a flat as a "private dwelling house". It also accepts his submission that if the respondent remains in occupation during such short-term lettings the Property is not "in the occupation of one family only".
28. The tribunal accordingly determine that the respondent is in breach of the restriction that the property may not be used other than as a private dwelling house in the occupation of one family only.
29. The tribunal was then required to consider whether the respondent's conduct was a nuisance in breach of the restriction in paragraph 1. The relevant wording in paragraph 1 is, "*Not to use the demised premises nor permit the same to be used for any purpose from which a nuisance can arise to the owners lessees or occupiers of other flats in the Building or in the neighbourhood nor for any illegal or immoral purpose.*"
30. All the witnesses gave evidence that the respondent, and more particularly Mr Martin Brcak with whom he shares the Property, had committed acts of nuisance, which included unacceptable levels of noise emanating from the Property at anti-social hours on a recurrent basis and numerous incidents of anti-social behaviour in Agave Road and the surrounding streets. The tribunal also had before it the witness statement of Ms Langford of the top floor flat 45 Agate Road, the adjacent building to 47 Agate Road. This refers to a number of incidents when Mr Brcak had trespassed naked onto their roof terrace, resulting in the police being contacted. The tribunal accept the evidence of the witnesses and that the actions of the respondent and Mr Brcak amount to acts of nuisance to owners/occupiers of other flats in the Building and to owners lessees or occupiers in the neighbourhood.
31. For the respondent to have breached the covenant in the lease it must be use of the Property, by the respondent or use permitted by him, that gives rise to the nuisance. The tribunal does not consider that all the acts of the respondent and Mr Brcak in respect of which it heard evidence necessarily arise from their use of the Property. It is, however, satisfied that unacceptable levels of noise emanating from the Property at anti-social hours on a recurrent basis and trespass on the adjacent property at 45 Agate Road are acts of nuisance that arise from the use by the respondent, or use by Mr Brcak permitted by him, of the Property.
32. Finally the tribunal is required to determine whether the respondent had used the Property for an illegal purpose in breach of paragraph 1 of the Second Schedule.
33. All of the witnesses referred to alleged misuse of drugs by the respondent and Mr Brcak, in the common parts of the building of which the Property forms part and in Agave Road and the surrounding streets.

34. In his witness statement P C Holland referred to evidence obtained from the Metropolitan Police intelligence system in respect of an incident reported on 9 July 2019 when various calls had been made to the police stating that a male occupant from the top floor flat 47 Agate Road was shouting loudly in the street and believed to be under the influence of drugs. This report states, *“Upon police arrival it was determined that the subject was under the influence of crystal meth and spice substances.....”* Mr Holland confirmed that misuse of such drugs is illegal. When questioned by the tribunal Mr Holland explained that the police had not sought to enter the Property as there was the possibility that drugs would not be found.
35. In her witness statement Ms Lightfoot, the Principal Anti Social Behaviour Officer within the Community Safety Unit at Hammersmith & Fulham Council referred to the belief that nitrous oxide was being used at parties held at the Property. In her statement she also referred to meetings held between the council, the police and Mr Brcak’s “drug and alcohol support worker” In her evidence to the tribunal she said that she was satisfied that the respondent and Mr Brcak took drugs, making reference to evidence in reports which had not been provided to the tribunal.
36. Mr Kemp gave evidence that he had found both the respondent and Mr Brcak under “heavy influence of drugs” in the communal areas of 47 Agate Road. This was manifested by screaming and shouting and behaving in a manner that was different from that which they displayed when “sober”. He also told the tribunal that Mr Brcak had told him that he takes drugs.
37. In light of the above evidence and on the balance of probabilities the tribunal finds that there has been unlawful drug taking at the Property in breach of the restriction in paragraph 1 of the Second Schedule, *“Not to use the demised premises nor permit the same to be used..... for any illegal or immoral purpose.”*
38. The tribunal accordingly finds that for the purposes of section 168(4) Commonhold and Leasehold Reform Act 2002 breaches of covenant in the respondent’s lease have occurred.
39. For the avoidance of doubt the tribunal would confirm that its decision is limited to whether a breach of covenant has occurred.

Name: Judge Pittaway

Date: 11 December 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix

The Law

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

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

(b) the tenant has admitted the breach, or

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

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

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

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), “appropriate tribunal” means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.