FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/OOHH/ LBC/2019/0039
Property:	2 Harold Court, St Lukes Road South, Torquay TQ2 5NZ
Applicant:	Charmleaves Limited
Representative:	Nalders LLP, Mr J Sharples of counsel
Respondent:	Jennifer Turner-Richardson
Representative:	In Person
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Judge A Cresswell (Chairman) Mr W Gater FRICS MCIArb
Date and venue of Hearing:	16 January 2020 at Exeter Magistrates' Court
Date of Decision:	23 January 2020

DECISION

The Application

1. On 6 September 2019, the Applicant, the owner of the freehold interest in 2 Harold Court, St Lukes Road South, Torquay TQ2 5NZ made an application to the Tribunal claiming breach by the Respondent of a covenant in the Lease. The Tribunal has considered only the breaches claimed by the Applicant to have occurred.

Summary Decision

2. The Tribunal has determined that the landlord has demonstrated that there has been a breach of covenant. The breaches found are in respect of the covenant relating to the tenant's duty *Not to use the flat nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family*. Details follow.

Inspection and Description of Property

3. The Tribunal inspected the property on 16 January 2020 at 1000. Present at that time were the Respondent and Mr Sharples, Counsel for the Applicant. The property in question is a detached Victorian villa divided some years ago into apartments, having been used in the past as a hotel for the clergy. The Respondent's apartment is on the ground floor, reached via a ground floor lobby and hall, both shared by flats 1, 2, 4 and 5. Her apartment consists of a 2 -bedroom flat with living room, kitchen and bathroom/wc. The living room and second bedroom had access to a balcony and open views of Torbay.
4. The area is characterised by mixed residential and holiday accommodation. St Lukes Road South follows the contours of a hill standing above Torbay.

Directions

5. Directions were issued on 26 January 2019. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
6. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral representations received at the hearing. At the hearing, the Applicant presented a skeleton argument and supporting documents and the Respondent presented Opening and Closing Statements and gave oral evidence.
7. At the conclusion of the hearing, the parties confirmed to the Tribunal that they had been able to say all that they wished to say.

The Law

8. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
9. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.
10. The Tribunal assesses whether there has been a breach on the balance of probabilities (**Vanezis and another v Ozkoc and others** [2018] All ER(D) 52).

11. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

12. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: **Kensington & Chelsea v Simmonds** (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: **Portsmouth City Council v Bryant** (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.

13. **Teign Housing v Lane** [2018] EWHC 40 (QB): Although a tenant did not consider that he had breached the terms of his tenancy, he had. His genuine belief that he had permission did not mean that there had not been a breach.

14. **Greenwich RLBC v Tuitt** [2014] EWCA Civ 1669:
The grounds for possession available against a secure tenant are contained in Sch.2 to the 1985 Act (*Encyclopedia* , para.1-1824 et seq.). Prior to amendment by the Anti-social Behaviour, Crime and Policing Act 2014 Ground 2 provided a ground for possession where:
"The tenant or a person residing in or visiting the dwelling-house—
(a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality,
Ground 2 does not require personal fault on the tenant's part. The ground is made out if the nuisance has been caused by members of the tenant's household or visitors: *Kensington and Chelsea RLBC v Simmons (1997) 29 H.L.R. 507 CA* ; *West Kent Housing Association v Davies (1999) 31 H.L.R. 415 CA* ; and *Portsmouth City Council v Bryant (2000) 32 H.L.R. 906 CA* . The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: *Bryant*.

15. **Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council** [1999] 4 All ER 449 Lord Hoffman:

I turn next to the law of private nuisance. I can deal with this quite shortly because it seems to me that the appellants face an insuperable difficulty. Nuisance involves doing something on adjoining or nearby land which constitutes an unreasonable interference with the utility of the plaintiff's land. The primary defendant is the person who causes the nuisance by doing the acts in question. As Pennycuick V-C said in Smith v Scott [1972] 3 All ER 645 at 648, [1973] Ch 314 at 321:

'It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance ...'

But I do not think that the normal use of a residential flat can possibly be a nuisance to the neighbours. If it were, we would have the absurd position that each, behaving normally and reasonably, was a nuisance to the other.

As Lord Goff of Chieveley said in Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53 at 70–71, [1994] 2 AC 264 at 299:

'... liability [for nuisance] has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action": see Bamford v Turnley (1862) 3 B & S 62 at 83, [1861–73] All ER Rep 706 at 712 per Bramwell B.'

Of course I accept that a user which might be perfectly reasonable if there was no one else around may be unreasonable as regards a neighbour. As Bramwell B remarked in Bamford v Turnley (1862) 3 B & S 62 at 84, [1861–73] All ER Rep 706 at 713 it may in one sense be quite reasonable to burn bricks in the vicinity of convenient deposits of clay but unreasonable to inflict the consequences upon the occupants of nearby houses. Likewise, it may be reasonable to have appliances such as a television or washing machine in one's flat but unreasonable to put them hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises. But I do not understand how the fact that the appellants' neighbours are living in their flats can in itself be said to be unreasonable. If it is, the same, as I have said, must be true of the appellants themselves.

On this part of the case the appellants again rely on Sampson v Hodson-Pressinger [1981] 3 All ER 710, to which I have already referred. In that case the Court of Appeal held that the use of the terrace over the plaintiff's roof was not only a breach of the covenant for quiet enjoyment by the landlord but also a nuisance committed by the upstairs tenant for which she and the landlord were both liable. My Lords, in my opinion this decision can be justified only on the basis that having regard to the construction of the premises, walking on the roof over the plaintiff's flat was not a use of the flat above which showed reasonable consideration for the occupant of the flat beneath. It was not, in Bramwell B's phrase, 'conveniently done'. If the upstairs tenant was going to use the roof in that way, it had to be suitably adapted to protect the plaintiff from noise. I do not regard it as authority for the proposition that normal and ordinary user, in a way which shows as much consideration for the neighbours as can reasonably be expected, can be an actionable nuisance.

16. The Tribunal does have jurisdiction to determine whether the landlord has waived the right to assert, or is estopped from asserting, that a breach has occurred, but does not have jurisdiction to consider the question of waiver necessary when deciding whether a landlord has waived the right to forfeit a lease (HH Judge Huskinson in **Swanston Grange Management Limited v Langley- Essex** (LRX/12/2007)). See further below.

17. In **Vine Housing Cooperative Ltd v Smith** (2015) UKUT 0501 (LC), HH Judge Gerald said this: *The question before the F-tT ..... was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events*

are of no concern to, and indeed are pure conjection and speculation by, the F-tT. Indeed the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.

GHM (Trustees) Limited v Glass (LRX/153/2007) the President (Mr George Bartlett QC) said:

"*in my judgement the LVT was in error in refusing to make a determination that a breach had occurred on the ground that the breach had been remedied by the acquisition of the landlords of knowledge on the tenants' identity. The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied, so that the landlord has been occasioned no loss, is a question for the Court in an action for breach of covenant*"

Forest House Estates Ltd v Al-Harthi (2013) UKUT (LC):

The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the Court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act.

Ownership

18. The Applicant is the owner of the freehold of the property. The Respondent is the owner of the leasehold interest in the flat.

The Lease

19. The lease before the Tribunal is a lease dated 29 May 1992, which was made between Seel Homes Limited as lessor (Derek Kenneth Swann as liquidator) and Brian Keating and Dorothy Carole Keating as lessees.
20. Paragraph 1 of the Fifth Schedule lease says:

    Not to use the flat nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family nor of any purpose from which a nuisance can arise to the owners lessees and occupiers of the other part of the Building or in the neighbourhood not for any illegal or immoral purpose nor for holiday letting
21. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
22. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

    15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd

[2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

Factual Background

23. The Respondent has been a long leaseholder of Flat 2 since 2006.
24. She registered with Airbnb at the end of May 2019 and had her first paying visitor on 11 June 2019. She charges £29 per night for bed and breakfast, from which sum she receives £26.98 from Airbnb.
25. Before commencing with Airbnb, she was aware of an AGM a couple of years ago, when the majority was against holiday lets. She did not intend to have holiday lets. She researched her position quite thoroughly and believed that she was allowed by the lease to engage with Airbnb in the way described.
26. The guests get a bed, linen and a towel. They can have a help-yourself breakfast; she would occasionally make toast and tea and coffee for breakfast. They have the use of the second bedroom, kitchen, bathroom and terrace. Some join the Respondent in her lounge, if she welcomes them to do so. Most are out most of the time.
27. She has had about 50 guests in total up until December 2019; visits have been made by one or two guests at a time, with 2 nights stay being typical. Purposes of visits have included visits to the town, a funeral, a church conference, an Irish dancing competition, etc.
28. The Respondent provides guests with a key to the front door of the property and to her flat. She tells them to park in the road and not in the yard of the premises.
29. She is not aware of any direct complaints to her, but had read about 2 minor issues in correspondence; one of those issues related to someone other than one of the Airbnb guests.
30. She gave one example of a couple of women whom she may keep contact with.

Consideration and Determination of Breach of Covenant (1)
Not to use the flat nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family *nor of any purpose from which a nuisance can arise to the owners lessees and occupiers of the other part of the Building or in the neighbourhood not for any illegal or immoral purpose nor for holiday letting*

The Respondent
31. The Respondent said that she was in occupation herself when she has guests through Airbnb. The site vets all guests, who must provide identification. The

site originally started as a platform where owners share their homes, and this is the way that she uses it.

32. The lease does not prohibit lodgers and nor does it require permission of the management company. The house has a history of lodgers.
33. She studied the **Nemcova** case in great detail, before deciding to embark on hosting, and other law firm blogs on the Internet, which indicated that if one lives permanently at the property occupying at least one of the bedrooms every time guests stay the night, the ruling should not prevent a person from hosting. Letting out the whole property is the issue.
34. On the Airbnb hosting forum, there was only one other instance of restrictive covenants, with "the girl there" saying that two different mortgage advisors had told her it was not considered as business.
35. She is confident that the **Falgor, Snarecroft** and **Nemcova** cases all support her stance that she is observing the covenant.
36. The Respondent reviewed the caselaw. In respect of **Caradon District Council v Paton** (2000) 3EGLR57; she said that "*a private dwelling house requires the flat to be occupied and used as a home*", which was the case for her, and referred also to **Nemcova**, where Latham LJ drew a distinction between use being made by the owner of the property and use being made by others. "*Where the owner himself is in occupation it can usually be said that he is using it as his private dwelling house*". In that case the owner was not in occupation; in the First-tier Tribunal in **Nemcova**, the Tribunal refused to distinguish **Caradon** on the basis that **Nemcova** had a different factual matrix.
37. She referred to **Scammell Gasztovicz** on Restrictive Covenants which stated that a household is a single household if the persons occupying it occupy the dwelling house as a unity whether or not those persons are related to each other, which is her case.
38. In **Segal Securities v Thorsby** (1962) 1QB 887, Sachs J made it clear that taking in a single person who shares the family life would not generally be a breach of covenant. The guests are part of her family during the time they stay. Those whom she excludes from her living room, she considers as family members she does not like.
39. In **Bermondsey Exchange Freeholder Limited v Nino Koumetto** (2018) EW Misc 810 (CC), the defendant had ceased to occupy his flat as a home.
40. **Hobson v Tulloch** (1898) 1 Ch 424 was an extremely different factual matrix where accommodation was linked to running a school. The Respondent was not hosting guests relative to her trade, business, craft or profession.
41. **Tendler v Sproule** (1947) 1 All ER 193 was a different situation of a relatively short fixed term tenancy. It seems there is a greater flexibility in the case of long leases.
42. A reading of the whole of paragraph 46 of **Snarecroft v Quantum Securities** (2018) EWHC 2071 suggests that the picture is changed when the defendant is using the property as a residence as the Respondent herself does, apart from times she is on holiday or visiting people elsewhere.
43. The Respondent quotes 2 paragraphs from **Falgor Commercial v Alsabahia** (1986) 1 EGLR 41. "*The defendant no doubt is making use of the flat for a business purpose in the sense of making money out of it, but the defendant is NOT carrying on any business in the flat, or in any part of it. Paragraph 3.26(b) is therefore not infringed by the granted of the licences*".

"*The test is (and as the Learned Judge found) whether the lessee is using the flat as the Lessee's private residence*" The Respondent is so using her flat.

44. The Respondent relies upon **Nemcova v Fairfield Rents Limited** (2016) UKUT 0303 89, being the case most similar to hers, a small flat where the platform is Airbnb, the important difference being that the Respondent was not in occupation when there were guests. The Tribunal said: "*it cannot conceivably have been the parties' intention that the lessee was the only person who was to be permitted to occupy the premises as a private dwelling house*". "*The lease clearly contemplates the lessee being able to deal with the property with substantial freedom*".

45. Further, "*No breach of the covenant under consideration will occur if and so long as the occupier for the time being continues to use the premises only as a private residence". "In short, for the covenant to be observed the occupier for the time being must be using it as his or her private residence".*

46. "*I do not consider the demand and acceptance of payment by the lessee from the occupier has any effect on the nature of the use. It may remain "a private residence" whether it is occupied by a tenant of the lessee who pays rent or by a friend of the lessee*".

47. "*I have reached the view, consistent with the decision of the First-tier Tribunal that the duration of the occupier's occupation is material. It does seem to me that in order for a property to be used as the occupier's private residence, there must be a degree of permanence".* She is in occupation of her own home so it is very permanent in her case.

The Applicant

49. The Applicant presented a very full Skeleton Argument. To save repeating it, it is attached below as an Annex to this Decision.

The Tribunal

50. The Tribunal accepts and adopts all that the Applicant says in Mr Sharples' admirable Skeleton Argument. It would be wasteful simply to set out all of that argument again here. It finds that his interpretation of the meaning of the various cases primarily on similarly worded covenants is the sound reading of those cases as opposed to the meaning derived by the Respondent.

51. The Tribunal is mindful, however, that every such case depends upon its own factual matrix and that the Tribunal must reach its own conclusion as guided by **Arnold v Britton**. In construing the covenant the emphasis has to be on the meaning of the words used in their particular, fact-specific context.

52. In the context of a residential building that comprises flats let on standard covenants which were intended to be enforceable by the tenants against each other, through the agency of the landlord, an intention to restrict the use of the property to use as a private dwelling house alone is neither improbable nor surprising. Considerations of estate management and good housekeeping provided a rational explanation why parties to such a lease might regard it as mutually beneficial to restrict the use to a private dwelling house.

53. To an owner-occupier or to sub-tenants under an assured shorthold tenancy, to have neighbours who are themselves owner-occupiers or sub-tenants is likely to be preferable to having neighbours, who include those who are occupying on short stays with no interest in the property. The natural and ordinary meaning of the covenant is its literal meaning, namely that the use of the flat should be limited to use as a private dwelling house. Not to read the covenant in such a way would undermine its purpose. To allow the use of the flat by regularly letting out a room to third parties would ignore the critical words of the covenant and remove its clear intention. The fact that there has

to date been no nuisance caused, does not mean that there is not a very real risk of future nuisance, which can be obviated by a covenant of this nature.

54. The Respondent told the Tribunal that her guests were as family but, with respect, the Tribunal found this assertion to be groundless. Nobody would regard persons staying for as little as one night, being out of the property most of the time, eating their meals other than breakfast outside, not previously known to the Respondent, some of whom were not welcome in her lounge and all but two of whom have not intended to maintain contact, as family members under any definition of those words.

55. By sharing her flat with paying guests, she was departing from the covenant not to use the property ***other than as a private dwellinghouse,*** because she was also using it as a guest house where she shared much of the accommodation with her guests. Further, she was using it other than ***in the habitual and regular occupation of one family*** because, over the relevant period of 7 months some 50 nights were spent there by strangers who also occupied the flat; those strangers were not members of one family, but of some 22 other families if there were, as she told the Tribunal, some 22 visits. Further, she was permitting the guests to use the property **other than as a private dwelling house** because they were using the property as a guest house (see above and the cases relied upon in the Skeleton Argument, **Caradon, Nemcova, Snarecroft, Bermondsey**). The Tribunal can see no real difference between a leaseholder moving out of the home whilst the guest stays and one remaining in residence; the property in each case loses its nature as a private dwelling house (as was said obiter in **Nemcova** and held so in **Falgor** and the historic cases of **Thorn v Madden**, **Hobson v Tulloch** and **Tendler v Sproule**). As the Upper Tribunal found in **Nemcova**, *"In short, for the covenant to be observed, the occupier for the time being must be using it as his or her private residence";* here neither the Respondent nor her guests were doing so for the reasons stated above.

56. Accordingly, the Tribunal finds the Respondent to have acted in breach of the covenant.

Consideration and Determination of Breach of Covenant (2)

Not to use the flat nor permit the same to be used *for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family nor* ***of any purpose from which a nuisance can arise to the owners lessees and occupiers of the other part of the Building or in the neighbourhood*** *not for any illegal or immoral purpose nor for holiday letting*

The Applicant

56. The Applicant is not relying on the fact that there has been a nuisance, but rather that a transient population has potential to give rise to more of a nuisance. That population is less likely to know the covenants or have a stake.

57. "We accept she genuinely believes she is entitled to do what she is doing and that her occupiers have not caused a nuisance".

The Respondent

58. The Respondent says that she has her house rules on the Airbnb website, which show that she has given due consideration to other flat owners in the building by saying that guests can only park in the courtyard while loading/unloading and there is plenty of free parking in the road. Also, it is stated that she does not allow children or parties.

The Tribunal

59. The Tribunal was aware that there was no requirement in the covenant for there to be an actual nuisance. The covenant must mean something more, however, than a mere risk of a nuisance. If it were not so, the Respondent would be at risk of breaching the covenant just by living within the flat, never mind having paying guests staying with her, and that cannot have been the intention of the parties to the lease.
60. The guidance of the House of Lords in **Southwark London Borough Council v Mills and others; Baxter v Camden London Borough Council** supports that view.
61. Here, there has been no nuisance and the Respondent is in residence at all times so as to have reduced any risk of a nuisance being caused.
62. The Tribunal finds, accordingly, that there has been no breach of this part of the covenant.

Consideration and Determination of Breach of Covenant (3)
Not to use the flat nor permit the same to be used *for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family nor of any purpose from which a nuisance can arise to the owners lessees and occupiers of the other part of the Building or in the neighbourhood not for any illegal or immoral purpose nor for* ***holiday letting***
The Respondent
63. The Respondent pointed to there being no definition of the phrase "holiday letting" in Blacks Dictionary of Law. "*Let*" is defined as *"to offer property for lease, to rent out*". No lease has been offered nor has the property been rented out.

The Applicant
64. The Applicant said that a holiday let *per se* means a demise, the grant of exclusive possession. Mr Sharples was aware of no other definition in statute or caselaw. It was unlikely that the Respondent lets even her one room, the situation being akin to a hotel licensee.
65. However, the covenant here requires the words "*holiday letting*" to be read as something different. Clause 3(j) of the lease contains an absolute prohibition on all forms of holiday letting, so that Paragraph 1 of the Fifth Schedule has to be looked at in that context. Words should normally have a purpose; to exclude holiday letting as holiday lets would have no purpose.

The Tribunal
66. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton and others** when considering the words of the lease in this case.
67. The words used in the relevant covenant are "*holiday letting*". The Tribunal often sees repeated covenants within leases. It would be an artificial exercise to try to find some other meaning for the same words appearing twice within a lease. In the absence of any persuasive suggestion that those words could possibly mean something different in this covenant to another, the Tribunal concludes that the meaning is the same and that this is a simple repetition of a restriction so often found in seaside leases. The Tribunal, accordingly, assigns to these words their common meaning.
68. The Tribunal finds, accordingly, that there has been no breach of this part of the covenant.

Consideration and Determination of Breach of Covenant (4)
Other Issues
The Respondent

69. The Respondent queried whether restrictive covenants are only enforceable by the owner of the land benefitting from the covenant. Here the owner of the land is not the Applicant, but the Cary Estate which receives an annual ground rent of £25.
70. As indicated above, there have been other instances of leaseholders taking in lodgers at the property.

The Applicant

71. The Applicant said that it was the owner of the freehold and entitled as such to bring this application.
72. The Applicant said that there are lodgers and lodgers, not all of whose presence will breach the covenant. If there had been a breach in the past, it was open to the Applicant to waive that breach, but waiving a breach is not waiving the covenant.
73. The Applicant makes further submissions in its Skeleton Argument in the Annex to this Decision.

The Tribunal

74. The Tribunal agrees with the Applicant that it has a right to bring the application as the owner of the freehold and the Respondent's landlord. Section 168(4) of the 2002 Act specifically says that a landlord may make the application.
75. There was simply no factual evidence before the Tribunal which would allow it to go any way at all to determining a breach of covenant by other leaseholders at the property, so as to be able to consider any questions of waiver or estoppel.

Conclusion

76. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of covenant.

Costs

77. The Respondent has made an application in respect of the Respondent's costs incurred in these proceedings and has applied for costs in the sum of £4223.40, being the costs of advice from a solicitor.

78. The relevant law is detailed below:

79. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 read as follows:

> Rule 13.——(1) The Tribunal may make an order in respect of costs only——
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in——
>
> (ii) a residential property case,
>
> or (iii) a leasehold case; or
>
> (2) The Tribunal may make an order requiring a party to reimburse to any

other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

80. The Tribunal heard the application by the Respondent for costs on the basis that the Applicant had acted unreasonably in bringing these proceedings.

81. The Tribunal reminds itself that this jurisdiction is generally a "no costs" jurisdiction. By contrast with the County Court, residential property tribunals are designed to be "a largely costs-free environment": **(1) Union Pension Trustees Ltd, (2) Mr Paul Bliss v Mrs Maureen Slavin [2015] UKUT 0103 (LC).**

82. The Tribunal refuses the application for costs. It has had regard to the word *"unreasonably."* The test is whether the behaviour permits of reasonable explanation: HH Judge Huskinson in **Halliard Property Company Limited and Belmont Hall and Elm Court RTM Company Limited LRX/130/2007 LRA/85/2008**.

83. The Tribunal followed a two-stage approach. First to find whether the Applicant acted unreasonably and then, if it so found, to exercise its discretion whether to order costs having regard to all of the circumstances.

84. The Tribunal finds that the Applicant has acted reasonably, having found the Respondent to have breached the covenant in question.

Section 20c and Paragraph 5A Application The Respondent has made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Applicant's costs incurred in these proceedings.

85. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a … … residential property tribunal, ….are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002 Schedule 11

Paragraph 5A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a

particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

86. The Tribunal first examined the lease to determine whether the Applicant is able to recover its costs via the Service Charge in accordance with the lease. The Tribunal finds that the lease does not permit the recovery of legal costs by way of Service Charge, as the Applicant agreed. In any event, the Applicant having been substantially successful, the Tribunal would not have made an order under Section 20C.

87. The Tribunal notes that the Applicant has been mostly successful; not wholly successful, but successfully has argued that the Respondent was acting in breach of covenant. The Tribunal refuses for that reason the application under Paragraph 5A and makes no order extinguishing any liability of the Applicant's to pay litigation costs incurred by the Respondent.

Judge A Cresswell

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-

day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX

IN THE FIRST TIER TRIBUNAL **REF**

CHI/00HH/LBC/2019/0039

PROPERTY CHAMBER

12 HAROLD COURT, ST LUKES ROAD SOUTH, TORQUAY

BETWEEN

CHARMLEAVES LIMITED

Applicant

- and -

JENNIFER TURNER NICHOLSON

Respondent

SKELETON ARGUMENT FOR THE APPLICANT

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1. This is the Applicant (A's) skeleton argument for the hearing on Thursday, 16 January 2020. A small bundle has been filed for the hearing and references below in square brackets are to it. The Respondent (R) now acts in person, having been represented by solicitor and counsel until last Thursday.

2. A seeks a determination under s 168(4) CLRA 2002 that R is in breach of covenant contained in her lease of 2 Harold Court, St Lukes Road South, Torquay (the flat). The lease is at [25-63]. It is a 2-bed flat.

3. Harold Court is a substantial house converted into 8 apartments near the sea front in Torquay. A is a management company and owns the freehold. Its shares are owned by the 8 tenants, including R. Seven of the eight tenants live in their flats. The eighth lets it out on an AST. The flats are all let on the same terms, as far as material [31].

4. Clause 2 [32] incorporates the covenants in the Fifth Schedule. Clause 1 [59] is as follows:
"Not to use the flat nor permit the same to be used for any purpose whatsoever other than as a private dwellinghouse in the habitual and regular occupation of one family nor for any purpose from which a nuisance can arise to the owners lessees and occupiers of the other part of the Building or in the neighbourhood nor for any illegal or immoral purpose nor for holiday letting."

5. Unbundling the clause, it contains 5 distinct prohibitions:
- not to use the flat "*other than as a private dwellinghouse in the habitual and regular occupation of one family"*
- not to use it in such a way as can cause a nuisance to the other owners lessees and occupiers
- not to use it for an illegal or immoral purpose
- not to use it "*for holiday letting*"
- not to permit it to be used in any of the above ways.

6. The claimed breach is R's having paying guests routinely stay with her, which she attracts through Airbnb's website. Whilst this is a new platform, the business is effectively that of a traditional B&B or guest house, rather than lodgings. Airbnb operates as an agency or brokerage providing an internet contact base between those who have rooms to let and those who wish to rent them. People consult the website, enter the place they want to go and the times they want to be there and are introduced through the website to owners registered with Airbnb who have accommodation which meets their criteria. The main contract is between the owner and guest. Airbnb collects the fee from the guest and remits it (minus commission) to the owner.

7. From the 2nd week in June to 20 November, R had guests 47 times [79 paras 11-12] roughly 9-10 times per month. Guests stay for a day or so. So guessing at the average length of stay, R has guests staying about 15-20 days each month. The flat is not their residence. They are mostly holidaymakers with the occasional business-traveller. See the difference between R's letter [75] ("not all on holiday") and her statement [80 para 14] ("It is not … the case that my guests are holidaymakers"). The former is considered more accurate.

8. It is submitted this use amounts to a breach of all bar the third prohibition (illegal/immoral use) but principally the first and fifth. R disagrees with this and continues to advertise on Airbnb and have paying guests.

(1) *"private dwellinghouse in the habitual and regular occupation of one family"*

9. I take the first and fifth covenants together. The covenant's overall purpose is to ensure the building's occupiers are a relatively stable group who have a stake/interest in preserving its amenities (condition, safety, security, etc.) and ensuring the lease covenants are observed. This includes owner-occupiers and residential sub-tenants, who as was said in Falgor Commercial v Alsabahia Inc. [121 top] "*will probably be more carefully chosen than would be the case with licensees…*". It does not include a transient, constantly-changing population of Airbnb guests whose identities are unknown to residents and over whom A and the other residents have little effective control.

10. First, R is in breach of the limit that it be a "*private*" dwellinghouse in the occupation of "*one family*" only. These require that the flat is not to be shared, unless the occupiers are part of the same family. So R would not be in breach if:

- she let it as a whole to someone who occupies it as their residence either alone or with others who are part of their family. There is no covenant against subletting the whole, except for subletting for holiday purposes [36 cl (j)]. This limits her to sublettings for residential purposes, as has happened with the other flat which is let on an AST.
- she occupied it herself alone or with members of her family. Friends staying, at least short term, would also not be a breach.

Conversely it plainly would be a breach to let/licence it exclusively to short term occupiers since they would not occupy it as their residence – see below.

11. Here, R lives in the flat and takes in paying guests. This is a breach since (a) it is no longer solely her "private residence" and (b) they are not part of her "family":

- Nemcova v Fairfield Rents Ltd [2016] UKUT 0303 [89] involved in covenant not to use the premises "other than as a private residence" – para [7]. The tenant (as here) let the flat to short term business occupiers, obtained through websites. She appears to have moved out during the lettings – para [10] – unlike here. This was held to be a breach of covenant. However the Tribunal also said obiter - para [49] – that
  "*It may be that where an occupier shared some part of the accommodation with someone else it would cease to be 'a private residence' being a shared residence which does not have the attribute of privacy*"
- in Falgor Commercial v Alsabahia Inc [1986] 1 EGLR 41 Fox LJ said [120 bottom last full para]:
  "And even if the lessee is actually residing on the premises but invites members of the public to live there as paying lodgers, he is not keeping the house as a private dwelling house only - that appears from the decision … in Tendler v Sproule"
- according to Scamell and Gasztowicz on Land Covenants 2nd ed. 2018 @ 11.205:
  "*Whether people sharing a house will constitute one household* [here, family] *would seem likely to depend upon such things as whether as between themselves they simply contribute a fair share of the household expenses, rather than one of the members making a profit out of allowing the others to live there*"

and that a situation such as the present falls at the far (i.e. breach) end of the spectrum. In the context of user covenants the authors equate a "private dwellinghouse" with "single household" – ibid. @ 11.202.

12. Second, courts have consistently held that a "private dwelling house" covenant is broken by the covenantor living there and taking in paying guests:

- in Hobson v Tulloch [1898] 1 Ch 424 the proposed use of a house as a boarding house, with the owner continuing to live there [p.425] was held to be a breach of covenant against use "other … than [as] a private residence"
- in Tendler v Sproule [1947] 1 All ER 193 the court said
  "*In my view, the taking in of two paying lodgers is a breach of a covenant 'not to use the said premises or any part thereof for any business.' I think also that it is a breach of the covenant to keep the premises 'as a private dwelling-house only.'* (p194C)

In the earlier case of Thorn v Madden the systematic taking in of paying guests, with the owner retaining possession and providing all services, was held to be a breach of covenant not to use the land "otherwise than as a private dwelling-house or professional residence only". In Tendler the court said of Thorn:
"*I think that the real gist of the decision is that the taking in of paying guests is a business and that a house which, or part of which, is used to take in paying guests is not a house which is being kept as a private dwelling-house only.*" (p.194E-F)

- in Segal Securities v Thoseby [1962] 1 QB 887 a covenant to use the premises as "a private residence in the occupation of one household only" was held to be broken by the taking in of a guest who answered an advert and who was not part of the owner's family, there being no sharing of meals and social life. The court said (p893-4) that Thorn and Tendler

  "… bind me to hold that if a tenant for any length of time, or regularly, takes in paying guests - which, after all, is a euphemism for the word "lodgers" - that is a breach of a covenant to use premises as a private residence only."

  Although it said the primary breach was of the "no business purposes" covenant, which was not present here (nor here), it was nevertheless a breach of the "private residence only" covenant. The court went on to say that a single paying guest who "*shares the family life [of the tenant] so far as practicable*" would not be a breach, absent exceptional circumstances. Nor would a "*true sharing between a tenant and a friend or friends*" involving shared meals/expenses (p.894-5) but those are far from the facts here.
- see also Falgor above (para 11)

13. Third the guests are not using the flat as their "residence". It is immaterial then that R is. She is "*permit[ting] the [flat] to be used … other than as a private dwellinghouse…*" by them:

- in Caradon DC v Paton [2000] 3 EGLR 57 the covenant was against use "*for any purpose other than that of a private dwelling house*". Again the covenantor did not live there but used it as a holiday letting. Latham LJ said (@ 59)

  "… a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday."

  So too the business traveller.
- Clarke LJ said (ibid.)

  "*the question is whether [a guest] was using the property as a private dwelling-house. If he was not using the property as a private dwelling-house, there can be no doubt that the [owners] were in breach of the covenants, because they undoubtedly permitted the use of the property …*

  a person taking a holiday let is not, in my judgment, using the property as a private dwelling-house. It follows that the [owners] permitted the properties to be used for purposes other than that of a private dwelling-house."
- that is a different situation from one where a tenant uses the property himself as *his* holiday home. In such case it can legitimately be said that it is his (albeit part-time) residence since he has the necessary long-term connection with it.
- in Nemcova v Fairfield Rents Ltd. above it said the covenant would not be broken by renting the flat to someone who occupied it as *their* residence. But to be the occupier's residence

  "*there must be a degree of permanence going beyond being there for a weekend or a few nights a week*" (para 53). So

  "*it is necessary … that there is a connection between the occupier and the residence such that the occupier would think of it as his or her residence albeit not without limit of time. In short, for the covenant to be observed, the occupier for the time being must be using it as his or her private residence.*" (para 48)
- in Snarecroft v Quantum Securities [2018] EWHC 2071 [104] the court held (by way of summary judgment) that a much weaker covenant than here – against use "other than for residential purposes" [107 para 12] [cf. "a single private dwellinghouse in the habitual and regular occupation of one family…"] – would be broken by its use as part of a hotel precisely because it involved the use by a transient population [117 paras 43-5]. As here. At para 43 it said that had the use been limited to a "single private residence" the breach would have been clear. And at para 31 it noted that

other cases made the distinction between *"a transient population and those who have a greater degree of permanence*".

- in Bermondsey Exchange v Koumetto [2018] EW Misc B10 (CC) short-term lets of the whole flat to Airbnb guests were held to breach both the covenant against subletting and against use "otherwise than as a residential flat with the occupation of one family only". The UKUT (cited @ 31) said that

  "there is a qualitative difference between letting a property on an assured shorthold basis to a person or family who occupies the same property as their home… and letting the property on short term let including through Airbnb and other websites"

  And the court agreed @ [66] saying

  "The user covenant is clear. [It] is breached when the flat is not being used as a residential flat but as short-term temporary accommodation for transient visitors paying for such use by way of commercial hire"

14. R seeks to distinguish these cases on the basis there (unlike here) the covenantors did not live at the property with their guests. That however is irrelevant
- as the dictum in Falgor (para 11) shows
- the cases in para 12 are all ones where the covenantor lived on the premises and took in paying guests
- the fact R lives there do not mean that the guests occupy it as their residence. It does not change the nature of their use/occupation from non-residence to residence
- the fact that her personal presence (considered by itself) is not a breach does not mean that their presence is not. The words "*other than*" make clear that the only permitted use is that of a "*private residence* [etc.]". So it is no answer to a complaint that certain conduct is a breach to say that other conduct is not. So for example if for part of the year R let out the flat to holidaymakers and moved out, it would not be an answer to say that for the rest of the year she was not in breach
- so the fact R is in residence (although as stated above it is no longer her "private" residence) does not mean that her guests' use is not a breach / is no more than her residence.
- so although R *is* using it as her residence, she is not using it solely as such, as she must. She is using it for other (impermissible) purposes.
- R's argument that their use "does not change the essential nature of the Flat" [16 para (8)] applies a test which is not in the covenant here or found in the cases.

15. R also seeks to distinguish these cases on the basis that her guests are licensees, not tenants. That is irrelevant:
- in none of the cases was the status of the guest relevant to the whether there was a breach.
- the covenant does not concern the occupier(s) status per se, but the use of the property.
- it can hardly be that a licence to use a room within a flat would not be a breach of covenant but a lease of that room would be, not least as the distinction is often a matter of degree.
- in the cases referred to below, substantially similar covenants were broken by taking in paying guests (lodgers) who are classically licensees, not tenants.
- in Falgor a "single private residence in one occupation only" covenant was held to be broken by granting *licences* of serviced accommodation [bottom 119 – top 120].
- there are separate covenants against subletting part and subletting the whole for holiday purposes [36 cl (j)]. So if this covenant were read as R says, there is nothing more against which it can "bite".

16. Fourth the flat is no longer in "the habitual and regular occupation of one family" only. R's guests are not part of her "family" or household nor in "habitual and regular occupation". So the fact the lease "*contemplates that tenants will have*

visitors to their flats" [18 para 8], whilst correct, is irrelevant. As the cases in para 13 show, their use is qualitatively different to its use for Airbnb guests.

(2) *Potential nuisance*

17. The fourth covenant is broken by conduct from which a nuisance "*<u>can</u> arise*". That is, which in its nature is capable of causing a nuisance. Airbnb guests are likely to cause the sort of problems A has complained of [77]. It need not be decided if they in fact existed and if R's guests were responsible. They are more likely to do so than those with a "stake" in the building (para 9) or their visitors and R cannot/does not supervise them at all times or have much effective practical/moral control over them.

(3) *Holiday lettings*

18. It is a question of construction whether "for holiday letting" [59] is limited to sublets strictly so called or includes licences. It is submitted the latter is correct as holiday sublets of the whole or part are already forbidden by clause 3(j) [36]. So to give the words in Sched 5 para 1 meaning "letting" must have an extended definition of an occupation licence. If it is the former, then is a question of fact whether R's guests are tenants (with exclusive possession of their room) or licensees, but as we do not have the contract that is difficult to determine.

(4) *Legitimate expectation*

19. Finally R's response [18 para 11] refers to acquiescence and "legitimate expectation". The latter doctrine is one of public law – it does not apply to private bodies like A. The former is irrelevant to whether R is in breach, but only to remedy. The disputed evidence [79 para 7] is also skeletal. The burden is on R. Acquiescence requires prejudice which is not shown.

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January 12, 2020