FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/23UC/LBC/2020/0004**
Property	:	**Flat 17, Sherborne House, Sherborne, Cheltenham, Gloucestershire GL54 3DZ**
Applicant	:	**Sherborne Park Residents Company Limited**
Representative	:	**CMG Leasehold Management Limited**
Respondent	:	**Robert Landers Hoyt** **Barbara Jane Hoyt**
Representative	:	**Withers LLP**
Type of Application	:	**Application for determination of breach of covenant: section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Member	:	**Judge E Morrison**
Date of decision	:	**19 May 2020**

FINAL DECISION

(issued pursuant to paragraph 5(e) of the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and Upper Tribunal

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Introduction

1. The lesssor of Sherborne House has applied for a determination, pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002, that the respondent lessees have breached a covenant in their lease by entering into short-term holiday lets of their flat.

2. Sherborne House is a Grade 2 listed former stately home converted into circa 30 apartments. It is set within its own formal gardens and parkland, and has communal facilities including a swimming pool, pool house, gym, sauna, orangery, and tennis courts.

3. The lease of 17 Sherborne House is dated 8 September 1982 and is for a term of 999 years from 1 January 1982. It contains no covenant against assigning, charging, underletting, parting with or sharing possession or occupation, or granting licences.

4. However, by clause 2 of the lease, the lessee covenants "with the Lessor and with the owners and Lessees of the other flats comprised in the building and leased by the Lessor that the Lessee and the persons deriving title under him will at all times hereafter observe the restrictions set forth in the Second Schedule hereto...".

5. That Schedule lists restrictions imposed in respect of the demised premises and common parts. Paragraph 1 provides "Not to use the demised premises nor to permit the same to be used for any purpose whatsoever other than for residential purposes only or for any purpose from which a nuisance can arise to the owners lessees and occupiers of other flats comprised in the building or in the neighbourhood or for any illegal or immoral purposes". The applicant asserts that the first part of this restriction has been breached because a short-term holiday let is not a use for residential purposes.

6. The respondents became registered as the proprietors of Flat 17 on 11 May 2012. Mr Hoyt describes their "home town" as being in Wisconsin in the United States but their daughter and grandchildren live in the Coln Valley in the Cotswolds. The respondents purchased the flat at Sherborne House so that they could visit their family for extended periods. They let out the flat through an agency to help meet the high service charges.

7. The time period relied on by the applicant runs from 10 February 2018 to 28 September 2019. The applicant states that entries in the visitors' register kept in the building's entrance hall show that there were over 50 'Airbnb-style' lettings during this period, with an average duration of 6.85 days. This is not disputed by the respondents.

8. The sole issue for the tribunal is whether a breach of the lease has occurred. Much of the evidence in the bundle is directed to other matters such as whether those staying in Flat 17 have caused a nuisance

or breached the "house rules". The applicant's allegations in this respect are disputed by the respondents and their letting agents. Whatever the truth of such matters, they are not relevant to the tribunal's decision because the applicant relies only on the first clause of paragraph 1 of the Second Schedule. It does not rely on the second clause which deals with use causing nuisance etc.

9. In deciding this matter, the tribunal has had regard to the bundle provided which includes written submissions by Mr Jamal Demachkie as counsel for the applicant and Mr Anthony Radevsky as counsel for the respondents.

The applicant's case

10. The applicant relies on four authorities to support its assertion that the respondents have breached their lease by using the property other than for "residential purposes".

11. Considering these cases in chronological order, the first is *Caradon DC v Paton* [2000] 3 EGLR 57, which concerned a purchaser's covenant in a right-to-buy transfer of two properties "not to use or permit to be used the property for any purpose other than that of a private dwellinghouse". The Court of Appeal found that short-term holiday lets were a breach of the covenant. It considered the context in which the covenant was imposed, and found that the purpose was to protect the amenities of the surrounding neighbourhood and to ensure the properties remained available for occupation as a home. Latham LJ said that the question was whether occupation for the purpose of a holiday was occupation for the use of the dwellinghouse as their home, and concluded (p 59):

Both in the ordinary use of the word and in its context, it seems to me that 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. It follows from that analysis that the evidence before the judge, and before this court, really permits of only one conclusion, namely, that is, that the occupation of the holidaymakers of these two properties was not for the purposes of use as a private dwelling-house, within the meaning of the phrase in these covenants.

Clarke LJ agreed that use as a private dwellinghouse involves the use, at least in some way, as a home (p 59).

12. The second case is *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC). The lease contained a lessee's covenant not to use the premises or permit them to be used for any purpose whatsoever other than as a private residence. The lessee accepted that she had granted a series of short-term lettings of the flat and that she had advertised its availability

on the internet. The covenant had been entered into not only with the lessor but with the lessees of the other flats in the block. The UT said it was therefore proper to infer that it was at least in part for the protection of those other lessees.

13. HHJ Stuart Bridge warned against reading more into the covenant than its ordinary and natural meaning; it did not refer to the word "home" or require the occupier, in terms, to use the premises as his home [47]. Further a person could have more than one residence. However. the occupier must be using the property as his or her private residence. He concluded:

    I have reached the view, consistent with the decision of the FTT, 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 going beyond being there for a weekend or a few nights in the week. In my judgment, I do not consider that where a person occupies for a matter of days and then leaves it can be said that during the period of occupation he or she is using the property as his or her private residence. The problem in such circumstances is that the occupation is transient, so transient that the occupier would not consider the property he or she is staying in as being his or her private residence even for the time being. [53].

14. In *O'Connor v Proprietors, Strata Plan No.51* [2017] UKPC 45, the Board considered the legality of a byelaw made in the Turks and Caicos Islands which sought to limit use of residential lots to that of a private residence of the owner or his guests, although lettings for more than one month were specifically permitted. In considering the main issue of whether the regulation was consistent with another statutory provision, the PC said that the specified limitation of one month was designed to provide some definition of what is meant by "use as a residence". The Board agreed with the analysis in *Caradon DC v Paton*.

15. The most recent authority cited by the applicants is *Bermondsey Exchange Freeholders Limited v Koumetto* (2018 County Court at Central London, Unrep.) where it was alleged that the defendant had breached various covenants in his residential lease. One of these was a covenant "not to use or permit the use of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation of one family only." The flat was being used to provide short term accommodation through online portals such as Airbnb. HHJ Luba QC rejected the lessee's argument that the provision simply prohibited occupation of the flat by more than one person unless all others were members of that person's family. He held that the covenant was breached and the flat was not being as a residential flat where it was providing short- term temporary accommodation for transient visitors paying for such use by way of commercial hire.

16. Mr Demachkie submits that minor distinctions in wording between 'residential flat' or 'residential use' or 'residential purposes' (as in this

case) are less important that focusing on what the covenant means in the context of the lease as a whole, and in accordance with the usual principle of the interpretation of leases – see *Arnold v Britton* [2015] UKSC 36; *Wood v Capita* [2017] UKSC 24. The leases at Sherborne House contain mutually enforceable covenants governing the use of residential flats in a converted house, with close-living and high-end amenities. Several covenants are restrictive of use and seek to generally restrict behaviour which impacts detrimentally on the amenity and enjoyment of other residents.

17. It is argued that in the context of this lease, the covenant must be intended to prohibit transient short-term lettings where the occupier for the time-being is using the flat as a fleeting holiday accommodation, or for a stag or hen- do.

18. The applicant's response to the authority relied upon by the respondent is set out below at 23.

The respondents' case

19. The thrust of the respondents' position is that none of the authorities cited by the applicant concern covenants which are worded in the same way as the covenant in this case. The clear intention of the provision in question here is simply to prevent use for non-residential purposes e.g. use for business or professional purposes. The fact that the lease is granted for 999 years, and contains no restriction on alienation, shows the context. Provided the use of the flat is for residential purposes, it does not matter what duration of letting takes place. A covenant not to use the premises for any purpose other than as 'a private residence' is far more restrictive.

20. In support of this position Mr Radevsky cites *Westbrook Dolphin Square Ltd v Friends Life Ltd (*No 2) [2015] 1 WLR 1713. The case addressed a number of issues raised in opposition to the proposed statutory enfranchisement of the Dolphin Square development in Pimlico under Part 1 of the Leasehold Reform Housing and Urban Development Act 1993. One issue was whether a sufficient proportion of the premises was being occupied "for residential purposes" as required by section 4 of that Act. Some of the flats at Dolphin Square were run as pre-booked serviced apartments, and let out for short periods to persons who were in London for a variety of reasons. In the time period considered, the most frequent length of stay was 2 days; the average length of all stays was 13 days.

21. The landlord's argument was that "residential purposes" meant either use as a person's only or principal home, or use as a person's home with a degree of permanence even if not as the only or principal home. Mann J rejected this, holding that if the draftsman of the Act had intended the expression to mean "home" he would have said so [para. 181]. He considered a number of authorities, including a VAT tribunal case, referred to at para. 187. This decision contrasted a 'residence' with

'residential accommodation', the latter merely signifying lodging sleeping or overnight accommodation. He concluded that he preferred the nominee purchaser's analysis and held that the flats being let for short periods were being occupied for residential purposes. At para. 206 he stated:

They are fully self-contained flats, not analogous to hotel rooms. It seems to me to be quite appropriate to characterise the occupation as being for residential purposes. For the time being the occupants are conducting residence-like activities there. That seems to me to be the test (and the answer to the test), not whether they are using them as homes, or even residences. If one focuses on the purposes, they are residential, and are not turned into something else by the hotel-like services which are provided. The shortness of the stay does not affect the characterisation of the occupation.

22. Mr Radevsky submits that this decision is highly relevant, dealing as it leases in a residential block of flats, and should be followed by the tribunal. There are no grounds to differentiate the short term lettings of 17 Sherborne House from the lettings of the flats at Dolphin Square.

23. In response to this Mr Demachkie submits that *Westbrook*, in spite of superficial similarities in the wording, in fact provides the least useful authority as it was a case of statutory interpretation of the 1993 Act in the context of leasehold enfranchisement. It was not a case which was considered from the perspective of breaches of covenants within a lease. The construction of a private contract between private individuals is very different from the determining the scope of what Parliament intended to exclude from the right to enfranchise. Mr Radevsky counters that the process of construing a lease can be similar to that of construing a statute The task is still to discover the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913.

Discussion and determination

24. Both parties have reminded the tribunal of the correct approach to be adopted when interpreting a contract. The seminal passage in *Arnold v Britton* [2015] UKSC 36 is at para 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…

A highly literal approach is not required; the court must consider the contract as a whole: *Wood v Capita* [2017] UKSC 24.

25. In *Nemcova* the Upper Tribunal warned against placing too much emphasis on prior decisions when construing a lease. Each lease is different and the words have to be considered in their particular fact specific context.

26. The tribunal is however aware of two further cases, beyond those cited by either party, which have considered the meaning of "residential purposes" in a residential lease, and it is appropriate to refer to these.

27. In *City of Westminster v Kothari* LON/00BK/LBC/2019/0087 the lease stipulated that a flat be used "for residential purposes only". It was used for short term holiday lets. Referring briefly to *Nemcova*, and without further analysis, the FTT found there had been a breach of covenant.

28. More detailed consideration to the meaning of "residential purposes" was given in *Snarecroft Ltd v Quantum Securities Ltd* [2018] EWHC 2071 (Ch). The claimant lessor applied for summary judgment under CPR Part 24 against the lessee on a particular issue in the case, namely whether paragraph 11 of the fourth schedule to the lease permitted the lessee to use the premises or any part thereof as a hotel. Paragraph 11 provided: "Following the obtaining of planning consent for residential use, not to use the premises or any part thereof other than for residential purposes." The contemplation of the lease was that the premises would be converted into two flats. Subsequently planning consent was obtained to use the premises, together with an adjoining property, as a hotel. The lessor took the position that use as a hotel would breach paragraph 11. The lessee said it would not because the point of having a hotel is to allow people to come and stay there and to sleep and do other things that ordinary people do in their own homes.

29. Having reviewed a number of the authorities, including *Caradon* and *Nemcova* the court concluded at paras. 45 -46:

It is clear on the authorities that a person may have more than one residence and therefore use of a particular property for staying in even for a short time, say, for the purposes of a holiday, can still be a residential purpose. But, even if a person has several residences, each one of them has some stability. Even if one of your several residences

is only a bedsit on a weekly licence, you return to it; you keep your own clothes, your own furniture, your own other effects there. But that is not true of a transient hotel where you arrive with a suitcase and you depart the next day. Even if you come back frequently to the same hotel, you do not necessarily occupy the same room, you bring back your clothes and effects, and others may have occupied that room during your absence. So, in the context of this lease, it seems to me that what is plainly contemplated is two flats, possibly subdivided into smaller units such as bedsits, but all of them as residences and not as overnight accommodation. There is a non-transient, longer term idea at work here. I do not say that the phrase "residential purposes" in the abstract could never apply to a hotel, but I do say that in the context of this lease, "residential purposes" does not include conversion into a hotel. Here, in my judgment, "residential purposes" as a phrase is being used in opposition to "business purposes". So flats, even, as I say, perhaps divided into bedsitting rooms, which were let on weekly or monthly tenancies or licences, would be used for residential purposes, whereas a hotel for short stay travellers would not. The planning permission which has been granted in the present case for use as a hotel is plainly restricted to short stay travellers, being limited to a maximum of 90 days and not to longer term occupiers. This in my view is use for a business purpose.

It is not possible also to avoid the fact that a hotel is very much a place of work for its staff... Even if a hotel could be said to be used in part for residential purposes where the guests are sleeping, it is also being used at least in part as a place of business. So in my judgment it would infringe the covenant such as we have here, which is not to use for other than residential purposes...

30. So while the conclusion in *Snarecroft* was partly founded on the commercial aspect of hotel use, the judge also found that the transient nature of user by short stay hotel guests could not be considered residential in the context of the lease.

31. It will be seen that all the authorities, save *Westbrook Dolphin Square*, go one way, in favour of the applicant's arguments. Yet none except *City of Westminster v Kothari* (which is of very limited assistance) is on all fours with this case; they either concern a differently worded covenant or a different context, e.g. a commercial hotel as in Snarecroft.

32. *Caradon* and *Nemcova* differ as to whether use as a residence or dwellinghouse also requires use of the premises as a "home". However, the common thread of all the decisions relied on by the applicant, and of *Snarecroft,* is that the concept of residence or residential use imports a degree of permanence beyond that found in a pre-booked stay of just a few days.

33. *Westbrook Dolphin Square* reaches the opposite conclusion. In effect Mann J said that if the occupiers were sleeping and washing in the premises, that was occupation for residential purposes and the length

of stay was irrelevant. It pre-dates *Nemcova* and *Snarecroft* and *Caradon* is not referred to in the judgment. *Westbrook* was not referred to in *Nemcova*.

34. Turning to the *Sherborne Park* lease, the tribunal must look at the words “nor to permit the same to be used for any purpose whatsoever other than for residential purposes only” in their context.

35. The Oxford English Dictionary contains the following pertinent definitions of “residence”:

-The circumstance or fact of having one's permanent or usual dwelling place or home in or at a certain place; the fact of residing or being resident
- The place where a person resides; the dwelling place or home *of* a person (esp. one of some rank or distinction).

The definition of residential is:
- Serving or used as a residence; in which one resides; providing accommodation in addition to other services.

36. It is the second meaning of “residential”, as an adjective, which broadens the concept beyond use as a residence to a use which is simply providing accommodation and other services. It is this second meaning that was adopted in *Westbrook Dolphin Square*.

37. The question for the tribunal is which of these natural and ordinary meanings should be imported to the Sherborne House lease. The lease is of a flat in a prestige building converted into flats; there is no ancillary commercial use. Clause 2 of the lease specifies that the restrictions in the Second Schedule will be included in all the leases and are for the benefit of the other lessees. Other restrictions in the Second Schedule, such as paragraphs 3 and 7 (prohibiting loud music) are designed to protect the amenity and quiet enjoyment of other residents. It is clear from the wording of the lessor’s covenant found at clause 6 (g) that the swimming pool and tennis courts, if not the other current communal facilities, existed at the time the lease was made. The lease also requires the lessee to become a member of the management company, to which the lessor intends to convey the freehold. Thus the clear intention is that the lessees will, through the management company, eventually manage the property themselves.

38. The property is in its own extensive private grounds in a rural village location. Looking at the matter objectively it is reasonable to assume that the original lessee would have understood that Sherborne House was intended as a private residential community, with shared communal facilities to be enjoyed by those who had all agreed to be bound by the same restrictions to protect amenity. It would not have been contemplated that lessees could arrange for complete strangers to stay in their flats on a frequent basis for very short periods. In that context the tribunal concludes that it is the first definition of

"residential" is the one to be imported into this lease. Occupation must be as a residence, which requires some degree of permanence beyond that present in short-term holiday stays.

39. This interpretation is consistent with the applicant's authorities. The tribunal does not consider that when "residential" is used in its first meaning, there is any substantive difference between use as a residence and use for residential purposes.

40. In *Westbrook* the court's task was not to discover what contracting parties meant in a lease of a specific property, but to discover what Parliament intended when setting out qualifications for the right to enfranchise, the qualifications applying to all premises wherever situated with no regard to their individual character or the provisions in their leases. The intention of Parliament in 1993 in a very different context can have little bearing on what the contracting parties intended when entering into the lease of 17 Sherborne House in 1982. HHJ Luba QC was referred to *Westbrook* in *Bermondsey Exchange* but he regarded it as of no assistance (para. 63). This tribunal agrees.

41. Finally, the respondents raise the question of where the line is to be drawn. They ask whether a letting for three months to someone taking a relatively long holiday would fall foul of the restriction. However, the tribunal is only required to consider the facts of this case. The flat has been advertised by the letting agents for holiday/leisure use. There is no evidence from the respondents to suggest there was any other purpose. Up to six separate sets of visitors have stayed in the flat in any one month. The average stay was 6.85 days. According to the visitor book records the shortest stay was 2 days and the longest, on one occasion, 18 days. The tribunal finds that these lettings breached the restriction in paragraph 1 of the Second Schedule to the lease because they were not a use for residential purposes.

Judge E Morrison

Appeals

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.