



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

Case Reference : **MAN/00CH/LBC/2020/0005**

Property : **5 Fairway Court. Fletcher Road,
Gateshead NE8 2AY**

Applicant : **Rosleb Limited**
Representative : **JB Leitch Solicitors**

Respondent : **Mr Andrew Stafford**
Representative : **TT Law**

Type of Application : **Commonhold & Leasehold Reform Act 2002,
Section 168(4)**

Tribunal Members : **Mr S. Moorhouse LLB
Mr I.R. Harris BSc FRICS**

Date of Decision : **16 October 2020**

DECISION

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DECISION

- (i) The tribunal determines that a breach of a covenant in the Respondent's lease of the Property has occurred. This is a consequence of the Respondent allowing short term occupancies arranged via Airbnb in contravention of a lease covenant not to permit the Property to be used for any purpose other than as a private dwelling.
- (ii) The tribunal directs that any application to the tribunal related to the recovery of costs shall be submitted within 28 days of the date of this decision.

REASONS

Background

1. Application was made to the tribunal on 10 February 2020 by Ochre Yards Three Limited for a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('the Act') that the Respondent had been in breach of the terms and conditions of his lease of a ground floor flat at 5 Fairway Court, Fletcher Road, Gateshead NE8 2AY ('the Property').
2. Pursuant to Directions a submission was made on behalf of Ochre Yards Three Limited. No submission was made by the Respondent. The Tribunal issued Further Directions on 15 July 2020 since it was unclear whether Ochre Yards Three Limited was the Respondent's landlord. Notice of Intention to Strike Out the Application was given.
3. On 4 August 2020 JB Leitch Solicitors wrote to the Tribunal having been instructed both by Ochre Yards Three Limited and by Rosleb Limited. JB Leitch applied on behalf of their clients for the substitution of Rosleb Limited as Applicant, pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The application included evidence in the form of an Official Copy of the Register of Title that Rosleb Limited was the current landlord to the Respondent, having purchased the freehold interest in the development of which the Property forms part on 24 January 2008.
4. The Respondent contacted the Tribunal by email, also on 4 August 2020. He had received by email a copy of the submission by JB Leitch Solicitors. The Respondent stated that he had not received the case papers. The Respondent also informed the Tribunal that the address for the Respondent stated in the Application was no longer correct. On 7 August 2020 the Tribunal's office emailed to the Respondent the case papers and offered a hard copy should this be required. The Respondent's current address for correspondence was confirmed.

5. The Tribunal issued further directions on 18 August 2020 directing the Respondent to submit any representations the Respondent may wish to make on the application to substitute Rosleb Limited as the Applicant. The Respondent submitted representations opposing the substitution of Rosleb Limited. He made reference to Civil Procedure Rules concerning the correction of a party's name and cited authority that the Tribunal should pay close attention to the approach of the courts on the topic. The Respondent made reference to a failure by the managing agents to use his correct address in connection with the proceedings and stated that the Property had not been let for a number of months, there was no intention to let it again and it was on the market for sale.
6. Having considered the application to substitute Rosleb Limited as the Applicant and the representations of the Respondent, the Tribunal issued further directions dated 26 August 2020. The tribunal directed pursuant to Rule 10(1) of its procedure rules that with immediate effect Rosleb Limited was substituted for Ochre Yards Three Limited as 'Applicant' in the present proceedings. In so doing the tribunal took into consideration the Tribunal's overriding objective of dealing with cases fairly and justly and was cognisant, in particular, of the potential delay and additional cost involved if, instead of being substituted as a party, Rosleb Limited were to submit a new application pursuant to section 168(4) of the Act.
7. The tribunal further directed that the Respondent prepare a statement of case including copies of all documents the Respondent wishes to be taken into consideration and any legal submissions. A brief reply by the Applicant was allowed.
8. Pursuant to further directions a submission was made on the Respondent's behalf by law firm TT Law, and a reply submitted on behalf of the Applicant.

Preliminary Matters

9. The submission by TT Law contends that the Respondent did not receive a number of letters issued by the Management Committee for the development of which the Property forms part because he did not reside at the address to which they were sent. It is contended that the letters should, under the terms of the lease, have been sent by registered post. It is stated that had the Respondent received these letters he would have established where he stood legally and proceeded accordingly. It is further submitted that the matter is academic because, as advised earlier, the Property is on the market for sale and the Airbnb lets had been discontinued. Finally reference is made to difficulties in obtaining papers relating to the proceedings and other responses from the Applicant's solicitors and to the intended sale being advertised through a trading division of the managing agent.
10. The Applicant has replied to the various points raised on the Respondent's behalf. The Applicant goes on to request that the tribunal make a determination as to whether a breach of covenant has occurred, in case the Property does not sell and the Respondent reverts to Airbnb lets.

11. The tribunal considers that it is appropriate in this case to proceed to a determination as to whether a breach of a covenant or condition of the lease has occurred. Section 168(4) of the Act allows the Application to be brought. This is not contingent upon there being a continuing breach. The tribunal included a note in earlier directions inviting the Applicant to submit notice of withdrawal should it wish to do so but the Applicant has opted to continue the Application for the reasons that have been given. It is unnecessary for the tribunal to reach findings of fact as to whether letters from the managing agent were received, or as to whether it should have been known that the Property was intended to be sold. These issues do not affect the entitlement of the Applicant to seek a determination under section 168(4), nor are they relevant in determining whether the Airbnb lets were in breach of the covenants or conditions of the lease.
12. The tribunal is satisfied that the Applicant has received the papers in these proceedings and has had the opportunity to make a detailed submission in response to the Application. Both parties are legally represented, neither party has requested a hearing and no inspection is required. The tribunal considers the matter suitable for determination on the papers.

Findings of Fact & Reasons for Decision

13. The Application alleges that the Property has been let for short term occupancy via Airbnb. The Application includes a copy of the Airbnb listing for February 2020 including 6 positive reviews all posted by customers in November and December 2019. In opposing the substitution of Rosleb Limited as the Applicant, the Respondent stated that the Property had not been let for a number of months. It was implicit in this that the Property had been let previously. The tribunal finds on the facts that the Property has been let for short term occupancy via Airbnb on numerous occasions.
14. The Applicant contends that the Airbnb occupancies were in breach of the covenants and conditions in the lease of the Property dated 29 July 2004 and made between Bellway Homes Limited (1) Ochre Yards Three Management Company Limited (2) and the Respondent (3). The submission by TT Law on the Respondent's behalf is silent on the issue of whether a breach of covenant had occurred.
15. The Applicant draws the tribunal's attention, in particular, to the following covenants:

Clause 5.5

'Not to do any act or thing which may vitiate any insurance effected on the Demised Premises or which may cause any increased premium to be payable in respect thereof.'

Clause 5.6

'Not at any time to carry on or permit to be carried on upon the Premises any trade or business whatsoever nor to use or permit the same to be used for any purpose other than as a private dwelling.'

Clause 5.7

‘Not to do or omit to do on or in the Demised Premises any act manner or thing which may be or become a nuisance or cause any damage to any owner or occupier of the Estate or any other adjoining or neighbouring property.’

16. The tribunal considers the Airbnb occupancies to be in breach of the covenant forming the second part of Clause 5.6: *‘nor to use or permit the same to be used for any purpose other than as a private dwelling’*. The Respondent as leaseholder has covenanted not to permit the Property to be used for any purpose other than as a private dwelling. Short term occupancy by Airbnb customers is neither ‘private’, since it is available to the public, nor is it use as a ‘dwelling’, since it lacks the degree of permanence implicit in this.
17. The tribunal finds that there is no breach of the covenant prohibiting the carrying on upon the Property of any *‘trade or business’*, since neither a trade nor a business were actually being carried out on the Property itself – the Property was being used as short term accommodation.
18. Whilst some details of the insurance arrangements were provided to the tribunal, and it is alleged for the Applicant that security may have been compromised through sharing with customers the building access code, there is insufficient evidence to conclude that the insurance might be vitiated or premium increased. The tribunal is also not convinced on the evidence before it that anything the Respondent has or has not done might be, or might become, a nuisance, or cause damage. On the evidence before it therefore, the tribunal finds no breach of clause 5.5 or 5.7.
19. Accordingly the tribunal determines that a breach of a covenant in the Respondent’s lease of the Property has occurred, and that this is a consequence of the Respondent allowing short term occupancies arranged via Airbnb in contravention of a lease covenant not to permit the Property to be used for any purpose other than as a private dwelling.

S Moorhouse
Tribunal Judge
16 October 2020