FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

HMCTS code (audio, video, paper) **V: CVPREMOTE**

Case reference	:	**CAM/00KF/LBC/2022/0012**
Property	:	**Flat 7, Lauriston Place, 150 Southchurch Avenue, Southend SS1 2PF**
Applicant	:	**Chancery Lane Investments Ltd**
Representative	:	**Mr Paul Simon, solicitor**
Respondent	:	**Mr Anthony Ojums**
Representative	:	**Mr Julius Nkanu of Counsel, instructed by Victory at Law solicitors**
Date of Application	:	**18 August 2022**
Type of application	:	**Application for an order that a breach of covenant or condition has occurred pursuant to s.168(4) of CLARA 2002**
The Tribunal	:	**Tribunal Judge S Evans** **Mrs Michele Wilcox BSc, MRICS**
Date/ place of hearing	:	**30 November 2022,** **By cloud video platform**
Date of decision	:	**12 December 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents before us were in an Applicant's bundle of 448pp, a Respondent's bundle of 39pp.

DECISION

1. **The Tribunal determines that the Respondent has breached the covenants in clause 3(4) and paragraph 1 of the Third Schedule to the Lease between June 2020 and November 2021.**

2. **The Applicant having been successful, we order the Respondent to pay the Applicant's application fee of £100 and hearing fee of £200 within 14 days, pursuant to rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.**

REASONS

Introduction

1. By its application the Applicant seeks a determination of breach of covenant or condition pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("CLARA 2002").

Relevant Law

2. The relevant statute law is in Appendix 1.

Background

3. The background facts are as follows:

4. The case concerns Flat 7 Lauriston Place, 150 Southchurch Avenue, Southend SS1 2PF ("the Property").

5. On 20 July 1990 the Applicant's predecessors in title granted a 199 year Lease from 25 March 1989 of the Property to Mr Saunders and Miss Sangwin as lessees. The Lease was registered on 8 August 1990.

6. On 14 September 2009 the Applicant was registered with freehold title to the Property.

7. On 17 September 2019 the Respondent was registered with leasehold title to the Property. He had purchased the Property as a buy-to-let investment on 5 July 2019, whereupon he let it on an AST on 8 July 2019. However after 6 or so days, the subtenant wished to surrender and the Respondent agreed. The Respondent says that this surrender resulted from there being no adequate lift access.

8. On 6 January 2020 a demand was made by the Applicant of the Respondent for a contribution to lift repair works in the sum of £8543.11, which he resisted paying.

9. On 1 June 2020 Ojums Apartments Ltd was incorporated. The nature of the business includes lettings. The Secretary is Adaobi Okeke, and the Respondent is the sole director.

10. The Respondent's case is that he could not let the Property on any ASTs for any continuous time, because subtenants were not interested in staying, unless there was a working lift.

11. Therefore, the Respondent began to list the Property as available to the public on short term agreements, on various websites including Air BNB, Vrbo, TripAdvisor, Snaptrip, Skyscanner, Only Apartments, Mister B&B, Lastminute.com, Hotels.com, Gites.fr, booking.com, Big Cottages, and Snaptrip.

12. On or about 18 August 2022 the Applicant discovered the use of the Property as an Air BNB etc, and filed this application with the Tribunal.

The Application

13. The Applicant sought a determination of breach on 2 grounds: use as short term 'lets', and failure to pay the service charge demand for lift works.

14. On 25 August 2022 the Tribunal gave directions. These included a direction that the allegation of failure to pay the service charge demand was not suitable for determination on this kind of application, and the Applicant would need to file a separate s.27A Landlord and Tenant Act 1985 application.

15. It is common ground that such an application was not filed. The Applicant did, however, file a witness statement from its director Mr Laurence Freilich, dealing with both aspects of the original application.

16. The Tribunal procedural judge directed on 23 September 2022 that the Tribunal's only jurisdiction was the determination of the alleged use of the Property as an Air BNB etc.

17. On 19 October 2022 the Respondent produced his witness statement.

18. He has also filed a statement dated 18 October 2022 from Jacinta Ojukwu, his original subtenant.

The Lease

19. The following were express terms of the Lease, so far as material:

"2. The lessee you hereby covenants with the lessor and the company and with each of them as follows:

....

(6)(i) During the last ten years of the term hereby granted not to assign underlet or part with possession of the demised premises or any part thereof or the said fixtures (if any) without the previous consent in writing of the lessor such consent not to be unreasonably withheld

(ii) Not at any time to assign underlet or part with the possession of part only of the demised premises."

20. The Lessee also covenanted by clause 3, so far as is material:

"(4) To perform and observe all and singular the obligations and restrictions set out in the third and fourth schedules hereto

...

(8)(i) Not at any time to transfer assign underlet or otherwise part with possession of the flat (or car parking space) as a whole without (a) first obtaining from the intended transferee or underlessees the execution of a deed of covenant in the form set out in the sixth schedule hereto and (b) procuring the registration of any such proposed assignee or underlessee as a member of the company

...

(9) To produce to the solicitors for the time being of the lessor at their office upon every devolution or charge of the flat within one month of such devolution the transfer assignment charge mortgage counterpart underlease counterpart tenancy agreement probate letters of administration assent or other evidence of devolution or a certified copy thereof for registration by

them and to pay to the said solicitors their proper fees for each such registration including value added tax."

21. By clause 5 the lessor and lessee jointly covenanted, so far as is material:

"Provided always and it is hereby agreed and declared as follows:-

(1) In case at any time during this demise any dispute shall arise between the lessee and any other of the lessees of the lessor or the owners or occupiers for the time being of any other part of the development relating to the premises to them respectively demised or any other matters whatsoever in this deed contained then in every such case the dispute shall be referred for the determination and award of the surveyor for the time being of the lessor whose determination and award shall be final and binding on the lessee and any other parties to the reference…"

22. The Third Schedule contains "lessee's obligations and restrictions", including:

"1. Not to use the said flat nor permit the same to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence in the occupation of one family only and not to permit overcrowding…"

Issues

23. The Applicant's statement of case alleges the following relevant breach of the Lease: "Using the Property as an Airbnb".

The Hearing

24. The Respondent, represented by Counsel, raised a preliminary issue of whether the Tribunal had jurisdiction to entertain the application. The Respondent's submission ambushed the Applicant, it being a matter raised by Counsel only at the commencement of the hearing. No authority by way of case law was provided by the Respondent. Nevertheless, Mr Simon was in a position to make some representations, and we entertained the application.

25. The Respondent's argument was that s.168(5)(a) of the Commonhold and Leasehold Reform Act 2002 applied, because this case concerned a matter which "has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party".

26. In this regard, the Respondent relied on clause 5(1) of the Lease (set out in paragraph 21 of this decision, above).

27. The Tribunal had no hesitation in rejecting this oral application, for the following reasons:

    (1) The lateness of the application, which had caused prejudice to the Respondent in not being able to research the issue and make full submissions;

    (2) It is far from clear that clause 5(1) could be said to be a "post dispute arbitration agreement" within the meaning of s.168(5)(a). We consider that the relevant clause in the Lease is directed to disputes between lessees or other occupiers which may be referred to the lessor's surveyor for determination; it is not directed towards alleged breaches between the lessor and lessor;

    (3) In any event, even if we are wrong on (2), the Respondent had not sought a referral to arbitration (by any request made to the Applicant), nor could it be said that the dispute is "to be referred" to arbitration.

28. We therefore proceeded to hear the merits of the Application. The Tribunal asked Mr Simon:

    (1) To clarify what the Applicant alleged was the act(s) or omission(s) which constituted the alleged breaches;

    (2) To specify which clause(s) or paragraph(s) of the Lease was being breached in relation to each of those matters;

    (3) To direct the Tribunal to the evidence on the papers which evidenced the alleged act(s) or omission(s).

29. We record that, in advance of the hearing, the Tribunal had sent both parties 2 cases which it considered to be relevant and upon which submissions might be made: *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC) and *Triplerose Ltd v Beattie* [2020] UKUT 180 (LC).

The Applicant's case

30. Mr Simon clarified that the period of breach alleged was between June 2020 and November 2021.

31. He explained that the Applicant considered that the Respondent had underlet the Property to Ojums Apartments Ltd, in breach of clause 3(8) of the Lease, because the business of the company includes letting and the Respondent is its sole director. Mr Simon also pointed to the fact that the Respondent's evidence included an AST granted by "Ojums Apartments".

32. He contended if the agreement above was not an underlet, it was a tenancy. Therefore clause 3(9) was breached as well.

33. He further contended, relying on the *Beattie* case, that there was a direct comparison between the relevant covenant in that case and the covenant in the Third Schedule, paragraph 1 of the Respondent's Lease.

34. In *Beattie* the covenant had been within para. 18 of Schedule 4 of the lease, in these terms:

> "Not at any time to carry on or permit to be carried on upon the property any trade or business whatsoever nor to use or permit the same to be used for any purpose other than as a private dwelling house for occupation by one family at any one time."

35. Mr Simon further relied on paragraph 33 of the Upper Tribunal's decision:

> "On the facts found by the FTT the individuals who occupied the flat for weekends or other short periods after responding to Internet advertisements were not using the flat as a private dwelling house for occupation by one family at any one time. By committing that use Mr and Mrs Beattie were in breach of para 18 of Sch 4 of their lease. The first ground of appeal is therefore allowed."

36. Mr Simon also relied on an earlier case (followed in *Beattie*) called *Nemcova v Fairfield Rents Ltd* (citation above), in which the relevant part of the covenant was even nearer to the instant one:

> "Not to use the demised premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence."

37. In that case the Upper Tribunal had held:

> "53. 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."

38. Mr Simon contended that here the Respondent had allowed occupiers into occupation of the Property as short-term holiday accommodation, noting that it has a seaside location. He relied on the Respondent's own witness statement at paragraph 15, which includes the following words:

"Families lodge in my apartment on a weekly or monthly basis."

39. Mr Simon also relied on over 60 pages of listings from the various websites mentioned at the start of this decision, and by way of illustration pointed to the Airbnb listing from 18 August 2022, which includes reviews from persons dating from August 2021, September 2021, October 2021 and November 2021. The website advertisement includes the words "hosted by Ada & Anthony" and "joined in August 2019 – Professional host" and "Ada – Ojums Apartments responds within an hour".

40. Mr Simon further contended the website portals exhibited were not portals for ASTs; and that the listing date for the Respondent being a member on "MisterBandB" and TripAdvisor was June 2020. Hence the alleged commencement date of the alleged breaches.

41. Mr Simon accepted the Applicant knew the Respondent had a buy to let mortgage, but there is no such thing as a buy to let property; moreover, he contended that having such a mortgage is not a licence to do what the Respondent was doing with the Property. There could be no waiver of the covenant in paragraph 1 of Schedule 3 to the lease, over which the Respondent was riding roughshod.

42. Finally, he confirmed that he did not rely on any of the other clauses in the Lease which had been cited in the Application Form.

The Respondent's case

43. The majority of the Respondent's witness statement concerns the issue of the lift. However, it also the following paragraphs:

"15. There is no express prohibition for the property to be used for Airbnb. Knowing this and knowing that the property is a buy to let and not private residential property, I advertise my flat through Airbnb and booking.com. Although I will reasonably prefer renting out the property on an assured shorthold tenancy, I took this desperate for a temporary measure in order to keep paying my mortgage, maintenance and service charges. My decision was borne out of necessity. I took the temporary measure solely for the purpose of protecting the property and my livelihood. It is not a commercial rental Airbnb and no business is being transacted from the property. Families lodge in my apartment on a weekly or monthly basis. I was merely taking lodgers. I ensured that they do not constitute any nuisance. Nothing immoral was done.

My lodgers did not cause offence to my neighbours. I ensured that no interest was created by the lodgers that may affect my mortgage deed.

And

"20. The Applicant has always known that the property is a buy to let investment property. They knew from the beginning that I took in lodgers through Airbnb and booking.com on a temporary basis. They have never complained or said anything about this. Their silence further supported my reasonable belief that using my buy to let flat as an investment property is not a breach of any of their policies. This is a frivolous and vexatious claim. It only came about due to the fact that I refused to pay for the lift replacement charge. I felt I am being blackmailed. Assuming but not accepting that they only recently knew about my use of the property for Airbnb, it is reasonable to expect that they would have issued me with a warning notice pointing out the breach of my lease covenant."

And

"22…. I have never disputed the fact that I took in lodgers on a temporary basis through Airbnb."

44. The Respondent through his counsel reiterated that the Property was a buy to let property for the purpose of getting tenants, and that the Applicant was aware of this. The Respondent pointed to an e-mail from Mr Freilich dated 17 August 2022 which begins:

"I write further to my colleagues e-mail of 12:55 this afternoon following your conversation with him pertaining to the arrears that have accumulated on your buy to let investment property Flat 7, Lauriston Place."

45. However, when asked by the Tribunal, Respondent's counsel confirmed that his lay client was not advancing any argument of waiver of covenant.

46. When pressed to explain why this conduct was not a breach of paragraph 1 of the Third Schedule, Mr Nkanu contended that there was no evidence that the people in the Property were there on a short term basis, and at one point he even sought to contend that the Respondent had not had occupiers "shorter than months".

47. Respondent's Counsel also confirmed to the Tribunal that he was not seeking to distinguish the Upper Tribunal cases referred to above.

48. Mr Nkanu further confirmed that the Respondent does not live in the Property. Indeed, the Respondent asked to speak himself, and told the Tribunal that he is not allowed to live in the Property by the terms of his mortgage, and that the Applicant knows all this.

49. Respondent's Counsel in closing submissions submitted there was no evidence of a subletting arrangement between the Respondent and his limited company.

Determination

50. The Tribunal determines that the Respondent has breached the covenant in paragraph 3(4) and paragraph 1 of the Third Schedule to the Lease between June 2020 and November 2021, for the following reasons:

(1) Applying the cases of *Beattie* and *Nemcova* (above), we find that the occupiers of the Property over that period occupied the Property on a transient basis, and therefore the Respondent has failed to use the Property other than as a private residence in the occupation of one family only;

(2) Those occupiers did not share any occupation with the Respondent; they were not lodgers in the sense used in housing law, not least because he was not in physical occupation, by his own admission;

(3) We reject the Respondent's submission, in so far as advanced, that the occupiers were not occupying "shorter than months". Paragraph 15 of the Respondent's witness statement, sworn with a statement of truth, states that occupiers lodge on a weekly or monthly basis. Further, the Applicant's evidence is clear that occupation was short-term and transient, at shorter intervals than a month: see, for example, the 3 occupiers who left reviews in August 2021, followed by another occupier in each of September, October and November 2021, all of these on Airbnb alone. Accordingly, there was no degree of permanence to the occupiers' occupation;

(4) There was no argument of waiver of covenant advanced such that paragraph 1 of the Third Schedule to the Lease might be said to be unenforceable; in any event, we agree with the Applicant that mere knowledge that the Property was a buy-to-let investment, or awareness that there was a buy-to-let mortgage, could not amount to waiver of covenant by the Applicant without more;

(5) The reasons for the Respondent's actions cannot be used to colour the determination of breach of covenant; much of what the Respondent advanced might be relevant on any future application for relief from forfeiture, if such action is ever taken. Waiver of breach (as opposed to waiver of covenant) and considerations of relief from forfeiture are not for our determination: see *Triplerose Ltd v Patel* [2018] UKUT 0374, cited in *Beattie* at paragraph 38.

51. However, we do not make any determination of breach of clauses 3(8) or (9) of the Lease. We had insufficient details of the precise legal arrangement between the Respondent and his company; and we had no evidence of the actual grant of a tenancy or underlet between the two, although we can understand the Applicant's suspicions. The naming of "Ojums Apartments" on the tenancy agreement is not relevant to any determination of Ojums Apartments Ltd's involvement (if any) in the occupation by the occupiers who used the Property on an Airbnb basis; and in any event, the tenancy agreement does not bear the name Ojums Apartment Ltd, the address for the landlord is not the company's registered address, and the agreement is not signed by anyone purporting to be acting in the capacity of an officer of the company.

Costs

52. The Applicant having been successful, we order the Respondent to pay the Applicant's application fee of £100 and hearing fee of £200 within 14 days.

Name: Tribunal Judge S Evans **Date**: 12 December 2022.

Rights of appeal

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

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

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

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

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

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

Appendix 1

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

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

(2) This subsection is satisfied if—

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

(b)the tenant has admitted the breach, or

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

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

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

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

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

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

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

(6)For the purposes of subsection (4), "appropriate Tribunal" means—

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

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