FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LBC/2023/0021**
Property	**:**	**Basement Flat, 62 Holland Road London W14 8BB**
Applicant	**:**	**68 Holland Road W14 Ltd (Landlord)**
Representative	**:**	**Ms D Turley**
Respondent	**:**	**Claude-Stephanie Ngingha (Tenant)**
Representative	**:**	**Mr Panton of Counsel**
Type of Application	**:**	**Breach of covenant**
Tribunal Members	**:**	**Judge F J Silverman MA LLM** **Ms S Phillips MRICS**
Date and venue of Hearing	**:**	**Albert Place, London WC1E** **04 July 2023**
Date of Decision	**:**	**31 July 2023**

DECISION

The Tribunal makes a declaration that the Respondent Tenant has been in breach of covenant 14 of Schedule 5 Part 1 of the terms of her lease.

Reasons

1. The Applicant landlord filed an application with the Tribunal on 20 April 2023 seeking a declaration that the Respondent tenant was and remained in breach of the covenants of her lease. Directions were issued by the Tribunal on 11 April 2023.

2. The hearing took place on 04 July 2023 at which the Applicant was represented by Ms D Turley, a Director of the Applicant company and the Respondent by Mr Panton of Counsel. The Respondent, who does not currently live in the UK, was not present and had been unable to obtain permission to attend the hearing by a video link from her current location.

3. In accordance with current Practice Directions the Tribunal did not make a physical inspection of the property. The issues in the case were capable of resolution without a physical inspection of the property.

4. The Tribunal heard evidence form Ms Turley on behalf of the Applicant and read Ms Ngingha's statement on which less reliance could be placed because she was not present and therefore her evidence could not be cross-examined. The Tribunal declined to accept a second witness statement from her which was presented at the commencement of the hearing having been served on the Applicant the previous evening. The Tribunal had not been served with the document and it considered that it would be unfair to allow the Respondent to rely on this statement in circumstances where the Applicant has not been given a chance to respond to its contents. Electronic bundles of documents filed by both parties were read by the Tribunal prior to the hearing and relevant page numbers are referred to below.

5. The Applicant landlord is the freeholder of the building known as 62 Holland Road London W14 8BB (the building) which comprises five self-contained flats. The Applicant company is a tenant run freeholder/management company of which both the Applicant and Respondent are Directors. The Respondent is the tenant of the basement Flat (the property) and normally resides there.

6. The lease under which the Respondent holds the property is dated 18 February 1981 (the lease) (page 19) and was made between Euraglen Ltd and (1) and Ninebarn Ltd (2).

7. Covenant 14 of Schedule 5 Part 1 of the lease reads as follows: *"(14) Not to hold on any part of The Demised Premises any sale by auction nor to use the same or any part thereof nor allow the same to be used for any illegal or immoral purposes but only to use the same as a self-contained residential flat with appurtenances in one family occupation only."*

8. In August 2022 the Respondent informed the Applicant that she would be moving abroad to take up a job opportunity and was looking to rent out her flat for a few months (page A32). Sub-letting of the whole property is permitted by the lease.

9. It is common ground between the parties that the Respondent sub-let the property to a tenant who then rented out the property as an AirBnB. Notice of the sub-letting was not notified to the Applicant as it should have been under the terms of the lease. The Applicant argued that the use of the property as an AirBnB offended against the residential user by one family provision contained in the lease.

10. The nature of the sub-letting was discovered by the Applicant when one of the AirBnB occupiers rang the wrong doorbell in the building when looking for the basement flat.

11. In the ensuing discussions between the Applicant and Respondent it appears that the Respondent initially conceded the breach in that she agreed to give notice to her sub-tenant to end the tenancy and to arrange a new tenant for early 2023 (page A42). However, this promise was not fulfilled and the property continued to be used for AirBnB lets.

12. The Applicant was anxious to resolve the situation not least because the short lets vitiated the insurance for the whole building.

13. As the matter remained unresolved in January 2023 the Applicant's solicitor sent a letter to the Respondent asking her to admit the breach. There was no response either to this letter or to a follow up letter in the same terms (pages A55-56).

14. The sub-tenant vacated the property on 30 June 2023. The alleged breach was therefore remedied as from that time. Despite the remediation of the alleged breach the Applicant wished to continue with their current application in order to establish whether or not the Respondent's actions had constituted an actionable breach of covenant. The fact that a breach has been remedied before the Tribunal hears the application does not affect its jurisdiction to make a declaration under s168(4) Commonhold and Leasehold Reform Act 2002.

15. In her defence it was argued for the Respondent that the use of the property by different persons on very short lets was still within the 'one family' restriction in the lease and that all the short lets had been 'residential'. This argument is not entirely convincing in the light of the AirBnb advertisements shown to the Tribunal which specifically say that the property is suitable for up to 9 persons at any one time (page 94). The number of reviews of the property (over 70 in a period of less than 6 months) also suggest that the property had not been used as a home for living in but rather as a short stay stop-over as an alternative to a

conventional hotel. This suggests that the property was being used by the sub-tenant to run an AirBnB business. There is no evidence that the sub-tenant ever occupied the property herself or use it as her home.

16. Mr Panton argued that the Respondent had not breached the covenant because she had not sub-let the premises for non-residential purposes. In this respect he referred to Westbrook Dolphin Square Ltd v Friends Life Ltd [2015] 1WLR 1713 which contains a discussion of the distinction between residential use and residential purposes. The Tribunal distinguishes Dolphin Square from the present case largely because the context in which the phrase 'residential purposes' was being discussed in Dolphin related to an entirely different context to the current circumstances, namely, the percentage of residential users in an enfranchisement case. The Tribunal takes the view that in the present case the phrase should be construed in its normal common sense meaning ie: a place where people live or make their home. Further, Dolphin concerned serviced apartments with average rentals of around 14 days or longer which is an entirely different scenario to the present case which concerns short lets of one or two nights only.

17. Similarly, the Tribunal rejects Mr Panton's reliance on Nemcova Ltd v Fairfield Rents Ltd [2017] L&TR 10 which uses the phrase 'private residence' which is not the same phrase as is used in the present case.

18. Counsel for the Respondent also referred the Tribunal to the definition of the expression 'residential premises' in s18(2) Landlord and Tenant Act 1954. That definition is used in the context of the statutory duty of tenants to give information to their landlords and in the Tribunal's opinion is of very little assistance to the matter under discussion.

19. The Respondent's representative also referred to the case of Bermondsey Exchange Freeholders Ltd v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Goeghehan Conway) 2018 WL 04619640 which is an unreported County Court appeal upholding the decision of the District Judge who granted an injunction restraining the use of a flat for short term lettings of the Air BnB type. In Bermondsey the appeal judge suggested that such short term lettings would offend against a 'residential use by one family only' type clause such as exists in the present case. Although this case does not create a precedent binding on the Tribunal it contains a set of circumstances not dissimilar to those in the present case and as such is persuasive, being the closest match of the three authorities relied on.

20. The sub-tenant Ms G Micke was a Director of a company whose business was arranging AirBnB lets for clients. She was therefore using the demised premises for business purposes (even though the end result of her business was residential short lets) and that use contravenes covenant 14 of the lease.

21. The wording of the covenant (above paragraph 7) places an obligation on the tenant not to '*allow*' the premises '*to be used*' other than for residential purposes. It is clear that the Respondent was aware of the nature of Ms Micke's business because she had been told about the user problem by her fellow Directors and must therefore have been aware that the use of the property by her sub-tenant was potentially in breach of the lease. By failing to act promptly to terminate the sub-tenant's unlawful use the Respondent had allowed the premises to be used in breach of covenant 14 and thus herself committed a breach of the covenant, such breach being remedied when Ms Micke vacated the property on June 30 2023.

22 The Law

Commonhold and Leasehold Reform Act 2002 s 168
No forfeiture notice before determination of breach
(1)A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2)This subsection is satisfied if—

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

(b)the tenant has admitted the breach, or

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

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

(4)A landlord under a long lease of a dwelling may make an application to a leasehold valuation 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.

Name:	Judge F J Silverman as Chairman	**Date:**	31 July 2023

Note:

RIGHTS OF 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 by email to rplondon@justice.gov.uk.
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.