FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00CN/LBC/2024/0003**
Properties	**:**	**Flats 3, 4, 4a, 5 and 6 York House, 9 Rotton Park Road, Birmingham, B16 9JH**
Applicant	**:**	**York House (Rotton Park Road) Management Company**
Representative	**:**	**Mr Jack Dillon (counsel) instructed by Sampson Coward LLP, Solicitors**
Respondents	**:**	**Simon Donald Currell (1) and Susan Carol Wadsworth (2)**
Representative	**:**	**Mr Simon Clegg (counsel) instructed by Browne Jacobson, Solicitors**
Type of application	**:**	**Application under s168 Commonhold and Leasehold Reform Act 2002 for a determination of a breach of a lease**
Tribunal members	**:**	**Judge C Goodall** **Mr G Freckelton FRICS** **Mr J Arain**
Date and place of hearing	**:**	**15 May 2024 at Centre City Tower Birmingham**
Date of decision	**:**	**29 May 2024**

DECISION

Background

1. This is an application for an order that the Respondents have breached the terms of the leases of five of the nine flats which are let on long residential leases at the property known as York House, 9 Rotton Row, Birmingham ("the Property"). The five flats about which this application is concerned are flats 3, 4, 4a, 5 and 6 (collectively "the Flats", and individually defined as "Flat 3" etc).

2. The freehold owner of the Property is the Applicant in these proceedings.

3. The current legal title to the leasehold interest in the Flats is vested in the First Respondent. By orders made in the Birmingham County Court under claim numbers G30BM098 and J01BM951, the First Respondent was declared to hold the legal and beneficial interest in the Flats for the Second Respondent.

4. The whereabouts of the First Respondent are unknown and he has not participated in these proceedings.

5. The application was made in August 2023. The case came on for hearing on 15 May 2024 at the Tribunal Hearing Centre in Birmingham. The Applicant was represented by Mr Jack Dillon, and the Second Respondent by Mr Simon Clegg, both of counsel.

6. The Tribunal heard oral evidence from Mr Paul Church and Mr Alex Watson for the Applicant, and from Mr Clive Wright and the Second Respondent herself for the Second Respondent.

7. This document sets out the determination made by the Tribunal and the reasons for our determination.

The Property

8. York House is located on a corner plot at the intersection of Rotton Park Road and York Road, just off Hagley Road in Edgbaston, Birmingham. It is a substantial three storey domestic residence which has been converted into nine flats. Flats 1, 2, and 3 are on the ground floor. Flats 4 and 4a are on the first floor. Flats 5, 6, 6a, and 7 are on the second floor.

The leases

9. Details of the leases of the Flats ("the Leases") are shown in Table 1 below:

Table 1

Flat	Date of leases	Term
3	6 November 1964	99 years from 24 June 1964
	10 December 2007	6 Nov 1964 lease extended to 125 years from 24 June 1964
4	14 February 1997	99 years from 24 June 1964

4a	15 December 1964	99 years from 24 June 1964
	17 December 2007	Unknown
5	12 November 1964	99 years from 24 June 1964
6	3 December 1984	99 years from 24 June 1964

10. The later lease for Flat 4a was missing and we were told there is no copy at the Land Registry. Both parties were content for us to assume that it was almost certainly a lease extension and that it did not vary or discharge the covenants contained in the 1964 lease.

11. All the Leases contained a covenant by the lessee to observe and perform the covenants contained in Schedule 1 of the Leases (clause 2(ii)).

12. Paragraphs 1 and 2 of Schedule 1 in all the Leases are in these terms:

> "1 Not to use the Flat nor permit the same to be used for any purpose whatsoever other than as a private dwelling house or strictly professional purpose which latter purpose must be first approved of in writing by the lessor nor for any purpose from which a nuisance can arise to the owners lessees and occupiers of the other flats comprised in the Mansion or in the neighbourhood nor for any illegal or immoral purpose. ("Covenant 1")
>
> 2 Not to do or permit to be done any act or thing which may render void or voidable the insurance of the mansion or may cause an increased premium to be payable in respect thereof." ("Covenant 2")

13. The leases also contain a covenant by the lessor to impose similar covenants in leases granted of other flats in the Property.

Allegation of breach

14. In the application, the first allegation of breach is that all the Flats are, and have been at various times for a considerable period, being used for short term Airbnb lettings in breach of covenant 1 in the First Schedule.

15. The second allegation of breach is that the Airbnb use has resulted in or is likely to result in an increase in the insurance premium, in breach of covenant 2 in the First Schedule.

The facts

16. From the witness statements and oral evidence adduced, we find the following facts.

17. The freehold of the Property was purchased in around 1979 by Roger Currell, who is the father of the First Respondent, Simon, and the former husband of the Second Respondent. He and the Second Respondent married in 1973 and divorced in 1978. The First Respondent is their child,

and he was born in 1973. The Second Respondent remained on good terms with Roger after their divorce.

18. Following his divorce from the Second Respondent, Roger remarried. He had two daughters, Fiona (born 1981) and Christina by that marriage.

19. As well as owning the freehold, Roger owned the leasehold interest in various Flats at various times. Roger purchased Flat 4 in around 1997 and lived there until his death in late 2023. During the hearing, Mr Dillon conceded that he could not seek a section 168 determination in respect of Flat 4.

20. The history of the early acquisition of the Flats is confused and the Tribunal does not intend to make findings concerning who purchased which Flat and when. Suffice it to say, that by 1997, Roger appears to have become the legal owner of all the leasehold interests in Flats 1, 2, 4, 4a and 6a.

21. Roger was a member of Lloyds, the insurance market. A significant call upon his finances in the sum of around £1.5m was made in around 1997. A bank guarantee for his liabilities was called in and he was forced to sell the Property. To keep it in the family, Roger arranged for the freehold and his leasehold Flats to be sold to the First Respondent. Roger was to reside rent free in Flat 4. He continued to have a role in the management of the Flats.

22. In 1999, Roger was declared bankrupt.

23. In 2004, the First Respondent purchased Flat 6. The Second Respondent became the tenant under an assured shorthold tenancy. Thereafter (no date has been provided, but probably not long after 2004) flats 3 and 5 were likewise acquired by the First Respondent.

24. The Second Respondent then (from around 2004) started to be involved in the management of the Flats owned by the First Respondent and managed by Roger. Her case is that she and Roger managed them together until around 2011, after which she became the main (and possibly sole) manager.

25. The management undertaken included significant work in Flat 3 to create three small flats within that Flat. The Second Respondent's case is that this work took place in 2003 (paragraph 12 of her witness statement) but in her Legal Submissions, the date is put as between 2004 and 2005.

26. Similarly, work in Flat 5 was undertaken at some point around 2004/05 to create two flats within it.

27. At some point after the works to the Flats, Roger and the Second Respondent started to let the Flats out on a short term basis. The Second Respondent readily admits that whilst some lettings were on assured shorthold tenancies, others were shorter, varying from a few nights or a

week or two, or as holiday lettings. These activities would appear to have technically been a breach of covenant 1 in the First Schedule of the leases.

28. We accept this evidence. It would have been very much in the interests of Roger and the Second Respondent to earn from the Flats. We consider that the conversion of at least Flat 3 did take place, and that would have created three flats where there was one, which would have been suitable for short lets. That is what Roger said in his defence to the 2011 litigation, and we do not have any contrary evidence.

29. The First Respondent probably had very limited contact with the activity at the Property from at least 2004 onwards, as he had moved to Romania in 1995 and he only returned home approximately twice a year, until he ceased to return at all from around 2014.

30. Nevertheless, the Second Respondent is adamant that the First Respondent, as freeholder, consented to the arrangements for short term occupations of the Flats. Her case is that although he was abroad, they were in contact on a daily basis. She said she explained everything that she and Roger were doing with the Flats, and he was very happy about their activities.

31. Nobody has adduced any documented evidence of such consent to short term use of the Flats from the First Respondent. At best, the arrangement was oral.

32. It is the nature of that consent that forms the crux of this case.

33. The Second Respondent was asked by Mr Dillon whether she realised the importance of obtaining consent to allow lettings on a short term basis which might be in breach of the lease. She said she was aware that consent was necessary and important, but she did not feel she needed to ask the First Respondent for his consent in writing, as they were a family, and he was her son. Asking for written documentation to confirm that the First Respondent was content with the short lettings is not how families relate to each other.

34. Our finding is that between 2004 and 2011 (when there is clear evidence that the relationship between the First Respondent and Roger turned sour – see below), the First Respondent is highly unlikely to have confirmed, orally, that he consented to the Second Respondent using any of the Flats in breach of covenant 1 in the First Schedule of the Leases. Indeed, we think it is highly unlikely that the question was asked expressly. It is likely that, had he been asked to turn his mind to the question, he would not have objected to the Second Respondent and Roger letting the Flats on short term lets in breach of covenant 1.

35. Our reasons are that he was living abroad and compliance with restrictive covenants would have been far from his mind. We consider it would have been far from the Second Respondent's mind as well. Legal compliance

was much more Roger's issue than hers. He had been the owner of the Flats, and the deal when he sold them to the First Respondent was that he would be the manager.

36. We did not find the Second Respondent to be a reliable witness. Her answers to questions were highly guarded and our impression was that she gave answers to questions that suited her case, rather than answers that always bore the ring of truth.

37. Frankly, we consider it highly unlikely that there was ever a conversation between Roger, the First Respondent, and the Second Respondent concerning whether a lease covenant was being breached, and if so what action should be taken to regularise the position. Certainly, the Second Respondent did not provide any details of the conversations that took place regarding consent, and her answers in cross examination were vague and unconvincing.

38. But we see no reason to believe that the First Respondent would have refused consent had he been asked for it. It was in his interests for the Flats to produce an income to support his mother and father, and he was not disadvantaged by them maximising the income that could be derived from the Flats.

39. In around 2011, the First Respondent engaged in litigation against Roger concerning the Flats. The Tribunal has a copy of Roger's defence to that litigation, which suggests the litigation was seeking possession of Flat 4. At the time, Roger's daughter Fiona was living at Flat 4a, and it appears the First Respondent was also seeking possession of that Flat.

40. The outcome of this litigation is unknown, save that there is no evidence that either Roger or Fiona ceased possession of the Flats they were occupying.

41. The ownership of the freehold, however, did change. On 14 January 2013, the freehold was sold by the First Respondent to the Applicant, a company formed by Mr Alex Watson and Mr Carwyn Beswick. They also bought two of the flats (though they were initially going to buy seven leasehold flats) as well. We do not know which they bought, but presume these were Flats 1 and 6a.

42. Turning back to the manner in which the Flats were let which we set out in paragraph 27 above. There is some evidence that by 2013, it was not the First Respondents understanding that short lets potentially in breach of covenant 1 were being granted. Mr Watson gave evidence that he understood the Flats were all let on shorthold tenancies when the Applicant purchased the Property. He appended copies of preliminary enquiries he had received from the First Respondent's solicitors when the Applicant purchased the freehold, to his witness statement.

43. The answers to those enquires (which were answered in respect of all the Flats) confirm that the First Respondent understood the Flats, in around 2013, were all being let on assured shorthold tenancies (see answers to supplementary enquires questions 5.1 and 5.2). This answer is of course contradictory to the Second Respondent's evidence that from around 2004, short term lets were being arranged.

44. Our view is that our conclusion in paragraph 28 above remains valid. The fact that the First Respondent would appear to have given arguably inaccurate answers to the Applicants preliminary enquiries supports and reinforces our conclusion in paragraph 37 that the First and Second Respondent and Roger are together unlikely to have had detailed technical conversations about compliance with covenant 1, or indeed, precisely who was renting which Flat and on what basis.

45. We note that there is no evidence at all to the effect that the Applicant became aware of Airbnb use of some or all of the Flats on its purchase of the freehold.

46. On 6 April 2016, the shares in the Applicant owned by Mr Watson and Mr Beswick were purchased by the current owners. Loosely, the current shareholders are all members of the Church family, who have property interests. Mr Paul Church, who gave evidence, is the father of Tamara Church, who was the controlling shareholder in 2016, but who sadly passed away in 2022. The shares are now owned by Mr Church's grandsons, who are also the current directors of the Applicant.

47. So far as the Tribunal can ascertain, the manner in which the Property operated did not change materially on the sale of the freehold by the First Respondent, save that shortly after there is evidence that the Second Respondent began to expand the short term / holiday letting clientele by advertising on Airbnb.

48. Regarding her own accommodation, the Second Respondent's evidence was that she has lived in various flats at the Property since around 2004. Initially she rented Flat 6 (from 2004). Then she moved to Flat 3 and then to Flat 5, which she considered as "my flat". The date of that move is not known. Around 2020 or 2021, she moved to Flat 4a. This was previously occupied by Fiona Currell. The Second Respondent believes that Fiona had rented Flat 4a from around 2012 – 14, but there is evidence in Rogers's defence to the 2011 litigation that Fiona was renting Flat 4a in 2011, and that the First Respondent was seeking possession of it then.

49. It is probable therefore that Fiona had rented Flat 4a earlier than 2011. The Second Respondent said she had lived there for 15 years, so it could have been as early as 2005, and it seems likely that she had continued to live there until 2020 or 2021 when she moved out and the Second Respondent moved in.

50. Whilst living at Flat 4a, the Second Respondent admitted that on approximately four occasions she had allowed Flat 4a to be let on Airbnb whilst she had been away.

51. Dealing now with the Airbnb use, Mr Paul Church's evidence was that on 4 April 2023, the Applicant's agent reported that they suspected the Flats were being used for lettings on Airbnb. Thereafter, the Applicant investigated this and ascertained that Airbnb are advertising, as at the date of the enquiry, seven units of accommodation available for booking at the Property, being:

- Quirky Victorian Flat for up to 6 guests
- Marrakesh – Small Studio
- Huge LOFT apartment – 3 bedrooms
- Cheeky Fun Studio
- Mexico – Privat Studio
- Frenchy goes cheeky – Private Studio
- Totally Private Tropical Cabin

52. A number of documents from the Airbnb web-site are appended to Mr Church's witness statement. These evidence enquiries and the web-site offerings in respect of the units described above between April 2024 and early 2024. The units are said to be co-hosted by Ineta and Susan. Ineta is said to have been a host for one year. Susan is said to have been a host for eight years.

53. The Second Respondent's evidence is that the first two units (Quirky and Marrakesh) are subdivisions of Flat 5, that Cheeky Fun Studio is Flat 4a, and that the final three units (Mexico, Frenchy, and Tropical Cabin) are the three subdivided units in Flat 3. That leaves Huge LOFT, which in our view is Flat 6. We so find.

54. The Second Respondent does not dispute that these flats were available on Airbnb as alleged. We so find. We also find that it is highly likely that she is the host described as "Susan" and that accordingly she has been an Airbnb host in relation to the flats at the Property for around eight years.

55. The Applicant has adduced evidence that in 2024 it disclosed to its insurer its belief that the Property was being used for Airbnb hosting. In the insurance schedule for the insurance period 18 March 2024 to 22 February 2025, the insurer has imposed an additional excess of £5,000.00 for each and every loss deductible on all properties within the portfolio being utilised for Airbnb.

56. The Applicant raised issues about the installation of a laundry area in the common parts of the Property, and installation of keysafes. We did not find that evidence of assistance in determining whether the leases had been breached.

57. The Second Respondent adduced evidence from a Mr Clive Wright who lives in Flat 2. His evidence was that he formed a friendship with the lessee of Flat 2 some 40 years ago and then moved away from Birmingham. He returned regularly to visit friends and watch his football team play and he regularly stayed in one of the Flats, facilitated by Roger and the Second Respondent. This evidence is entirely consistent with the Second Respondents story about making the Flats available for short lets, but does not assist us in our issue of determining whether consent to grant short lets was granted by the First Respondent and in what manner.

58. The Second Respondent's bundle also included a witness statement from Ms Ineta Liepina. She was unable to attend the hearing due to illness. Her evidence is that she was the tenant of Flat 5a from September 2012 until June 2020. She stated that she assisted the Second Respondent with administration and practical arrangements relating to the Property. She confirmed that there was a mix of Airbnb tenants, one night bookings, students, and building or other professional needing to stay over in Birmingham for work. We have no reason to doubt this evidence, and Mr Dillon did not urge us to disregard it.

Law

59. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides:

> **168 No forfeiture notice before determination of breach**
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> (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—
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> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
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> (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 the 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.

60. An application to the Tribunal for a determination that a breach of a lease has occurred is not an application for a determination of whether that breach has been waived. Waiver is for the County Court to consider if relief from forfeiture is sought (*Bedford v Paragon Asra Housing Limited* [2021] UKUT 266 (LC)).

61. On the question of what constitutes use of a private dwelling-house, in paragraph 20 of *Triplerose Ltd v Beattie* [2020] UKUT 180 ("*Triperose")*, the Upper Tribunal said:

> "These … authorities … demonstrate that the use of residential property for short term occupation by a succession of paying guests has always been treated as a breach of a covenant requiring use only as a private residence or dwellinghouse. Occupation by a sub-tenant who uses the property as his or her own private residence is permitted, as may be occupation by a group of individuals living collectively, or by non-paying guests, family members, or servants occupying with the tenant. But short-term occupation by paying strangers is the antithesis of occupation as a private dwellinghouse. It is neither private, being available to all comers, nor use as a dwellinghouse, since it lacks the degree of permanence implicit in that designation."

Discussion

62. Mr Dillon sought only to persuade the Tribunal that lettings of the Flats on Airbnb over the last eight years is the breach in respect of which his client seeks a determination. He accepted that on the basis of the Second Respondent's evidence, he could not sustain the application in respect of Flat 4. He therefore sought a determination of breach of covenant 1 in the First Schedule to the leases for Flats 3, 4a, 5, and 6 to the effect that breach of the covenant had taken place for eight years.

63. The Second Respondent has admitted Airbnb use for the last eight years, and is therefore not able to challenge the application, save to the extent that she obtained consent for the lettings.

64. It is not arguable, and indeed was not argued, that Airbnb use complies with covenant 1. *Triplerose* is clear authority for the proposition that Airbnb use is a breach of covenant 1.

65. Mr Clegg, for the Second Respondent, argued that the application should be rejected because, though Airbnb lettings are admitted, there was either a discharge of the covenant, or waiver, or estoppel based upon *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 ("*High Trees*") arising from the First Respondent giving consent to such use from 2004. He said that until consent was withdrawn, the Second Respondent was entitled to rely upon it.

66. Essentially, Mr Clegg's argument falls at the first hurdle, because in our review of the facts, we determined that consent was not granted. The best that can be said, from the Second Respondent's perspective, is that the First Respondent turned a benign blind eye to the manner of the lettings.

67. If we are wrong, in our view benign acquiescence in a breach of covenant cannot operate as a discharge or variation of the covenant (which is absolute). Quite apart from the evidential issues, a lessor generally cannot give consent to a discharge or variation of a lease without itself being in breach of its own covenant to the other lessees in the Property.

68. As identified above, the Tribunal is not concerned about waiver in this application.

69. An argument based upon promissory estoppel (*High Trees*) is unlikely to succeed where the ownership of the freehold has changed hands and the current freeholder was not aware of the original promise.

70. If we are wrong in determining that none of the defences raised by Mr Clegg can operate to defeat the application, we would still have considerable difficulty in determining that any consent that was granted to ignore covenant 1 could bind a purchaser without notice of the consent.

71. For these reasons, we do not consider there is a proper legal challenge to the Tribunal determining that a breach has occurred.

72. We need to be as precise as we can in identifying the breach.

73. We need to be clear that neither party made any attempt (presumably because it was impractical or unknown) to identify specific clients who had stayed in the Flats for a specific period, which occupation had been a breach of covenant 1. The evidence is that there have been a variety of occupants, some of whom, such as Ineta in respect of Flat 5a, and Fiona in respect of Flat 4a, and Alicia Gaska in respect of Flat 3, whose occupation is extremely unlikely to have breached covenant 1. We are therefore unable to specify when and for what periods covenant 1 has been breached. The breaches may have been occasional, regular, or constant. We have not been told and do not know.

74. So far as covenant 2 is concerned, Mr Dillon urged us to find that this covenant has been breached. He relied upon the documentary evidence we have identified in paragraph 55.

Decision

75. In respect of Flats 3, 5, and 6, we find that since 2016 (i.e. the last eight years), the Second Respondent (who is the beneficial owner of these Flats) has breached covenant 1 by permitting or arranging for the Flats to be used by occupants who were not occupying the Flats for the purpose of a private dwelling house on unknown occasions.

76. In respect of Flat 4a, we find that since 2020 (when Fiona Currell left), the Second Respondent has breached covenant 1 by permitting or arranging the Flat to be used by occupants who were not occupying the Flat for the purpose of a private dwelling-house on four occasions, for a short time on each occasion.

77. In respect of Flat 4, we find that there has been no breach of covenant 1.

78. In respect of covenant 2, we find that in 2024 the Second Respondent, in letting Flats 3, 4a, 5 and 6 (but not Flat 4) at various times on Airbnb, may have caused an increased premium to be payable in respect of the Property, and so was in breach of covenant 2.

79. We make no finding against the First Respondent. Not only can he not be found so that he did not participate in the hearing, but there is no evidence that he allowed, permitted, or connived in the Airbnb lettings.

Appeal

80. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)