



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

Case reference : **CHI/29UC/LBC/2023/0020**

Property : **Flat 6, Millers Court, Borstal Hill,
Whitstable, Kent CT5 4QB**

Applicant : **Ashlar Investments Limited**

Representative : **Girlings Solicitors**

Respondent : **Simon Petts**

Type of application : **Determination of breach of covenant
pursuant to section 168(4)
Commonhold and Leasehold Reform
Act 2002**

Tribunal members : **Judge H. Lumby**

Venue : **Paper determination**

Date of decision : **22 May 2024**

DECISION

Decisions of the tribunal

The tribunal determines that the Respondent is in breach of the provisions of clause 2 and paragraph 1 of the Second Schedule of his lease of the Property.

The application

1. The Applicant seeks a determination pursuant to section 168(4) Commonhold and Leasehold Reform Act 2002 (the “2002 Act”) as to whether the Respondent is in breach of clauses 2, paragraph (1) of the Second Schedule and clause 3(d) of his lease of the Property.
2. The relevant provisions relate to the use of the Property and the payment of costs in relation to the preparation of a notice pursuant to section 146 of the Law of Property Act 1925, which the Applicant contends has been breached by the Respondent.

The background

3. The Property is a flat in a purpose built block.
4. The Respondent is a long leaseholder, holding his interest pursuant to a lease dated 19 October 1988 for a term of 99 years from 25 March 1988. The freehold reversion to the lease is vested in the Applicant.

The lease

5. Clause 2 of the Respondent’s lease of the Property contains a covenant by the tenant as follows:

“THE Lessee hereby covenants with the Lessor and with the owners and the Lessees of the other flats now or hereafter comprised in the Building that the Lessee and the persons deriving title under the Lessee will at all times hereafter observe the restrictions set forth in the Second Schedule hereto”

6. Paragraph 1 of the Second Schedule of the Respondent’s lease of the Property contains a covenant by the tenant as follows:

“Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private residence and car parking space in the occupation of one family only nor for any purpose from which a nuisance can arise to the owners lessees and occupiers of the other flats comprised in the Building or in the neighbourhood or for any illegal or immoral purpose”

7. Clause 3(d) of the Respondent’s lease of the Property contains a covenant by the tenant as follows:

“to pay all costs charges and expenses (including Solicitors costs and surveyors fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court”

Tribunal determination

8. This has been a determination on the papers. The documents that the tribunal was referred to are in a bundle of 63 pages, the contents of which the tribunal have noted. The bundle contained the original application, the tribunal’s directions dated 31 January 2024, the Applicant’s statement of case, the Respondent’s lease, title information, emails between the Respondent and the Applicant’s representative, a statement of case from the Applicant and a print out from a website. A statement of costs has also been separately provided by the Applicant.
9. Having considered all of the documents provided, the tribunal has made determinations on the issue as follows.

Applicant’s case

10. The Applicant has provided a statement of case. Its case is that the Respondent is in breach of the terms of his lease by unlawfully sub-letting the Property as a holiday home and advertising it for use on popular sites such as Airbnb.com and Booking.com. In addition, it argues that the Respondent is in breach of the terms of his lease by failing to pay costs incurred by the Applicant in enforcing the terms of his lease.
11. In its statement of case, the Applicant refers to clause 2 of the lease, which is a covenant by the tenant to comply with the Second Schedule to the lease. Paragraph (1) of the Second Schedule is a covenant by the tenant not to use the Property other than as a private residence. It contends that the use of the Property for holiday or short term lets is in breach of this and refers to the decision in *Nemcova v Fairfield Rents Ltd UKUT 303 (LC)* where it was held by the Upper Tribunal that “...for the 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”.
12. The Applicant argues that the Respondent has advertised the Property since March 2019 on Airbnb, with over 400 reviews left for the Respondent. In addition, it claims that the Respondent has set up a separate website called Sixmillerscourt.co.uk with links to the Airbnb site.
13. It contends that on 26 May 2023, Girlings wrote to the Respondent requesting that he ceases advertising the Property on Airbnb and that the Respondent replied on 21 June 2023 accepting that the Property had been used for Airbnb lets and confirming that the use would cease in September 2023. Girlings replied by email confirming that all such use should cease in

September 2023 and demanding payment of costs pursuant to clause 3(d) of the lease. The Applicant says that this email and a follow up on 11 July 2023 were not replied to by the Respondent.

14. The Applicant argues that the Property continued to take bookings from Airbnb and was also advertising the Property on Booking.com.

Respondent's case

15. No submissions have been received from the Respondent.

The tribunal's decision

16. The issue to be determined is whether the Respondent is in breach of the specific covenants in the Lease.

Use of the Property

17. The Applicant asserts that the Property is being advertised through Airbnb, the separate Sixmillerscourt.co.uk website and Booking.com and there are numerous reviews. However, no evidence that the Property is advertised on Booking.com has been provided beyond a picture of an unidentified flat to let. In addition, there is no evidence of the reviews referred to or confirmation that they relate to the Property. Likewise, there are only assertions of booking been made after 1 September 2023, no evidence of this has been provided.

18. Advertising the Property to let on the various sites does not of itself amount to a breach. Instead, it is the actual letting which could amount to a breach. The only evidence provided by the Applicant of this breach is in the email from the Respondent on 21 June 2023. In that email, he clearly accepts that he has been using the Property as an Airbnb, stating:

“On the Subject of Airbnb, yes I have clearly been using it to break even whilst I was looking for work. I was looking to stop doing it in September as I now have a job and income again and wish to start a home there. It has also been used by my friends, family including my mother for 3 months who is also in poor health and has had to move to be closer to me.”

19. The Applicant argues that this is an admission of breach of the covenant in paragraph 1 of the Second Schedule not to use the Property otherwise than as a private residence. The tribunal notes that the Respondent only confirms that he has used the Property for lettings through Airbnb, as opposed to admitting any breach of the clause. The issue to be determined is therefore whether lettings pursuant to bookings on Airbnb are a breach of this covenant.

20. The Applicant has referred to the case of *Nemcova v Fairfield Rents Ltd* and the requirement that for a property to be an occupier's private residence, there must be a degree of permanence about the occupation. It is clear from the Respondent's email on 21 June 2023 that he was not in occupation of the Property himself. By letting the Property on Airbnb, the tribunal determines that the Property was not being used as the Respondent's private residence. However, the covenant states that the tenant is not "to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private residence and car parking space in the occupation of one family only". This does not require the tenant to use it as its own private residence; instead, it requires the occupiers to use it "as a private residence ... in the occupation of one family only". The fact that there are no restrictions on assigning or underletting the whole of the Property prior to the last seven years of the term is consistent with this analysis; if the covenant required occupation by the tenant then it would not be possible to underlet.
21. As a result, there is no prohibition on letting the Property through Airbnb, provided that the occupation by the occupier had a sufficient degree of permanence to be able to conclude that the occupier was using the Property as his private residence. In this case, the Applicant asserts that the Respondent has had over 400 reviews on Airbnb since 2019, suggesting only short term lets. This is consistent with the sixmillerscourt.co.uk website shown in the bundle, which states the Property is "Available to let for short stays and weekends". The Respondent, by not responding to the Applicant's application, has not challenged any of the evidence put forward by the Applicant. In the email from the Respondent on 21 June 2023, he accepts that he has been using it for Airbnb lettings and in addition for use by friends and family "including my mother for three months who is also in poor health and had to move to be closer to me".
22. Taking all these factors into account, the tribunal concludes, on the balance of probabilities, that the Respondent has allowed the occupation of the Property by occupiers pursuant to Airbnb bookings on short term lets. The fact that his website allows occupation for "short stays and weekends" is evidence of the short term nature of these occupations. It determines that such occupations are not sufficient to be occupation as a private residence. As a result, the tribunal determines that the Respondent has breached the covenant in its lease not to use the Property otherwise than as a private residence.
23. As a result, the tribunal determines that the Respondent is in breach of clause 2 and paragraph (1) of the Second Schedule of his lease.

Non-payment of costs

24. The Applicant argues that its solicitors have demanded payment of its fees in connection with the enforcement action against the Respondent and the non-payment of these is a breach of clause 3(d) of the Respondent's lease.

As evidence, it points to the 26 May 2023 letter from Girlings to the Respondent demanding payment of costs of £750 plus VAT and its email dated 30 June 2023 saying that these costs have now risen to £1,050 plus VAT, a demand repeated by a further email on 11 July 2023.

25. The tribunal considered the wording of clause 3(d). It requires the tenant to pay all costs incurred by the landlord (including solicitors' costs) "for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925". The tribunal notes that the Respondent's lease does not contain an indemnity by the tenant to the landlord in relation to any breach of covenant or general right to recover the costs of enforcement. As a result, the Applicant has had to rely on clause 3(d) as its route to recover these costs.
26. The tribunal notes that clause 3(d) is limited to specific costs – they must be incurred "for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925". The tribunal accepts that the Applicant's application to the tribunal is intended to lead to the preparation and service of a section 146 notice. However, it finds that the costs demanded related to requiring the Respondent to comply with his lease covenants. Girlings required Airbnb lettings to cease by 1 September 2023 or action towards forfeiture would be taken. These are not costs relating to the preparation and service of a section 146 notice. As such, the non-payment of these fees was not a breach of clause 3(d) and so not a demand the Applicant's representative was entitled to make.
27. As a result, the tribunal determines that, on the evidence before it, the Respondent is not in breach of clause 3(d) of his lease.

Costs

28. The Applicant in its application stated "it requires ... Costs of this application". It has submitted a statement of costs to the tribunal. That schedule does not include the £100 application fee to the tribunal and so this element has not been considered by the tribunal.
29. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007, which states that costs shall be in the discretion of the Tribunal but subject to, in the case of this Tribunal, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "Rules"). The Rules then proscribe the discretion substantially.
30. The Rules provide that costs may be awarded to a party if another party has acted unreasonably or an award of wasted costs is appropriate. More particularly, the relevant provision in the Rules reads as follows:

13 Orders for costs, reimbursement of fees and interest on costs

The Tribunal may make an order in respect of costs only –

a) Under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

b) if a person has acted unreasonably in bringing, defending or conducting proceedings.....

31. The leading authority in respect of part (b) the above rule is the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Alexander* (and linked cases) [2016] UKUT 290 (LC). This lays down guidance of general application when considering such cases. The Upper Tribunal considered three sequential stages which should be worked through, summarised as follows:

Stage 1: Whether the party has acted unreasonably. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

Stage 2: Whether the tribunal ought (in its discretion) to make an order for costs or not. Relevant considerations include the nature, seriousness, and effect of the unreasonable conduct.

Stage 3: Discretion as to quantum. Again, relevant considerations include the nature seriousness and effect of the conduct.

The Upper Tribunal expanded on what constitutes “unreasonable conduct”. The Upper Tribunal said that an assessment of whether behaviour is unreasonable requires a value judgment and views may differ. However, the standard of behaviour should not be set at an unrealistic level. Tribunals must not be “over-zealous in detecting unreasonable conduct” and must use their case management powers appropriately. The Upper Tribunal referred to tests and comments from other case authorities.

32. The burden is on the applicant for an order pursuant to Rule 13 and where orders under r.13(1)(b) are to be reserved for the clearest cases.

33. Rule 13(1)(b) is quite specific that an order may only be made “if a person has acted unreasonably in ... defending or conducting proceedings”. Under the Rules, the word “proceedings” means acts undertaken in connection with the application itself and steps taken thereafter (Rule 26). Such an application does not therefore involve any primary examination of a party’s actions before a claim is brought (although pre-commencement behaviour might relevant to an assessment of the reasonableness of later actions in “defending or conducting proceedings”).

34. The Applicant has set out no basis or arguments as to why it should be awarded costs. The burden of proof in this case lay with the Applicant to prove that a breach had occurred and the Respondent is entitled to leave it

to the Applicant to make out its case. The Respondent's pre-application behaviour in letting the Property through Airbnb is only relevant in assessing the reasonableness of later actions in "defending or conducting proceedings". No such arguments have been presented by the Applicant.

35. The Applicant has not identified anything amounting to unreasonableness by the Respondent in defending the proceedings or in his conduct such as to merit a costs order. By not identifying any unreasonableness, it follows that the application for costs on the basis of acting unreasonably falls at stage 1. The tribunal therefore did not consider stages 2 and 3, there being no basis for doing so and so it makes no comment in relation to these.

36. The tribunal therefore determines that the Applicant's application for payment of its costs by the Respondent is refused.

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 rpsouthern@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.