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

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| **Case References** | **:** | **MAN/00BN/LBC/2023/0018 & MAN/00BN/LBC/2023/0019** |
| **Properties** | **:** | **Apartments 107 and 606 Chatsworth House, 19 Lever St, Manchester M1 1BY** |
| **Applicant** | **:** | **Adriatic Land 8 (GR2) Limited** |
| **Representative** | **:** | **LMP Law Limited<br>Ceri Edmonds (Counsel)** |
| **Respondent** | **:** | **Philip Leslie Walker** |
| **Representative** | **:** | **Taylor Rose MW<br>Arron Walthall (Counsel)** |
| **Type of Application** | **:** | **Commonhold & Leasehold Reform Act 2002 Section 168(4)** |
| **Tribunal Members** | **:** | **Tribunal Judge J.E. Oliver<br>Tribunal Member J. Elliott** |
| **Date of Determination** | **:** | **18th June 2024** |
| **Date of Decision** | **:** | **5th July 2024** |

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**DECISION**

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## Decision

1. The Respondent is in breach of the covenant contained within Clause 6.13 of the Leases in respect of Apartments 107 and 606 Chatsworth House, 19, Lever Street, Manchester.

2. The Respondent is not in breach of the covenants contains within Clauses 6.14 and 6.15 of the same Leases.

3. If either party wishes to pursue a claim for costs, that is to be made pursuant to Rule 13(5) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

## Application and Background

4. This is an application by Adriatic Land 8 (GR2) Ltd ("Adriatic") for a determination Philip Walker ("Mr Walker") has breached the covenants in the leases for Apartments 107 and 606 Chatsworth House, 19 Lever Street, Manchester ("the Properties").

5. Adriatic is the freeholder and Mr Walker is the lessor of the Properties. Mr Walker acquired his interest in the Properties on 3rd May 2002 and 28th June 2002 respectively. The leases ("the Leases") for the Properties are on similar terms.

6. The application to the Tribunal is dated 31st July 2023 and directions were issued on 21st February 2024.

7. The application was listed for a video hearing on 18th June 2024 without an inspection.

## The Law

8. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") states as follows:

   "A Landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for a determination that a breach of covenant or condition in the lease has occurred."

9. The Tribunal, in making such a determination, is limited to whether a breach has occurred. It does not have jurisdiction to consider the issue of waiver, a matter raised within this application. This is a separate matter for any subsequent court proceedings.

10. The Leases are to be construed as established by the Supreme Court in ***Arnold v Britton [2015] UKSC 36.*** Lord Neuberger at paragraph 15 stated:

    "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all*

*the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" to quote Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

11. Lord Neuberger continued at paragraph 17 as follows:

"*the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that language is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use on a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."*

12. In **Nemcova v Fairfield Rents [2016] UKUT 303 (LC); [2017] 1 P. & C.R. 4** at paragraph 4 HHJ Bridge said:

"*the assistance to be given from a prior decision of the courts which construes a similar provision in a particular way may be limited. Each lease is different; and so is each clause. It is necessary for considerable caution to be exercised when considering prior decisions as due weight being given to the context may lead to a different* conclusion."

## The Leases

13. The Leases for the Properties each contain the same covenants by the Respondent as follows:

    (i) Clause 6.13:

    "to use and occupy the Flat for residential purposes only and not to use or suffer the Flat to be used in any manner other that as aforesaid and in particular not to carry on or permit or suffer to be carried on in or from the Flat any trade business or profession whatsoever."

    (ii) Clause 6.14:

    "not to assign or underlet part of the Flat or occupation of part of the Flat as distinct from the whole."

(iii) Clause 6.15

"not to assign underlet or part with possession or occupation of the Flat except to an assignee or underlessee who complies with the provisions of the next following sub-clause as to the execution of the appropriate Deed of Covenant in the form set out in the Fourth Schedule."

(iv) Clause 6.16.1:

"Should the Tenant or any under-lessee desire to transfer or adding this Lease of the Flat or underlet the Flat (except in the case of an underletting for a period not exceeding three years).....

## The Hearing

14. At the hearing Adriatic was represented by Ms Edmonds, Counsel and Mr Walker by Mr Walthall, Counsel.

15. It was agreed by the parties there is no dispute of fact. It was acknowledged Mr Walker is the leaseholder of the Properties and has, for some years, let them on short-term lets. Mr Walker advertises the Properties on-line through Rooms4Now and My Places and is a director of both companies. The adverts show the Properties can accommodate up to 8 guests and be let for a period ranging from 1 to 75 days.

16. Adriatic advised it had commenced proceedings following complaints from other leaseholders within the development regarding the use of the Properties. They had written to Mr Walker asking him to desist from the short-term letting of the Properties upon the basis he was in breach of the covenant contained within Clause 6.13 of the leases.

17. Adriatic acquired the freehold of the Properties in 2018 and it was accepted that the previous freeholder, Mainstay, had also contacted Mr Walker in similar terms. However, no action has been taken. Mr Walker argued he was not in breach of the covenant and, if he was, then that breach had been waived. The Tribunal confirmed its jurisdiction was limited to the issue of the breach of covenant.

Submissions on behalf of Adriatic

18. In their application Adriatic relied upon a breach of the covenants contained in Clauses 6.13 – 6.15 of the Leases. It was accepted Mr Walker has not underlet part of the Properties and, consequently, there has not been any breach of Clause 6.14. Further, none of the lettings have been for a period of more than 3 years as stipulated within Clause 6.16.1 and therefore there has been no breach of Clause 6.15. The application is therefore limited to whether there has been a breach of the covenant within Clause 6.13.

19. Since the facts were agreed, the hearing was conducted on legal submissions only.

20. Ms Edmonds advised the covenant within Clause 6.13 is for the benefit of both the freeholder and the other leaseholders within the development. This is to ensure the development is used for residential purposes only and providing some permanency of occupation. This is evidenced by Clauses 6.15 and 6.16 of the Leases. Whilst the subletting of properties within the development is not prohibited, the requirement for a Deed of Covenant to be signed for any sub-letting of 3 years or more indicates an intention there is to be no short term lets.

21. It was submitted this was further supported by other terms of the Leases. Clause 7.5 of the Third Schedule provides for all leases to be in the same form, thus ensuring the same covenants are applied to all other properties within Chatsworth House. Clause 7.13 provides for the transfer of the freehold to Chatsworth House Residential Limited. Whilst this has not been effected, it shows an intention for there to be residential management. Paragraph 11 of the Third Schedule states:

"*To comply with regulations which the Landlord may from time to time make for the safety care and cleanliness of the Development and the comfort and convenience of the tenants and of the Neighbouring Premises".*

When the leases were drafted, this shows the development is intended to be a residential block and Clause 6.13 should be construed accordingly.

22. Ms Edmonds referred to established case law and submitted they show that short-term lettings breach a covenant restricting the use of a property to residential use. There are 8 cases of which only 1 found that short-term lets were compatible with use for "residential purposes".

23. The Tribunal was referred to the 7 cases where such a breach of covenant had been found being **Nemcova v Fairfield Rents, Caradon District Council v Paton [3 ] E.G.L.R 57,Falgor v Alsabahia [1986] 1 E.G.L.R. 41, City of Westminster v Kothari LONLBC/2019/0087** referred to in **Sherborne Park Residents Company Limited v Hoyt CHI/23UC/LBC/2020/0004** and **Snarecroft Limited v Quantum Securities [2018] EWHC 2071 (Ch)**.

24. The remaining case is **Westbrook Dolphin Square v Friends Life Ltd [2014] EWCH 2433 (Ch)**. Ms Edmonds distinguished this decision upon the basis this case is about collective enfranchisement and the court was considering the phrase "residential purposes" in relation to s.4 of the Leasehold Reform, Housing and Urban Development Act 1993. It was submitted this case is not an authority for construing the words "residential purposes" in the context of a user covenant within a lease. The case was disapplied in both **Sherborne Park** and in **Bermondsey v Koumetto BO2LB714**.

25. Ms Edmonds accepted that in the stated cases the covenant was worded differently to the one in Clause 6.13. For example, in **Nemcova** the covenant referred to the property to be used as the occupier's "*private residence*" and that required a degree of permanence that was not satisfied by short-term lets.

However, at paragraph 44, the Upper Tribunal did accept that covenants made with other lessees is a factor that should be considered:

"*However, it is important to remember that the covenants of the lease were entered into not only with the lessor but also with the lessees for the time being of the other flats in the bloc. It is therefore an entirely proper inference that the current covenant was extracted in part for the protection of these other leaseholders.".*

26. The Tribunal was also referred to the decision of the First-tier Tribunal in **Sherborne House.** There, the block was almost entirely comprised of residential flats and this was taken as evidence the intention was for the block to be residential. The covenant here was:

"*Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than for residential purposes only or for any purpose from which a nuisance can arise to the owners lessees and occupiers of other flats comprised in the building or in the neighbourhood or for any illegal or immoral purpose".*

27. A covenant not to do anything that would cause a nuisance to neighbouring properties, as exists in the lease at Clause 1 of the Third Schedule, is further evidence of the use of the Properties as residences. This was a factor considered in **Snarecroft**.

28. A covenant against the subletting of part, as contained in Clause 6.14 of the Leases, was relevant in both **Nemcova** and **Triplerose v Beattie [2020] UKUT 180 (LC).**

29. The Tribunal was further invited to consider that the covenants within the Leases not to do anything that would increase the insurance premiums (Clause 6.17) and is another indication of the intention that the Properties would not be used for short term lets.

30. Ms Edmonds submitted the adverts for the Properties providing accommodation for up to 8 people for stays of 1 night or longer could not be said to be for "residential purposes". If a significant number of flats within the development were used for the same purpose this would create a nuisance for the other residents in breach of the covenant contained within Clause 1 of the Third Schedule of the Leases.

31. The letting of the Properties by Mr Walker via his companies is in breach of the covenant not to use them for business purposes. The Tribunal was referred to **Bermondsey v Koumetto** and **Nemcova** where it was found that using a property for short term lets can amount to using it for commercial use.

32. In **Bermondsey** the covenant was:

"*Not to use or permit the use of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation for one family only.*"

Here, in his judgement HHJ Luba said:

"65 ….*The covenant relates to the use of the flat as a "residential flat" only. What the judge found was a series of arrangements for short-term, transitory, occupation by strangers (to the Defendant) by way of what she described as "commercial hire". She considered that the meaning of Clause 2.4 was "clear" and it prohibited use of the flat for any "commercial" purpose "such as hotels or bed and breakfast style letting, for example through Airbnb or such letting as the Defendant has done.*

*66.For my part, I am in entire agreement with the Judge. The user covenant is clear. Clause 2.4 is breached when the flat is not being used as a residential flat but as short-term temporary accommodation for transient visitors paying for such use by way of commercial hire. Just such a breach was found by the Judge in the instant case and I cannot detect no error in that finding".*

Submissions on behalf of Mr Walker

33. Mr Walthall referred to Adriatic's statement alleging two breaches of the covenant at Clause 6.13, the first being "*the Respondent is using the properties to carry out a business that provides short-term subletting" and* the second being "*as a result of the properties being used by other persons other than the Respondent, the property is not being used for residential purposes by the Respondent".*

34. It was argued the Leases do not prevent subletting; this is accepted by Adriatic.

35. Mr Walthall submitted there is a distinction to be drawn between the wording of the covenant here where there is reference to the Properties being used for "residential purposes" in contrast to the wording of the covenants in the cases relied upon by Adriatic where there is reference to a property being used as a "private residence "or "residence".

36. It was said short term lets fall within "residential purposes" because:

(i) A person uses a short-term let for eating, sleeping, cooking and washing all of which are "residential" activities.

(ii) The block differs from other blocks within the city centre in that the covenant prevents it from being used for commercial or retail use. A short-term let does not fall into either definition.

(iii) The adjective "residential" does not carry the notion of permanence - per **Westbrook Dolphin Square Limited v Friends Life ltd (No 2)**.

a. The noun "a residence", "a flat" or a "dwellinghouse" suggests permanence, these words are not present within Clause 6.13, instead referring to "residential". Similarly other phrases suggest

permanence, none of which are present here. For example, "private" and occupation by one family".

(iv) Where coverting the block to a hotel may be a breach of the covenant, a short-term let is different to a hotel room.

37. Mr Walthall suggested the Leases do not require Mr Walker to occupy the Properties. The word "suffer" suggests the use of the Properties to be by a third party.

38. When considering what was envisaged at the time the Leases were drafted, it cannot be said AirBNB type lettings were envisaged, since they were not common at that time.

39. Mr Walthall referred the Tribunal to **Westbrook Dolphin Square** and the decision of Mann J who stated at paragraph 206:

"*The flats are used for the sort of activities that go with residence-sleeping, cooking, washing, laundry, and other ordinary living activities. To characterise the premises as a sort of self-catering hotel, as Mr Jourdan does, does not actually answer the question in issue, but in any event it is not really accurate. The flats have some of the features of a hotel in terms of the booking arrangements, some of the facilities provided and a reception area, but unlike most hotels it has full cooking facilities and washing machines. It seems to me to be quite appropriate to characterise the occupation as being for residential purposes. For the time being the occupants are conducting residence-like activities there. That seems to me to be the test (and the answer to the test), not whether they are using them as homes, or even residences. If one focuses on the purposes, they are residential, and are not turned into something else by the hotel-like services which are provided. The shortness of the stay does not affect the characterisation of the occupation".*

40. The Tribunal was also referred to the decision of the First-tier Tribunal in **Wharncliffe Court (Highcliffe) Limited v Coldstreamer Limited CHI/19UC/LBC/2021/0025** which dealt with an application for a breach of covenant and which accepted there was a difference between the words. "residence" and "residential".

41. The word "residence" indicates some level of permanence whereas the term "residential purposes" suggests those activities more common with short-term lets, such as sleeping and cooking. In **Wharncliffe** the phrase for the Tribunal to consider with the lease was "private residential flat" and it determined all those words had to be taken together and, when doing so, found there had been a breach of covenant. However, Mr Walthall argued this is not the case here where only the word "residential" is used. He referred the Tribunal to other parts of the Leases where the words "residential flat" are used, but not in Clause 6.13. A distinction is therefore to be drawn; the term "residential flat" could have been used but was not.

42. Mr Walthall referred the Tribunal to **Nemacova** and submitted this case could be distinguished upon the basis the covenant here referred to "private residence. There were two factors to prevent short-term lets, in the words

"private" and residence". Similarly, in **Triplerose** the relevant wording is "private dwelling house".

43. In **Snarecroft v Quantum Services** no distinction was drawn between "residence" and "residential purposes" and the terms were regularly interchanged. The issue was the proposed conversion of a building to a hotel for which a lease had been granted for conversion to two flats. The case did not make any reference to **Westbrook**. Mr Walthall submitted the case was of no assistance to the Tribunal for these reasons.

44. Mr Walthall also drew a distinction from the decision in **Sherborne Park** where there was found to be a breach of covenant. There, the Tribunal focussed upon the provision of tennis courts and swimming pools and the property being in the countryside. It could not envisage short-term lets in this type of property. However, that was very different to the Properties here, that are situate in central Manchester.

45. Regarding the suggestion the current use of the Properties may cause increased insurance premiums, in breach of Clause 6.17, there was no evidence to support this.

46. Mr Walthall asked the Tribunal to also consider that Mr Walker is not the only leaseholder operating short-term lets within Chatsworth House. There are some businesses whose registered address is at Chatsworth House. This is not the case with Mr Walker whose companies are registered elsewhere.

47. It was submitted the Properties were bought before the start of Airbnb. Mr Walker provides accommodation "to clients who do not want to pay utility bills etc. due to the length of their stay and the nature of their business".

## Decision

48. The Tribunal is to be guided by the approach adopted in **Arnold v Britton** when interpreting the Leases as referred to above and in considering the Leases as a whole.

49. In **Nemcova** the Upper Tribunal directed that there should not be too much reliance placed on earlier decisions and a lease should be considered on its own wording.

50. The issue is whether the wording of the Leases prevents the use of the accommodation as short-term accommodation as Mr Walker has done for some years.

51. The Tribunal considered the issue of the meaning of "residential purposes only".

52. Mr Walthall submitted there is a distinction to be made between the words "residential purposes" and "residence". Both parties referred to **Snarecroft** which considered the term "residential purposes". Whilst the matter referred to a hotel, the Court did consider the term with reference to short-term lets. At paragraph 45 HHJ Matthews said:

"*It is clear on the authorities that a person may have more than one residence and therefore the use of a particular property for staying in even for a short time, say, for the purposes of a holiday, can still be a residential purpose. But, even if a person has several residences, each one of them has some stability. Even if one of your several residences is only a bedsit on a weekly licence, you return to it; you keep your own clothes, your own furniture, our own other effects there. But that is not true of a transient hotel where you arrive with a suitcase and you depart the next day……So, flats, even, as I say, perhaps divided into bedsitting rooms, which were let on weekly or monthly tenancies or licences, would be used for residential purposes, whereas a hotel for short stay travellers would not*".

53. Mr Walthall submitted this case was no relevance, but the Tribunal disagrees. It confirms the transient nature of a hotel to be outside the definition of "residential purposes". Here, Mr Walker has confirmed his adverts for the Properties show a letting period of 1 to 75 days. The former period falls into the definition of "transient" accommodation and therefore it follows it must be outside the term "residential purposes". No evidence was provided to the Tribunal to show what proportion of the lettings fall into this category, but the adverts confirm they are available.

54. Mr Walthall further submitted that when the Leases were drafted the term "*residential flat"* was used elsewhere, but not in clause 6.13 and therefore an inference is to be drawn that it was not intended to be used. The Tribunal does not find this persuasive.

55. Whilst the covenant in **Bermondsey** also referred to the use by one family, as distinct from the covenant here, this was not stated to be a determining factor. In his conclusion, HHJ Luba QC confirmed this at paragraph 66 of his judgement, as referred to in paragraph 32 above.

56. Mr Walthall relied upon **Westbrook Dolphin Square Limited** to support the position that a short-term let falls into the definition of "residential purposes". The Tribunal accepts the Applicant's position that this is a case specific to s.4 of the Leasehold Reform, Housing and Urban Development Act 1993 and consequently can be distinguished from the facts of this case.

57. The Tribunal further considered the second part of the covenant, namely, "not to carry out or permit or suffer to be carried on in or from the Flat any trade business or profession whatsoever".

58. It was said on behalf of Mr Walker that his business is not registered at the Properties and consequently no business is operated from it. It was further submitted there are a significant number of properties within the block that also operate short term lets and from where the businesses are also registered.

59. The Tribunal considered the decision in **Bermondsey** where it was determined the use of accommodation for transient visitors amounted to "*commercial hire"*.

60. The Tribunal noted that whilst the businesses operated by Mr Walker are not registered at the Properties, this does not negate the fact that the purpose of

the lettings is to raise revenue and that is a business that is carried out "*on in or from the Flat*".

61. The Tribunal was not provided with evidence to show the extent of the use of other flats within the block for short term lets, but it did not consider it to be a fact relevant to the determination of the application.

62. The Tribunal accepted the arguments put forward on behalf of the Applicant that when the Leases were drafted, there was an intention for the block to be a residential block. This is evidenced by the covenants contained within Clauses 6.13-6.15 and by the provision for the covenants within the Leases to be not only with the freeholder, but also with the other leaseholders, as referred to in **Nemcova.**

63. The Tribunal, when considering the covenant, finds the use of the Properties for short term lets, to be a breach of the covenant. This use is not for residential purposes, but for commercial purposes.

64. Mr Walthall asked the Tribunal to note that several other flats within the block are used for short term lets and no action has been taken against those leaseholders. The Tribunal does not find that to be a relevant factor.

65. The Respondent submitted a Schedule of Costs prior to the hearing. If either party wishes to purse a claim for costs this should be submitted to the Tribunal pursuant to Rule 13(5) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.