Case No: B02LB714

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building,
Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 1 May 2018

BEFORE:

HIS HONOUR JUDGE LUBA QC

BETWEEN:
BERMONDSEY EXCHANGE FREEHOLDERS LIMITED

Claimant

- and -

NINOS KOUMETTO
(as Trustee in Bankruptcy of
KEVIN GEOGHEHAN CONWAY)

Defendant

MR MARK SEFTON (of Counsel) appeared on behalf of the Claimant

MR JAMES HANHAM (of Counsel) appeared on behalf of the Defendant

Hearing date: 1 February 2018

JUDGMENT (Final)

Introduction

1. Is the owner of a flat at liberty to use it for short term rental or commercial hire to tourists, business travellers and others through use of internet-based websites such as Airbnb?

2. Subject to any statutory provisions or planning controls, the answer to that question will turn on whether the lease granted by the lessor (often the freeholder) to the owner of the flat permits or prohibits such use.

3. In this case, District Judge Desai held that the terms of the relevant lease prohibited such use and that an injunction should be granted to enforce its terms.

4. By this appeal, the flat-owner contends that the Judge was wrong because: (1) the lease did not prevent or inhibit such use of the flat; and/or (2) even if it did, an injunction ought not to have been granted.

5. The appeal proceeds pursuant to permission to appeal, and an extension of time in which to appeal, granted by HHJ Freeland QC.

6. The appeal was argued cogently, both orally and in writing, by counsel for each party. I am grateful to them for their excellent submissions.

7. I am sorry that the pressure of pre-listed judicial work at this Court has been such as to significantly delay my delivery of this judgment on the appeal.

The essential facts

8. The Claimant is the freehold owner of the Bermondsey Exchange building at 179-181 Bermondsey Street in South London. It was once a warehouse but was converted into 18 flats in about 1998. The flats were all sold-off, on long leases in the same or similar form.

9. Mr Kevin Conway (hereafter 'the Defendant'), who is or was a solicitor, holds a 999 year lease of the flat at Unit 19. The lease has a substantial value and the flat has in the past been the Defendant's home.

10. Many of the flats in the Bermondsey Exchange development are not occupied by their owners but are instead sub-let to residential tenants on private rental agreements constituting assured shorthold tenancies. Such tenancies usually endure for a minimum period of at least six months.

11. Having ceased to occupy his flat as his home, the Defendant initially sub-let it on such private rental tenancies without objection.

12. But more recently, in 2015, the Claimant became concerned that the Defendant was using his flat to provide short term accommodation for more transient and temporary occupiers who were booking the use of the accommodation through on-line portals such as Airbnb. The Claimant's concerns related to the obvious potential for

additional nuisance and security issues and to the detrimental impact on a 'sense of community' that casual hotel-style use of ordinary residential accommodation might lead to.

13. The Defendant was asked to desist but took the view that, to the extent that he was using the flat in the way complained-of (which he denied), he was not prevented by his lease from doing so.

14. The Claimant then issued the present claim. It relied as evidence of the Defendant's use of the flat on copies of website listings advertising the flat for short term letting, booking calendars, e-mail reviews and photographs.

15. The Defendant initially represented himself in the proceedings and took issue with all parts of the claim. Indeed, he denied that the flat was being used in the manner alleged at all.

16. Following a trial held on 8 September 2016, the Judge found against him. She delivered a reserved judgment on 10 November 2016 in which she recounted and rejected all his contentions – that the flat had not been used in way complained-of, that there had been agreement by the Claimant's agents to the use complained-of, that such use had in any event ceased and would not recur (so that no injunction was justified), and that - in any event - such use amounted to no breach of the lease.

17. I need not set out the terms of the Judge's comprehensive and detailed judgment at any great length. The Judge described the Defendant's "paramount defence" [29] as being that the premises were never occupied as claimed by the Claimant. For reasons that she gave, she found that there was "substantial and even compelling" evidence [37] that "the property has been widely advertised on Airbnb and similar websites for letting" [35]. The material before her pointed "to short term commercial hire" [36].

18. She also rejected the contention that such use had been authorised or permitted. She did so both because the point had not been pleaded [27] and because she was not satisfied that 'consent' had been given [28] which, in any event, was a contention contrary to the Defendant's primary case that there was no activity being undertaken for which consent was required [49].

19. As I have indicated, the Judge, having considered the terms of the lease, held that the use that the Defendant had made of the flat breached its terms. I shall set out the relevant provisions of the lease, and the Judge's relevant reasoning, in due course.

20. Finally, despite it being submitted that the use complained-of had ended and would not recur, the Judge was satisfied that an injunction should be granted to prohibit such use in future. Again, I shall outline her reasons for that conclusion later in the judgment.

21. Shortly before the Judge delivered her judgment, the Defendant was made bankrupt on a petition presented by HMRC. By the time this appeal came before me, his trustee in bankruptcy had, I was told, made a decision by which he agreed to adopt and continue the appeal, notwithstanding the potential impact on the Defendant's creditors

of a possible adverse outcome. Accordingly, and on his application, I made an order substituting him as the Defendant.

The Terms of the Lease

22. The 'Tenants Covenants with the Landlord' are set out in Clause 2 of the Lease.

23. Clause 2.10 is concerned with "Dealings" with the premises by the Tenant.

24. By the first sub-clause of Clause 2.10 the Tenant covenants:

> ***"Not at any time to assign, sub-let or part with possession of part only of the Demised Premises"***

25. The Judge held that there had been no breach of this covenant because it relates to use of "part only" of the premises. She found that the Defendant was in fact using the whole premises for short term lets or commercial hire [47]. That finding is not in issue in the appeal.

26. By the second sub-clause of Clause 2.10 the Tenant covenants:

> ***"Not to part with or share possession of the whole of the Demised Premises or permit any company or person to occupy the same save by way of an assignment or underlease of the whole of the Demised Premises".***

27. The Judge found that the Defendant had "breached that term in that he has parted with possession of the property" [48]. In the alternative, he was in breach because he had "allowed other persons to occupy the property other than by way of assignment or underlease of the whole" [48]

28. The third sub-clause of Clause 2.10 contains a Tenant's covenant:

> ***"Without prejudice to the absolute prohibitions hereinbefore contained not to assign or underlet the whole of the Demised Premises without the prior written consent of the Landlord."***

29. As to that sub-clause the Judge held that "it is not in dispute the Defendant had not obtained the prior written consent for letting the property through Airbnb and other websites. The Defendant therefore has breached the term by underletting the property effectively for holiday lets through Airbnb" [49].

30. The judge considered that another of the "significant" [38] or "main" [41] clauses in the lease applicable to the facts she had found was Clause 2.4. That is concerned with the use the Tenant may make of the flat. It provides that the Tenant covenants:

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

31. The Judge held that provision of the flat to hirers through Airbnb amounted to "letting, akin to holiday lets" [46]. She held that such hirers "are not using the property as a residential flat". As she put it:

> "There is a qualitative difference between letting a property on an assured shorthold basis to a person or family who occupies the same property as their home…and letting the property on a short term let including through Airbnb and other websites" [46].

32. The Judge also mentioned other less directly relevant provisions of the lease in her judgment but nothing turns on them.

The Appeal

33. The grant of permission to appeal is limited by the Order of HHJ Freeland QC to the third and fourth of the Orders made by Judge Desai. The third order contains the Injunction made. The fourth provided for the Defendant to pay the costs.

34. The Grounds of Appeal for which permission to appeal has been granted by HHJ Freeland QC are those set out "in Paragraph 8 of the Appellant's skeleton argument dated 24 July 2017".

35. By that Paragraph 8, through the medium of three sub-paragraphs and multiple sub-sub-paragraphs, there appear to be some 17 or so distinct grounds of appeal.

36. Very sensibly, although his skeleton argument for this appeal subjected the Judge's reserved judgment to a comprehensive paragraph-by-paragraph critique, Mr Hanham focussed his challenge on the Judge's construction of the provisions of the Lease and the terms of the injunction.

37. In my judgment, Mr Sefton accordingly correctly identified the following issues as falling for determination on the appeal:

> First, was the Judge right to hold that the Defendant had breached the lease?
>
> Secondly, did the Judge exercise her discretion wrongly when deciding to grant an injunction, and should she either have refused the order entirely or granted the injunction on different terms?

Breach of the Lease

38. Although Mr Sefton was prepared to and did advance argument upholding the Judge's finding of breach of the User Covenant (Clause 2.4), his primary argument in support of the challenged order was that the judgment and the injunction flowing from it could be entirely sustained by the finding on the Covenant against Alienation (Clause 2.10).

Clause 2.10

39. In my Judgment, the taking of Clause 2.10 as a starting point represented a sensible and proportionate course in the consideration of the appeal.

40. I remind myself that Clause 2.10(2) provides that the Tenant covenants:

> ***"Not to part with or share possession of the whole of the Demised Premises or permit any company or person to occupy the same save by way of an assignment or underlease of the whole of the Demised Premises".***

41. Where the Tenant parts with possession of the whole to another, that would usually provide the other with exclusive possession and amount to a letting. Where the Tenant allows another to 'share' possession that would usually be a reference to a licence to occupy.

42. I accept Mr Sefton's submission that, on a proper construction, this sub-Clause prohibits both parting with or sharing possession of the premises, on the one hand, and, on the other hand, permitting someone to occupy the premises.

43. As Mr Sefton put it, and as I accept, it is therefore a covenant designed to capture both unauthorised leases and unauthorised licences. The restriction on parting with possession is directed to unauthorised sub-lettings. The restriction on permitting occupation is directed to unauthorised licences.

44. As Mr Sefton correctly recognised, the Judge, in holding that there had been a breach of Clause 2.10(2), did not decide whether the precise character of the breach was that the Defendant had parted with possession, or whether it was that he had permitted people to occupy the flat. As he put it: "She did not need to do so. She held that he had done one or the other, and that whichever one it was he had done, he was in breach of [the sub-clause]. This was all that [the Claimant] needed for the injunction."

45. Mr Hanham took a pleading point. He contended that no breach of this covenant, in <u>both</u> of its two alternative senses, was relied upon by the Claimant in its claim. I reject that point.

46. The Claimant's Particulars of Claim had relied on breach of Clause 2.10(2) – at paragraphs 5(3) and 6 – and the Claimant's skeleton argument for the trial made this contention clear: see paragraph 27(2). Moreover, the transcript of the trial before the Judge plainly demonstrates that points on both the first and second limb of Clause 2.10(2) were being taken: see pages 76F-H and 77D. Indeed, the Defendant appreciated that and replied accordingly: see page 93C-D.

47. As to whether the Judge had been entitled to find any breach, Mr Hanham had no permission to pursue any challenge to the Judge's findings of fact as to the provision of the flat to short term users through portals such as Airbnb. He was therefore constrained to contend that such use could not or did not, as a matter of law, amount to breach of either limb of sub-clause 2.10(2).

48. As to the first limb of the sub-clause, he contended that the Judge had been wrong to find that the nature of the arrangements made with occupiers had been lettings akin to holiday lets. He submitted that the arrangements that had been in evidence were those entered into with Airbnb and they did not amount to tenancies but only licences. There had thus been neither parting with 'possession' nor sharing of 'possession'. The Judge had been wrong in law to hold that the arrangements amounted to lettings or any parting with or sharing of 'possession'.

49. As to the second limb of the sub-clause, he argued that – if I was against him on the pleading point, as I am – it could not be applied or operated in any sensible way. As he put it "If it is interpreted literally, then the covenant prevents the tenant (and every other leaseholder) from having a partner come to live with him, or her, or having a member of family or a friend reside in the flat on their own, on an informal basis, but it is reasonable to assume that leaseholders in the building do this all the time. On a literal interpretation, the covenant stops a leaseholder having someone live in the flat whilst he or she is away. The covenant however must be interpreted sensibly, but it is difficult to see how it can be interpreted differently to its literal meaning. It refers expressly to a "company", and that suggests that what is intended to be prohibited is a commercial arrangement and not a personal one."

50. I reject the contention that the words of the second limb of the sub-clause can be overlooked or ignored because they may be thought by some leaseholders, in some circumstances, to be impracticable or unworkable. The words mean what they say. They prohibit the tenant from allowing occupation of "the whole" by others, without qualification as to the circumstances.

51. This is not, in my judgment, a case in which this Court should examine and finally determine whether the particular arrangements that the Defendant was entering into with third parties through on line portals (or perhaps arrangements that the Defendant was entering into with the operators of the websites) would be classified in law as tenancies or licences and which limb of Clause 2.10(2) they offended. Not least because the Defendant's paramount defence at trial had been that there had been no-one in occupation of his flat through any such arrangements.

52. All that the Judge had needed to find was that the whole flat had been occupied by others by arrangements made by, through, or on behalf of, the Defendant at a time when he was not himself occupying it. That is precisely what she found. Indeed, that is hardly surprising given that the advertising material relating to the availability of the flat told customers that provision would be of the "Entire home/flat" (as at Trial Bundle p113)

53. Indeed, the advantages to landlords in drafting alienation provisions with a breadth such as that set out in Clause 2.10(2), were expressly identified in a case in Australia in which a Judge had needed to decide whether Airbnb-style arrangements were lettings or licences: *Swan v Uecker* [2016] VSC 313. Croft J there ended a judgment with these concluding remarks at [80] (with my emphasis added):

> "…the context provided by the terms of the particular apartment lease are important. Although this apartment lease is a residential lease, many

commercial leases restrict the tenant from sub-leasing, assigning the lease, granting any licence to occupy all or part of the leased premises or otherwise parting with possession without the landlord's prior consent. **Broad terms such as this would prevent, for example, sub-letting or licensing without the landlord's consent and would avoid the need—as in the present case—to characterise the nature of the same arrangement like the AirBnB arrangement for occupation of the whole of the leased premises as a sub-lease or a licence**"

54. The Judge had certainly inclined to the view that the Airbnb arrangements were short 'lettings' and for that reason went on to hold that the conduct of the Defendant had also been in breach of Clause 2.10(3) i.e. the covenant "not to assign or underlet the whole of the Demised Premises without the prior written consent of the Landlord."

55. The Judge found that there had been an underletting and that no consent had been sought or granted.

56. Despite Mr Hanham's attractive submissions that a decision that there had been an 'underletting' was not open to her, I am not satisfied that there were the necessary features here to displace the presumption from *Street v Mountford* that the provision of exclusive possession of premises to another for a period and for payment for that period constitutes a letting.

57. Neither the short duration of the arrangement, nor any notional provision for 'services' (such as leaving the flat stocked with material from which to assemble a breakfast or other meal), nor reservation of a right of entry, nor any combination of those features, displace that presumption from applying to an Airbnb-style arrangement.

58. The decision in *Swan v Uecker* is, at very least, persuasive authority to that effect. In my judgment, Mr Hanham's reliance on the pre-*Street v Mountford* petrol station case of *Shell-Mex & BP v Manchester Garages* [1971] 1 WLR did not justify a different outcome.

59. Accordingly, even if the Judge had founded her judgment only on the first limb of Clause 2.10(2), I would have upheld her finding of breach. Her reliance on both limbs, and thus the second as free-standing (if necessary), renders her overall finding of breach of the sub-clause, in my judgment, unimpeachable. Likewise, her holding of breach of Clause 2.10(3).

Clause 2.4

60. I turn then to the User covenant (Clause 2.4) which, it will be recalled, provides that the Tenant is:

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

61. In Mr Hanham's submission, the Judge had been wholly wrong to find breach of this Clause by the use of the flat by paying guests obtained through Airbnb or a similar platform. As he put it this "was not a breach of the user covenant, on its true interpretation. The covenant requires the apartment to be used "as a residential flat", and the paying guests were using it as such, albeit for short periods of time. The apartment did not lose its "residential" character. There was no requirement that those residing in it should regard it as their main or only "home" or even as a "home"."

62. He took me to authority, not cited to the judge, that a flat is occupied for "residential" purposes, where it is occupied by short-term paying guests. Most particularly, a dictum of Mann J in *Westbrook Dolphin Square Limited v Friends Life Limited* (No 2) [2015] 1 WLR 1713 at [176] to [207] concerned with the meaning of "residential purposes". I was also taken to other earlier cases concerning terms such as "residential accommodation" also reviewed in *Westbrook.* They were addressed by the Judge in this case at [46].

63. I did not find those authorities of assistance. This present case is concerned with a private residential development of flats let on long leases with common terms. The context is one of residents living cheek by jowl and only with other residents (save in relation to the ground level of the development which I was told had been specifically let separately for commercial use). It is in that context that the words fall to be understood and applied.

64. Mr Hanham submitted that the words simply mean that the tenant is prohibited from allowing the occupation of the flat by more than one person unless all others are members of his/her family. There was no expressly pleaded case that the Airbnb-style arrangements had led to occupation by two or more friends or acquaintances rather than by two or more others in one family group.

65. With great respect to Mr Hanham these propositions were simply unrealistic when considering the words in their proper context. The covenant relates to 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." [41].

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 can detect no error in that finding.

Should an Injunction have been granted?

67. Mr Hanham submitted that even if, as I have held, the Judge was right as to her findings on breach of the terms of the Lease, she should not have made a prohibitory or restraining injunction. Nothing more had been required, he contended, than a declaration as to the construction of the Lease. The Injunction should be discharged.

68. He pointed to the fact that the activity complained of had taken place in 2015 and had ended. Indeed, the Judge had recorded that it was common ground that there had been no recurrence since the spring of 2016 (mistyped as '2015' in the judgment)[55].

69. He reminded me that a restraining injunction ought, as a matter of principle, only to be granted if there was some proven likelihood of future interference with a Claimant's rights. Absent a proven risk of future breach, the better course was to declare what the legal position was and to give the Claimant liberty to apply if a presently unexpected future breach occurred. On the material before her, the Judge had been neither entitled to make, nor justified in making, the Injunction Order granted.

70. There is no doubt that the Judge had herself appreciated the force of those contentions. She had correctly directed herself in the course of the trial that "an injunction does not automatically follow from a breach". In the course of her judgment at [51] and [52] she identified that she was being asked to grant a "discretionary remedy" and reminded herself that the use of the flat in the way complained of had ceased some time ago [55].

71. However, she considered - for the reasons given at paragraphs [51] to [55] - that in the circumstances of this particular case, concerning this particular flat on this particular development, an injunction was warranted.

72. Her reasons pointed to the facts that: breach of the lease had been established; relations between the parties (once cordial) had broken down; it had not proved possible to resolve the matter by way of an undertaking; and that short-term arrangements - through Airbnb style platforms - were a modern phenomenon offering new 'opportunities' in changing times that might tempt other residents on the development. She considered that the case was tipped in favour of the grant of an injunction by the interests of clarity and certainty.

73. Mr Sefton indicated that other material had been before the Judge capable of providing further reasons for justifying the exercise of her discretion in favour of making the injunction. Most particularly, this was not a case of an admission and a commitment not to repeat. It was a case in which the Defendant had denied that he had permitted the flat to be used for commercial hire at all. He had not stopped that

activity because he had been challenged but because his partner had decided to occupy the flat rather than continue to market it through Airbnb-style platforms.

74. Mr Sefton took me to *Snell's Equity*, Chapter 18 at para 18.028(1) as authority for the proposition that a Court can infer from past breach that a future breach may recur unless restrained by injunction.

75. In my judgment, no recourse to authority is needed. The appropriateness of the grant or refusal of an injunction involved a weighing up of the facts and arguments on both sides and the careful judicial exercise of a discretionary judgment as to whether to grant an equitable remedy. The Judge's judgment and reasons amply demonstrate that that was the task she undertook and discharged.

76. Despite Mr Hanham's attractive submissions, I am not satisfied that he has come anywhere near establishing a justification for my interfering with the Judge's assessment.

The terms of the Injunction

77. The Judge's reserved judgment indicated that she proposed to make an injunction order "in the terms set out in paragraph 9.1" of the Particulars of Claim [55].

78. Her final order was not quite in those terms. Rather, she ordered that:

> "The Defendant be restrained whether by himself or by his servant or agents or any of them or otherwise howsoever from doing or suffering to be done any of the following acts from the date of this order until 10 November 2020:
>
> (i) using the Demised Premises for short-term accommodation for paying guests or using them otherwise than as a residential flat with the occupation of one family only;
>
> (ii) parting with or sharing possession or occupation of the whose (sic) of the Demised Premises or permitting any company or person to occupy the same save by was (sic) of an assignment or underlease of the whole of the Demised Premises;
>
> (iii) assigning or underletting the whose (sic) of the Demised Premises without the prior written consent of the Claimant such consent not to be unreasonably withheld."

79. I was told that, following delivery of the reserved judgment, counsel for the Claimant had – in the usual way - agreed to settle the Minute of Order, including the terms of the Injunction. Counsel for the Claimant had then shared a draft with the Defendant. Having received the response "no comments to make on the draft order", he submitted his draft, which the Judge approved. I doubt that the draft submitted contained the typographical errors set out in the Order.

80. Mr Hanham now contends that the substantive wording of the Injunction cannot be permitted to stand. To the extent that it merely regurgitates the terms of the lease, it serves no function because it does not explicitly identify a particular thing that the Defendant must not do and which would otherwise be a breach. To the extent that it does identify such a 'thing' it does so in terms too broad or wide to be capable of application or enforcement.

81. For myself, I am not satisfied that I ought - on appeal - to interfere with wording of an Order, the precise wording of which had been shared with the Defendant in draft and without demur, on the grounds that it was now unclear or uncertain. Its central message is tolerably clear to any party.

82. However, with characteristic realism and fairness, Mr Sefton recognised that a further exercise in collective working between counsel now instructed (neither of whom appeared below) might result in the fashioning of a more accurately and felicitously worded Injunction Order. Accordingly, I shall be happy to consider variation of the Injunction into any suitably agreed form and will review any agreed rubric at the hand-down of this judgment.

Outcome

83. The answer posed to the question asked at the outset of this judgment is that – for the reasons I have given - the terms of the Lease applicable in this case were breached by the use of the flat for occupation by transient short-term paying occupants engaged through Airbnb style platforms. Further, the Judge was entitled to grant orders in the terms that she did, prohibiting such use.

84. In substance therefore, the appeal fails. However, I shall – as indicated – entertain any agreed variation of the terms of the Injunction Order made.

85. If the parties are able to agree a suitable Order consequent upon my judgment, their attendance at the handing-down is excused.

HHJ Luba QC

1 May 2018