



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

Case Reference : CHI/00ML/LBC/2019/0015

Property : Flat 2, 51 Tisbury Road, Hove BN3 3BL

Applicant : 51 Tisbury Road Hove Limited

Representative : Dean Wilson LLP

Respondent : Frederick Kurt Forrest

Representative : N/a

Type of Application : Determination of an alleged breach of covenant

Tribunal Member(s) : Judge J A Talbot

Date of Directions : 26 July 2018

Date of Decision : 18 September 2019

DETERMINATION

Determination

The Tribunal determines pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant of the lease has occurred, namely, that the Respondent was subletting the property on a short-term holiday basis using the platform Airbnb, in breach of Paragraph 1 of the First Schedule to the lease.

The Application

1. An application on behalf of the landlord, 51 Tisbury Road Limited, was made by solicitors Dean Wilson LLP on 29 April 2019 for a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the Act”) that a breach of covenant contained in the Respondent’s lease has occurred.
2. Directions were issued by the Tribunal on 30 May 2019. Both parties complied with the Directions, providing extended statements and documents in support.
3. Neither party requested an oral hearing so the Tribunal considered the matter on the papers. An inspection is not necessary.

The lease

4. The Tribunal had a copy of the lease of the First Floor Flat, 51 Tisbury Road, Hove BN3 3BL, also known as Flat 2 (“the Flat”). It is dated 26 October 1984 and is between Timeprice Limited and Ellen Maud Bryant for a term of 125 years from that date.
5. Insofar as is relevant to this application, the lease provides for the tenant’s covenants as follows:

Clause 3(1)(h): Not at any time during the term hereby granted to divide the possession of the demised premises by assignment or underletting or parting with possession of part only and not during the last seven years of the term hereby granted without the previous consent in writing of the lessor (such consent not to be unreasonably withheld) assign underlet or part with the possession of the whole of the demised premises

Paragraph 1 of the First Schedule: Not to use the demised premises nor permit the same to be used for any purpose whatsoever than as a private dwellinghouse in the occupation of one family only nor for any purpose for which a nuisance can arise to the owners lessees of occupiers of the other flats in the building or in the neighbourhood not for any illegal or immoral purpose.

The Law

6. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows:-

No forfeiture before determination of breach

- (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
- (2) This subsection is satisfied if -
 - (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
 - (b) the tenant has admitted the breach, or
 - (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that a breach as occurred.

The issue in dispute, background facts and submissions

7. Dean Wilson LLP, solicitors for the Applicant landlord, submitted that the Respondent tenant, Mr Forrest, was sub-letting the Flat using the online platform Airbnb on a short-term basis for holiday purposes, with no degree of permanence.
8. The Tribunal inferred that Mr Forrest was not himself occupying the flat as his home. He lived elsewhere at 19a Wilbury Grove, which is his address as stated on the Application form, and also on the Official Copy of Register of leasehold title. He is the registered proprietor of the subject Flat from 01/09/2016.
9. Dean Wilson provided copy correspondence to support the Applicant's case that letters had been sent to Mr Forrest on 8 March and 25 April 2019 pointing out that the Flat was being advertised and sub-let on Airbnb and offering terms to resolve the issue. These included Mr Forrest agreeing not to accept any further short-term lettings, and various other unrelated matters, such as payment of service charges, the cost of repairs for damage allegedly caused to the common parts by one of the subtenants, and legal costs.
10. Dean Wilson argued that by taking in paying guests, the Flat was not being used as a private dwelling house only, and by advertising the property as available as "an entire flat" it followed that Mr Forrest was not living in the Flat at all or using it as his own private dwelling house.
11. Dean Wilson further argued that there has to be a degree of permanence for a property to be used as the occupier's private residence. Where a person occupies a property for a matter of days and then leaves, it could

not be said that the occupier was using the property as their private residence during the period of occupation. The fact that Mr Forrest had sublet the property on a series of short-term holiday lets on Airbnb meant that the occupation was transient and was not being used as “private dwellinghouse in the occupation of one family only a dwelling house” as required by the lease.

12. Dean Wilson referred to the legal cases of *Tendler v Sproule*, *Falgor Commercial SA v Alsabenia Inc*, & *Arnold v Britton*, all of which were analysed in the leading case in the Upper Tribunal Lands Chamber of *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC) which dealt with the issue of Airbnb sub-lettings and held there was a breach of lease.
13. Mr Forrest did not dispute that he had sublet the Flat using Airbnb, but in his brief emailed statement dated 15 July 2019 he submitted that he did not think he had broken any terms of his lease. His understanding was that “the legal case to which Dean Wilson had referred does not necessarily apply to every lease”. He presumably has in mind the *Nemova* case.
14. Mr Forrest’s main objection to the Application appeared to be that he was “in the process of taking the property down from Airbnb”. When his last Airbnb guests left, he said he marketed the property for a long-term letting and found a tenant who was due to move in on 1 July 2019. Therefore, he regarded the Application as unnecessary and a “bullying” tactic by Dean Wilson to “extort” money from him under threat of getting the lease “cancelled”.

Consideration

15. The Tribunal carefully considered all the written evidence and submissions. Overall, and taking all the circumstances into account, the Tribunal was satisfied that a breach of the lease had occurred. This is because the Tribunal broadly accepted the reasons and submissions made by Dean Wilson LLP on behalf of the Applicant.
16. Whilst Mr Forrest is correct that breach of lease cases will turn on the terms of each individual lease, the Tribunal noted that the terms of his lease were similar to those in the leading case of *Nemcova*. As in that case, in cl.3(1)(h) of the lease for the subject Flat, there is no prohibition against subletting of the whole of the demised premises, as opposed to part thereof (other than within the last seven years of the demise, the landlord’s consent not to be unreasonably withheld, which does not apply here).
17. However, in addition, in *Nemcova*, the lease contained a covenant: “not to use the demised premises or permit them to be used for any purpose whatsoever other than a private residence”. The similar provision in the lease for the subject Flat reads as follows: “not to use the demised premises nor permit the same to be used for any purpose whatsoever than as a private dwellinghouse in the occupation of one family”.

18. The key point, therefore, is the duration of the letting. In order for a property to be used as a private residence, or dwelling house by a family, there must be a degree of permeance going beyond a few nights. An Airbnb guest would not regard the property in which he or she was staying to be a “private dwellinghouse”, even for the time being.
19. It is not clear whether in fact the Flat is now occupied by sub-tenant on a long-term basis. Mr Forrest provided evidence in the form of emails that a prospective tenant, Mr Michael Piotrowski, was interested in the Flat, and he also provided a copy of an Assured Shorthold Tenancy Agreement for a term of 12 months from 1 July 2019. The Agreement is in draft only as it is undated and unsigned. However, the fact that Mr Forrest may have recently stopped subletting the Flat under the Airbnb platform does not assist him within this Application. This is because the Tribunal has to decide, under s168 of the Act, whether a breach of the lease “has occurred” at some time in the past, which was not in doubt, given that the Airbnb lettings did not comply with the lease terms.
20. Tribunal was therefore satisfied that a breach of paragraph 1 of Schedule 1 had occurred. The Tribunal accordingly makes the determination as set out above at the start of this Decision.

Judge J A Talbot

Dated 18 September 2019

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 a written application to the First-tier Tribunal at the regional office which has been dealing with the case.
2. The application must arrive at the Tribunal office within 28 days after the Tribunal sends to the person making the application the written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the person making the application is seeking.