FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/LBC/2019/0010**
Property	**:**	**Flat 15 Bevan House, Boswell Street, London WC1N 3 BT**
Applicant	**:**	**Bevan House Management Company Limited**
Represented by	**:**	**Mr Coker (counsel)**
Respondent	**:**	**Denis Ludwig Becker Not in attendance Represented by Hockfield and Co Solicitors**
Type of Application	**:**	**Breach of covenant**
Tribunal Members	**:**	**Judge Daley Ms M Krisko FRICS**
Date of Hearing		**17 April 2019**
Date of Decision		**21 May 2019**

DECISION

Decision of the Tribunal

The Tribunal has determined that the Respondent has breached clauses 3(7) and (8) of his lease of the subject property.

The Background

1. The premises are a flat in a purpose built block of 33 flats known as Bevan House situated at Boswell Street, London WC1N 3BT. The Applicant is the freeholder of the premises, and the Respondent is the registered tenant of flat 15.

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2. The Premises are subject to a long lease dated 17 August 1978, the Respondent has been the leaseholder of the premises since 22 September 2005.

3. On 15 February 2019 the Applicant applied for a determination that the Respondent had breached various covenants in the lease by reason of flat 15 having been let and or licensed to persons for short periods of time in return for a fee via Air BnB.

4. Directions were given by the Tribunal on 21 February 2019. The Directions stated that-: "The Tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The Tribunal will be satisfied if: (a) that the lease includes the covenants relied on by the applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants."

5. The Directions also stated that the Tribunal considered the matter to suitable to be dealt with on the basis of written representations however any party had the right to ask for a hearing.

6. . The Respondent was represented by a solicitor Mr J Garvey of Hockfields and Co, who prepared his written response to the Application. The Applicant firstly indicated that they were content with a paper determination on 10 April 2019 and then requested a hearing and the matter was set down for a hearing on 17 April 2019 at 1.30pm

7. In a letter dated 10 April 2019, Hockfields Solicitors stated " The Applicant requested that this matter be dealt with by means of a paper determination... the Tribunal in paragraph 4 of the Directions, confirmed that it considered that this matter might fairly and conveniently be determined on that basis... The Respondent is not now in a position to attend the hearing on Wednesday 17 April 2019 and cannot afford the cost of representation by solicitor or counsel, but nonetheless remains content for the Tribunal to determine the matter on the basis of his Statement and Representations."

8. The Tribunal therefore noted that the Respondent had explained that he would not be in attendance and the Tribunal noted the written representations on his behalf.

9. <u>The Hearing</u>

10. At the hearing, the Applicant was represented by Mr Coker of Counsel, The Respondent, for reasons stated and acknowledged by the Tribunal was not in attendance.

11. Mr Coker outlined the Applicant's position that the material period at which the breach arose was between June 2018 and February 2019, and that the tenant admitted letting the premises on Air BnB.

12. Counsel referred to two clauses in the lease clause 12 in the sixth schedule and clause 22 also in the sixth schedule. Clause 12 stated-: "The Lessee shall not do or permit or suffer to be done in or upon the Demised Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the owner or occupier or any other part of the Estate or in any way to behave in such a manner as to cause offence to the Lessor or to such owners or occupiers or whereby any insurance for the time being effected on the Estate or any part thereof may be rendered void or voidable or whereby the rate of premium may be increased and shall pay all costs and expenses incurred by the Lessor in abating a nuisance in obedience to a notice served by a competent authority."

13. Clause 22 of the sixth schedule stated -: "… Neither the Demised Premises nor any part thereof shall be used for any illegal or immoral purpose nor shall any trade or business be carried on there nor shall any boarder or lodger be taken but the Lessee shall use the Demised Premises for the purpose of a private residence only."

14. In paragraph 11 of the Applicant's statement of case, the Applicant stated that there was no prohibition on sub-letting Flat 15, however it must be occupied at all times as a private residence. In the Applicant's submissions this meant that it could not be let to a person who is going to use it for a "short-term holiday stay."

15. Mr Coker referred to the Respondent's statement of case in which he stated in paragraph 4 & 5. " I have sub-let the flat in the same manner since 2007, which I am entitled to d- as acknowledged on behalf of the landlord in para 11 of the Applicant's statement of case. Insofar as the matters complained of are concerned, these have been carried out by my sub-tenant and not by me; and they have been carried out without my permission or consent."

16. Counsel noted that this was not an excuse he referred to *Roadside Group-v-Zara Commercial Limited [2010] EWHC 1950*. Counsel referred to paragraph 19 which stated "Covenants in leases are to be construed in their own context and having regard to their ascertainable purpose and objective. Nevertheless, the distinction between a covenant expressed in the active voice such as "not to use" and a covenant expressed in the passive voice such as " …shall not be used" is well established. As Atkin LJ said in *Berton –v- Alliance Investments Co [1922] 1 KB 742 at 759*. "It is clear that a person under a covenant not [to] use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent…"

17. Counsel submitted that the clause covenants were in the "passive voice", which meant that it did not matter who had breached the lease terms, as a result the fact that the leaseholder was not directly responsible did not provide a defence to the breach. Counsel noted that the Respondent may be able to avoid forfeiture however the jurisdiction of the Tribunal was limited to determining whether a breach had occurred notwithstanding that it may have been subsequently remedied. Counsel referred to *Nemcova Limited –v- Fairfield Rents Ltd [2016] UKUT 303* in which lodgers and paying guest were considered to be a business. However the lease did not prohibit subletting to an occupier as long as it was occupied as a private residence, in his submission this was only achieved if the premises was used as the tenant's home, there must he, submitted be a degree of permanence.

18. Counsel referred to paragraph 42 of *Nemcova* which stated of the term in the lease that "...use of the premises as a private residence-could be effected by anyone whom the lessee for the time being permitted to live there. There is some control on alienation: this is an absolute covenant prohibiting alienation of part which is a standard term in residential leases of flats. But as long as that covenant is complied with, the lease clearly contemplates the lessee being able to deal with the property with substantial freedom."

19. Counsel referred to the case of *Borthwick-Norton and Others-v-Romney Warwick Estate Ltd [1950] 1 All ER*, in which the Judge decided that a breach of covenant could be committed notwithstanding the leaseholder had not directly caused the breach. The head note stated-: "The judge held that the law would impute knowledge to them as they had received sufficient warning of what was going on at the premises, but had wilfully shut their eyes to the true state of affairs." Mr Coker submitted that the test was what had actually happened in this case.

20. He referred the Tribunal to an email dated 30.05.18. This email was written by Corker Clifford LLP on behalf of the Applicant. The email stated that concern had been raised by two tenants of the number of people using flat 15. Mr Corker in his email dated 1.06.2018, stated that he would investigate. There was a further email dated 4.06.2018 sent to Mr Becker stating that the concern was that it was possibly being used on Airbnb.

21. In his email reply dated 20 June 2018, Mr Becker stated that he had discussed the concern with his tenant who stated that his tenant worked in the film production and regularly travelled and had guest staying at the property during his absence. On 5 February 2019, Corker Clifford sent a letter before action, this was followed by a further letter which although dated 5 February referred to the Respondent's lack of response to the letter dated 5 February. The Applicant sent a further

letter dated 11 February. This letter concluded by stating-: " If we do not hear from you by 4pm on 11 February 2018 or if you do not admit the breaches, we are instructed to make an application to the First-tier Tribunal(Property Chamber) for a determination that you are in breach."

22. In his email dated 11 February 2019, Mr Becker stated that he had not received the letters, In his response he stated *" …The flat is let to Mr Juan Ignacio Pena on a rolling short tenancy agreement since 9th May 2014… I previously questioned Mr Pena about apparent subletting. He confirmed that on occasion, he lets out the apartment for short periods of time while traveling for work, and that he keeps within the legal framework…"*

23. Counsel referred to a copy of the advert which was placed on Air BnB. He stated that this advert had been placed in July, August and September.

24. In respect of clause 12 of schedule 6, Mr Coker stated that there were two covenants within clause 12, that is, not to cause a nuisance and annoyance and not to void the building insurance policy. In respect of the building insurance he referred to paragraph 14, of the statement of case. The statement of case set out that the Applicant had informed the Building insurer National Insurance & Guarantee Corporation Limited and that as a result they were contemplating withdrawing cover and in the interim they would continue to insure but on more onerous terms.

25. In respect of the nuisance, the statement referred to the withdrawal of cover as troubling or disturbing so as to cause a nuisance.

26. The Tribunal considered the Respondent's reply dated 9 April 2019. In his reply to the Applicant's statement of case, he stated that paragraph 22 of schedule 6, he stated that his sub tenant was not carrying out a trade or business at the premises, and that his letting the premises as a short term let contrary to his Assured Shorthold Tenancy Agreement, did not amount to running a trade or business on the premises.

27. He also refuted the allegation that his tenant had caused a nuisance. However he stated that the sub tenancy had been brought to an end on 9 April 2019. He did not however deal with the issue concerning the insurance.

The Tribunal's Decision

1. The Tribunal having heard from Counsel from the Applicant and having read the response from the Respondent and considered the documents submitted in the hearing bundle finds that the Respondent is in breach of clause 22 of the lease in respect of; "...nor shall any trade or business be carried on there, nor shall any boarder or lodger be taken but the Lessee shall use the Demised Premises for the purpose of a private residence only..."
2. The Tribunal considered the Advert on Air BnB, which contained the dates when the flat was available for letting for February and March 2019, and which also contained a number of reviews, it was clear from this that the flat had been let to a number of different individuals. There were 7 reviews between August 2018 and January 2019 and 15 in total.
3. The Tribunal finds that this was in breach of the sub clause of the lease which required the Respondent or his sub tenant to use the premises as a private residence only.
4. The Tribunal makes no finding that the premises were used for "... any trade or business".
5. In respect of clause 12, the Tribunal accept that the letting of the premises via *Air BnB* had the potential to affect the insurance and on the basis of the statement of case, the Tribunal accepts that the insurance premium was affected.
6. Accordingly the letting of the premises was in breach of clause 22, in part, which states-: "or whereby any insurance for the time being affected on the Estate or any part thereof may be rendered void or voidable or whereby the rate of premium may be increased."
7. However the Tribunal is not satisfied on a balance of probabilities that the letting of the property amounts to a nuisance and annoyance, as no evidence was presented to the Tribunal concerning this, and the Tribunal does not accept that any negative affect on the insurance was in of itself a nuisance, accordingly the Tribunal's findings are limited to a breach of clause 22, in respect of the Respondent's failure to ensure the premises was occupied as a private resident, and clause 12, in respect of the insurance.

Name: Judge Daley **Date:21 May 2019**

Appendix of relevant legislation
A summary of the legislation is set out below
The Law

Section 168 (2) of Commonhold and Leasehold Reform Act 2002

(4)A Landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred.
(5) But a landlord may not make an application under (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

ANNEX - RIGHTS OF APPEAL

1. ***If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.***

2. ***The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.***

3. ***If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time*** *limit.*

4. ***The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.***