

PROBLEMS WITH AIRBNB-STYLE LETTINGS

The popularity of this form of sub-letting is causing problems for head-lessors, particularly in apartments and blocks of flats. The transient nature of the occupation is creating increased noise nuisance, additional wear and tear to common parts and increased rubbish. Such use may also be a breach of mortgage and/or insurance conditions and may also be a breach of planning. In order to prevent such problems or head them off, the lessor needs to look at the protection given by the lease, especially the user covenants and covenants against alienation, covenants against nuisance, and covenants against invalidating insurance.

A series of recent cases demonstrate the courts' approach to this issue.

Nemcova and Fairfield Rents Limited [2016] UKUT 303(LC)

The Upper Tribunal provided guidance on the circumstances in which the short term Airbnb-style lets might amount to a breach of covenant. The tenant was the leaseholder of a flat granted for a term of 99 years. She was letting out the flat to guest by a series of short term Airbnb-style lets. The lease contained a covenant relating to user which stated:

“not to use a demised premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence.”

Under pressure from other residents in the apartment block, the landlord issued an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination of breach of covenant. The Upper Tribunal found that it could not be said that the Airbnb guests occupied the premises as a private residence. A weekend, or a few nights, is too transient. Accordingly, the lessee was in breach of covenant.

Laxcon Developments Limited v St John Guy Rogers (2015) FTT.

In this matter the lessee was sub-letting rooms within the property, a 3 bedroom penthouse, by advertising on various websites including Airbnb, Prime Location and Holiday Lettings. Those renting the rooms were using the property for noisy and at times riotous parties. On an application under s. 168 The tribunal found that the lessee was using the property "otherwise than as a private residence for occupation by a single household" and was instead using the property as a guesthouse for overnight, weekend or longer stays. Furthermore, he was running a business from the property both by letting out rooms for commercial gain and by permitting the property to be used for video shoots and the like, again for commercial gain. The tribunal also found that the tenant was in breach of the covenant against causing a nuisance and annoyance to other occupiers of the building. By permitting his "guests" to use the property and those guests either having parties or allowing others to do so, he is just as responsible as he would be if he were hosting the parties himself.

Roundlistic Limited v Jones [2016] UKUT 325(TCC)

In this matter the building was divided into two maisonettes. The lessee had been granted a lease extension of the lower maisonette pursuant to LRHUDA 1993. The lease contained a covenant which stated that the tenant was "not to use the premises hereby demised or permit the same to be used for any purpose whatsoever other than as a single private dwelling-house in the occupation of the lessee and his family." In this case the lessee had not sub-let the property under a series of Airbnb-style lettings but rather a twelve month assured shorthold tenancy. The lessee's job required him to live in Italy for two years. On an application under s. 168 The Upper Tribunal upheld the First Tier Tribunal's decision that the covenant effectively operated to prohibit the letting because no-one other than the tenant from time to time and their family could occupy the lower maisonette. The Upper Tribunal rejected the tenant's arguments (1) that the landlord was not entitled to enforce the covenant because it was prevented from doing so by an estoppel by convention; (2) in the alternative, that the landlord had waived its right to enforce the covenant; (3) that the covenant amounted to an unfair contract term under the Unfair Terms in

Consumer Contracts Regulations 1999 (“UTCCR”) overturning the decision of the FTT on this point.

The circumstances of this case are particularly unfortunate for the lessee as it is not uncommon for people to need to relocate from their permanent homes for a period of time. It emphasises the importance of checking the effect of such covenants when entering into the lease.

Bermondsey Exchange Freeholders Limited and Conway (01.05.18) Central London CC.

In this case the tenant held a 999 year lease of a flat in a block of 18 flats. All the flats had been sold off on long leases in the same or similar form. From about 2015 onwards the Defendant was using the flat to provide short-term accommodation through online portals such as Airbnb. The lease contained a covenant that the tenant is “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 under-lease of the whole of the demised premises”. The original decision of the district judge was upheld as all that she 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. The judge found that there were not the necessary features here to displace the presumption from **Street v Mounford** that the provision of exclusive possession premises to another for a period and for payment for that period constitutes a letting. 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), or reservation of a right of entry, nor any combination of those features, displaced that presumption from applying to an Airbnb-style arrangement.

The judge then looked at the user covenant which provided 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.”

The judge rejected the tenant's submission 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. The judge found that these propositions were unrealistic when considering the words in their proper context. 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 commercial hire. The meaning of the covenant was clear and it prohibited the 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 had done.

In the circumstances the judge found that an injunction to restrain future breaches of the lease should be continued.

Conclusion

The developing line of authority provides some relatively clear principles.

1. By sub-letting a property on a series of Airbnb-style lettings the lessee will be in breach of a covenant to use the property as a private residence as the property would be used as short-term temporary accommodation for transient visitors paying for such use by way of commercial hire;
2. Such lettings will also breach covenants against parting with or sharing possession of the whole of the demised premises by way of an assignment or underlease;
3. Such lettings will also breach covenants against carrying out a trade, business or profession from the property.

The courts have been quick to emphasize that each case will depend upon its particular facts and, more importantly, the precise terms of the covenants in the relevant lease. Both lessors and lessees need to check the covenants to ensure that they meet their respective needs. If the lessees in the Roundlistic case had given the matter proper thought, they may have declined to purchase the lease if a variation of the covenant could not have been agreed beforehand.

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Statutory Materials

- 1. Housing Act 1988 Part 1 Chapter II ss 19A - 23**
- 2. Housing Act 2004 Part 6 Chapter 4 ss 212-215C**
- 3. The Housing (Tenancy Deposits) (Prescribed Information) Order 2007**
- 4. The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015**
- 5. The Gas Safety (Installation and Use) Regulations 1998**
- 6. Deregulation Act 2015 Chapter 20 ss 28 – 47**
- 7. Claim Form N5B**