UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0180 (LC)
UTLC Case Number: LRX/124/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT – covenant against use of flat other than as a private dwelling house and prohibiting use for trade or business – whether breached by use of flat as serviced apartment advertised on internet booking sites – section 168(4), Commonhold and Leasehold Reform Act 2002 – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

TRIPLEROSE LIMITED

Appellant

and

RICHARD JAMES BEATTIE
CHLOE MARIE BEATTIE

Respondents

Re: Apartment 86,
Hanover Mill,
Hanover Street,
Newcastle-Upon-Tyne

Martin Rodger QC, Deputy Chamber President

27 May 2020

Hearing conducted using video conferencing platform

Piers Harrison, instructed by Scott Cohen LLP, for the appellant
Dominic Crossley, instructed by Gunnercooke LLP, for the respondents

The following cases are referred to in this decision:

C. & G. Homes Ltd. v. Secretary of State for Health [1991] Ch. 365

Caradon District Council v. Paton and Bussell (2001) 33 H.L.R. 34

Falgor Commercial SA v Alsabahia Inc (1986) 18 H.L.R. 123

Florent v Horez (1948) 48 P & CR 166

Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC)

Swanston Grange (Luton) Management Ltd v Langley-Essen LRX/12/2007, LT

Triplerose Ltd v Patel [2018] UKUT 0374 (LC)

Uratemp Ventures Ltd v Collins [2002] 1 AC 301

Introduction

1. The main issue in this appeal is whether the use of a residential flat as a serviced apartment advertised for short term occupation through internet booking agencies such as Airbnb or Booking.com breached a tenant's covenant not to use or permit the flat to be used "for any purpose other than as a private dwellinghouse for occupation by one family at any one time".

2. In *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC) this Tribunal (HHJ Bridge), after an extensive review of the relevant authorities, concluded that the use of a flat for short term occupation by guests sourced via internet booking agencies was a breach of a covenant prohibiting its use "other than as a private residence." The language of the covenant in this appeal is only very slightly different but the issue is essentially the same.

3. The appeal is against a decision of the First-tier Tribunal (Property Chamber) (FTT) made on 17 June 2019 on an application under section 168(4), Commonhold and Leasehold Reform Act 2002, by the appellant, Triplerose Ltd, for a determination that breaches had been committed by the respondents, Mr and Mrs Beattie, of covenants in their lease of Apartment 86, Hanover Mill, Hanover Street, Newcastle-Upon-Tyne. The FTT dismissed the application, distinguishing *Nemcova* and the other authorities cited to it on the basis that the relationship between the user covenant and an alienation covenant in the lease, which the FTT considered to be unusual, required a different conclusion in this case. The FTT also decided that short-term occupation arrangements made via an internet booking agency did not amount to a breach of a covenant against carrying on or permitting to be carried on any trade or business upon the premises.

4. Permission to appeal was given by this Tribunal, having been refused by the FTT. An application was also made on behalf of Mr and Mrs Beattie, for permission to cross-appeal on the grounds that the FTT should have found that the relevant covenants had become unenforceable against them. Consideration of that application was postponed to be dealt with at the hearing of the appeal.

5. The appeal was conducted using a video conferencing platform which enabled the parties to observe the proceedings and submissions made on behalf of the appellant by Mr Harrison and on behalf of the respondent by Mr Crossley. I am grateful to them both for their assistance.

The facts

6. The lease of 86 Hanover Mill was granted on 20 February 2009 for a term of 125 years. Mr and Mrs Beattie took an assignment of the lease on 11 December 2009. By that time the appellant had acquired a long leasehold interest in the whole building, making it their immediate landlord.

7. Schedule 4 of the lease contains covenants on the part of the tenant which bind Mr and Mrs Beattie. Central to the issue in this appeal is paragraph 18, by which the tenant agreed:

> "Not at any time to carry on or permit to be carried on upon the Property any trade or business whatsoever nor to use or permit the same to be used for any purpose other than as a private dwelling house for occupation by one family at any one time."

8. The lease also includes an absolute prohibition on assigning, sub-letting or parting with possession of part of the Property (paragraph 31.1) and a qualified covenant against sub-letting the whole of the Property in the following terms at paragraph 31.2:

> "Not to sub-let the whole of the Property without the consent of the landlord, such consent not to be unreasonably withheld or delayed save that the following are permitted without the Landlord's consent:
>
> 31.2.1 The grant of assured shorthold tenancies for a duration of no more than 6 months; and
>
> 31.2.2 The grant of underleases giving effect to a shared ownership scheme, or any similar or equivalent scheme."

9. Paragraph 32.2 required the tenant to give notice to the landlord of any dealing with the Property, including the grant of any tenancy agreement, within 1 month of the date of the relevant transaction and to pay a registration fee of not less than £65 for each such document.

10. In response to the application for a determination that they were in breach of covenant, Mr and Mrs Beattie both provided witness statements to the FTT. They explained that, due to changes in Mr Beattie's employment situation, they had relocated their home away from Newcastle. They had made arrangements with a company called Quality Street Ltd for their flat to be advertised on the Airbnb and Booking.com websites as available to let for short term occupation but Mr Beattie still made regular use of it. The FTT also heard oral evidence from Mr Beattie and made the following findings concerning those arrangements:

> "Mr Beattie confirmed that Quality Street Ltd used the property to provide serviced accommodation, handling check-ins and check-outs and arranging laundry services. The respondents would receive payment after 30 days. Quality Street would apply a strict policy set by the respondents, for example, limiting occupation to those over 25 years of age and prohibiting occupants from holding parties. Quality Street would raise any questions or concerns with the respondents but would otherwise proceed with the bookings without reference to the respondents.
>
> Mr Beattie stated that Quality Street Ltd would only arrange bookings for the times at which the Property was available. Bookings were predominantly at weekends. Mr Beattie would personally use the Property one night, possibly two or three nights each week. Mr Beattie would contact Quality Street in advance to tell them the days the property would be free, or to tell them not to accept bookings for certain days. Generally, Mr Beattie would keep the Property available for personal use on Tuesdays and Wednesdays."

11. The FTT found that there was no evidence that occupiers of the flat had caused nuisance or annoyance to others, and there is no appeal against that conclusion. It also held that there had been no breach of paragraph 18 of Schedule 4. The essence of its reasoning was explained in paragraph 55 where it began by referring to a dictum of Lord Millett in *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301:

> "Lord Millett in *Uratemp* describes the ordinary meaning of the word "dwelling" and indicates that it has no specialised legal meaning. Even so, the interpretation adopted by Lord Millett (suggesting a greater degree of settled occupation than "residence", in accommodation forming the centre of the occupier's existence) does not appear to the tribunal to represent the intention of the parties in the present case. In the tribunal's view the reference to "private dwellinghouse" in the lease has to be seen (i) in the context of the words that precede it, which suggest that the purpose of the clause is to prevent a trade or business being operated from the property, thereby maintaining residential use, and (ii) in the context of the particular features of the alienation provisions allowing occupancy on terms which suggest that use as temporary accommodation, whether as a tenant, licensee or lodger, is envisaged."

12. When it considered the part of the covenant prohibiting carrying on a trade or business the FTT directed itself by reference to the decision of the Court of Appeal in *Florent v Horez* (1984) 48 P & CR 166 that a leisure activity, hobby, occupation, social duty or other similar activity carried on by a tenant in a dwellinghouse does not amount to the carrying on of a business there unless there is some direct commercial involvement or the use is more than ancillary or subordinate to the residential use. It considered that the temporary occupation by third parties in this case was both ancillary and subordinate to use by Mr and Mrs Beattie's use of the property; it was "a temporary expedient pending sale and allowed implicitly by the alienation provisions of the lease."

Issue 1: The prohibition on use as a private dwellinghouse

13. The first ground of appeal was that the FTT had been wrong to construe paragraph 18 as permitting the provision of serviced accommodation on a commercial basis because such use was not use "as a private dwellinghouse".

14. Mr Harrison submitted that the correct question for the FTT was whether, on the facts it had found, the person who was in occupation of the flat at any particular time was using it for "any purpose other than as a private dwellinghouse for occupation by one family at any one time". Mr and Mrs Beattie had clearly permitted the use of the flat by short term guests so it was not enough that, when they were in occupation, the flat should be used by them only as a private dwellinghouse. The question had to be asked about the use being made of the flat by the occupier for the time being.

15. The approach identified by Mr Harrison was the approach taken by the Court of Appeal in *Caradon District Council v. Paton and Bussell* (2001) 33 H.L.R. 34 and by the Tribunal in *Nemcova*.

16. In *Caradon* leaseholders who had covenanted to use their properties as private dwellinghouses only rented the properties to tenants on short-term holiday lets during the summer months. Their landlord claimed that they were acting in breach of covenant, but the County Court judge dismissed the claim on the basis that the defendants' tenants occupied the properties as private dwelling houses, albeit on very short leases. The landlord appealed to the Court of Appeal where, at [35], Latham LJ said that "the answer to the question posed by this case is dependent on whether or not one can properly describe the occupation of those who are the tenants for the purposes of their holiday as being occupation for the purposes of the use of the dwelling house as their home." At [40] Clarke LJ agreed, saying "the question is whether [the person occupying under a holiday let] was using the property as a private dwelling house."

17. In *Nemcova*, the facts of which were not materially different from those of this case, the Tribunal followed the same approach, at [48]: "In short, for the covenant to be observed, the occupier for the time being must be using it as his or her private residence."

18. What, then, does occupation as a private dwellinghouse entail? In *C. & G. Homes Ltd. v. Secretary of State for Health* [1991] Ch. 365, the Court of Appeal held that whether a property is a private dwellinghouse is a question of fact which involves consideration of the degree of permanence of the occupancy, the relationship between the occupants, whether payment is made for the occupation, whether the owner has people at the property supervising and offering support to the occupants. The last factor was relevant in the context of that case, which concerned the use of premises by the Secretary of State to provide supported housing for residents with learning difficulties or mental health issues (*per* Nourse LJ at 383).

19. Mr Harrison also referred to other decisions of the Court of Appeal including *Tendler v Sproule* [1947] 1 All ER 193, where the Court held that the taking in of lodgers or paying guests was a breach of a covenant to use premises as "a private dwelling-house only", and *Falgor Commercial SA v Alsabahia Inc* (1986) 18 H.L.R. 123, where it held that granting occupational licences of a serviced apartment was a breach of a covenant not to use the premises otherwise than as a single private residence.

20. These and other authorities reviewed in *Nemcova* and collected in *Woodfall: Landlord and Tenant* at 11.206 demonstrate that the use of residential property for short term occupation by a succession of paying guests has always been treated as a breach of a covenant requiring use only as a private residence or dwellinghouse. Occupation by a sub-tenant who uses the property as his or her own private residence is permitted, as may be occupation by a group of individuals living collectively, or by non-paying guests, family members, or servants occupying with the tenant. But short-term occupation by paying strangers is the antithesis of occupation as a private dwellinghouse. It is neither private, being available to all comers, nor use as a dwellinghouse, since it lacks the degree of permanence implicit in that designation.

21. The FTT was aware of these authorities and clearly appreciated their effect, yet it felt unable to apply them in this case. What was it about the appellants' lease which led the FTT to distinguish such a consistent line of binding authority?

22. The FTT first directed itself to Lord Millett's explanation in *Uratemp Ventures* at [30] that the word "dwelling" is an ordinary English word, not a legal term of art, and refers "to the place where one lives and makes one's home", suggesting "a greater degree of settled occupation than "reside" and "residence", connoting the place where the occupier habitually sleeps and usually eats". It then suggested that "the question for the tribunal is whether such a degree of permanence is intended by the private dwellinghouse provision in the lease".

23. In answering that question the FTT drew attention to five relevant features of the lease. First, that the prohibition on use other than as a private dwelling house was "set in the context of the restriction on trade or business"; secondly, that the wording refers to "a" private dwellinghouse and not "his or her" private dwellinghouse; thirdly, that the lease also specifically permitted short term assured shorthold tenancies not exceeding 6 months; fourthly, that it was common ground between the parties that the taking of a lodger was not prohibited; and finally that the lease did not prohibit other forms of occupation under licence.

24. Those features led the FTT to this conclusion at paragraph [54]:

> "In the light of the above the tribunal does not accept that the intention of the parties was to allow, expressly or implicitly, short terms letting, licensing and lodging in the alienation provisions and then to limit or prevent this via a restriction set in the context of a prohibition on running a trade or business."

25. Mr Crossley supported the FTT's reasoning and suggested that there was no other plausible reading of the lease which reconciled the restriction on use other than as a private dwellinghouse and the contemplation that the flat could be let for short periods of up to six months.

26. The factors identified by the FTT do not seem to me to require any departure from the approach taken by the Tribunal to the very similar covenant considered in *Nemcova.* If anything, the particular language of the covenant in this case, with its reference to "dwellinghouse" connoting settled occupation and habitual residence, makes this an even clearer case.

27. The fact that the covenant has two limbs, prohibiting any trade or business as well as prohibiting use other than as a private dwellinghouse, does not require that one limb be treated as subordinate to the other. On the contrary, effect must be given to both. The pairing of restrictions on business use and non-residential use in a single covenant is a common drafting technique and in *C. & G. Homes Ltd* Nourse LJ, at 380, applied what he called "the fundamental rule that due effect must be given to all of the words in which the parties have expressed themselves" to just such a covenant. There is no difficulty in giving full effect to both limbs of the covenant as there is no inconsistency between them. There is no need to qualify the second prohibition by reading it as permitting uses which would not usually be described as use as a private dwellinghouse provided they do not involve conducting a business from the premises.

28. The FTT was right that the covenant does not require that the flat be used as the private dwelling house of the tenant (it must be "a" private dwellinghouse, not necessarily, "his or

her" private dwellinghouse). The fact that the original tenant was a limited company is a further indication that the parties contemplated that the individual or family using the flat as their private dwellinghouse need not be the tenant under the lease. It could, for example, be a director of the original tenant company or a sub-tenant. None of those possibilities detract from the requirement that whoever is in occupation for the time being must use the flat only as their dwellinghouse.

29. The FTT appears to have regarded what it called the "express permission for short term assured shorthold tenancies of a duration not exceeding 6 months" as a critical feature in its analysis. But to read into this an indication that the parties contemplated a succession of short term occupiers is to misunderstand the covenant. Paragraph 31.2 of Schedule 4 to the lease does not prohibit subletting for terms of any duration; rather it provides that if a letting is for more than six months or does not create an assured shorthold tenancy the consent of the landlord is required, and may not unreasonably be withheld. Since an assured shorthold tenancy is simply an assured tenancy granted after the commencement of the Housing Act 1996 (section 19A, Housing Act 1988), and since it is a condition of an assured tenancy that the tenant occupies the dwellinghouse as their only or principal home (section 1(1)(b), 1988 Act), there is no possible tension or inconsistency between the requirement that the flat be used only as a private dwellinghouse and the possibility of a letting for less than six months. A short term letting to someone who did not use the flat as their only or principal home (and who therefore was not using it as a private dwellinghouse, but as a *pied a terre*) would be a breach of covenant unless the landlord's consent had first been obtained. The FTT's suggestion that the parties intended "use as temporary accommodation" whether by means of short term letting, licensing or lodging is not justified.

30. The FTT said that the parties agreed that taking in a lodger was not prohibited by paragraph 18. I am not at all sure that is correct, since the flat must be used "by one family at any one time", but even if the parties' consensus was correct it would not point to an intention that occupation by a series of unconnected individuals was to be permitted.

31. Finally, the absence of an express prohibition on the grant of licenses is not a factor of any weight when the lease includes a prohibition on use other than as a private dwellinghouse.

32. Whether looked at individually or in combination, the five factors identified by the FTT as distinguishing paragraph 18 from any other prohibition on use other than as a private dwellinghouse or residence, do not justify its conclusion. It is not a case of conferring a right to short term letting or licensing, then taking it away; properly understood, the lease permits only such short term letting as is consistent with use as a private dwellinghouse.

33. On the facts found by the FTT the individuals who occupied the flat for weekends or other short periods after responding to internet advertisements were not using the flat as a private dwellinghouse for occupation by one family at any one time. By permitting that use Mr and Mrs Beattie were in breach of paragraph 18 of Schedule 4 of their lease. The first ground of appeal is therefore allowed.

Issue 2: The prohibition on carrying on or permitting a trade or business to be carried on upon the property

34. There is no challenge to the FTT's finding that no trade (in the sense of buying or selling) was being carried on upon the property. But Mr Harrison argued that the FTT had been wrong to disregard the decision of the Court of Appeal in *Tendler v Sproule* that the taking in of paying guests was a breach of a covenant not to use premises for a business.

35. The covenant in *Tendler v Sproule* obliged the tenant "not to use the premises or any part thereof for any business", and it was held that the taking in of paying guests constituted a breach of that obligation. Mr Crossley drew a distinction between using premises for a business (as a "business resource" as he put it), and carrying on business upon the premises. In this case it was not in dispute that the flat was being used for the business of short term letting, but that business was being carried on from elsewhere, not "upon the property", and those who were at the property were using it for residential purposes. In other words, the prohibition is against conducting business in the flat, not against using the flat for short term residential purposes albeit as part of a business.

36. I was not shown any authority in which this distinction has been considered. The FTT directed itself by reference to the decision of the Court of Appeal in *Florent v Horez* (1948) 48 P & CR 166, a case concerning a tenant who held numerous meetings of a Turkish Cypriot cultural committee at his flat. It was said by the Court of Appeal to be a question of degree whether on the one hand, the use of premises was ancillary or subordinate to their residential use and therefore not a breach, or, on the other hand, amounted to carrying on business (in the widest sense) on the premises. In this case the FTT considered that the flat continued to be used for residential purposes by Mr Beattie, that nobody was operating a business on the property, and that the third-party use was a temporary expedient pending the sale of the flat and was "both ancillary and subordinate" to Mr and Mrs Beattie's use. For those reasons the FTT concluded that there was no breach of the covenant against permitting a business to be carried on upon the property.

37. Mr Harrison pointed out that the covenant in this case prohibits carrying on upon the premises "at any time … any trade or business whatsoever" and suggested that carrying on any amount of business at any time would therefore be a breach. I agree, but that does not meet Mr Crossley's point that no business was being conducted "upon the Property". No activity was carried on upon the property which in itself amounted to a business. I consider that the provision of laundry services between lettings, leaving breakfast goods for visitors, and handling check-in and check-out (which was not said to happen at the flat) do not alter that assessment and do not amount to carrying on business on the property. I therefore consider the FTT was right to find that letting the flat for short term residential use did not breach the covenant against carrying on business upon the property.

The application for permission to cross appeal

38. If the Tribunal found in favour of the appellant, as I now have, Mr Crossley sought permission to argue that the appellant's right to rely on covenants which had been breached had been waived by its issuing of demands for subletting fees and receipt of those fees. His point was not that the particular breach complained of had been waived (which is not a matter within the jurisdiction of the FTT to determine, see *Triplerose Ltd v Patel* [2018] UKUT 0374 (LC) at [22]) but that the whole covenant had become unenforceable against Mr and

Mrs Beattie and could not therefore be said to have been breached by them (which is a matter within the FTT's jurisdiction because it goes to the issue of whether there has been a breach at all, see *Swanston Grange (Luton) Management Ltd v Langley-Essen* LRX/12/2007, LT at [16]-[21]).

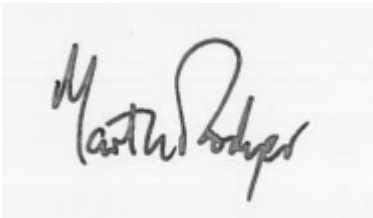
39. I refuse permission to cross-appeal on that issue (which the FTT did not find it necessary to consider) because there was no evidence before the FTT capable of supporting it.

40. It was common ground that fees had been levied by the landlord's agent (presumably in return for a relaxation of the need to give notice of individual sublettings and pay a registration fee) but there was no suggestion that those fees authorised use of the flat for any purpose other than as a private dwellinghouse. Nor did the email correspondence relied on take the matter any further. The flat had originally been let on assured shorthold tenancy which would have been consistent with paragraph 18 of the fourth schedule, and the request for a "replacement key" is not capable of being treated as notice that the flat was now used for weekend occupation in breach of it. The disputed evidence about whether the letting fee had actually been paid added nothing.

Disposal

41. For these reasons I dismiss the appeal on issue 2 and allow the appeal on issue 1. I refuse permission to cross-appeal.

42. I substitute a determination that Mr and Mrs Beattie breached paragraph 18 of Schedule 4 to their lease between October 2017 and September 2018 by permitting their flat to be used for a purpose other than as a private dwellinghouse, namely as short term residential accommodation occupied by a succession of paying guests sourced through internet booking agencies.



Martin Rodger QC,

Deputy Chamber President

4 June 2020