

8460

**HM COURTS & TRIBUNAL SERVICE**  
**LEASEHOLD VALUATION TRIBUNAL**

**Case No. CHI/00HN/LBC/2012/0022**

**DECISION AND REASONS**

**Application** : Section 168(4) Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) and section 20C of the Landlord and Tenant Act 1985 (“the 1985 Act”)

**Applicant/Landlord** : Keverstone Court Freehold Limited

**Respondent/Leaseholders** : Mrs Andrea Becker and Ms Farah Baig

**Premises**: 17 Keverstone Court, 97 Manor Road, Bournemouth, Dorset BH1 3EX

**Lease** : a lease dated 15 December 1989 made between Barmac (Estates) Limited (1), Keverstone Court Residents Society Limited (2), Bellwinch Homes Limited (3), and Albert Stephen Tayler and Dorothy Joan Tayler (4)

**Date of Section 168(4) Application** : 20 August 2012

**Date of Directions** : 29 August 2012

**Date of section 20C Application** : 25 September 2012

**Hearing** : considered by the Tribunal without a hearing pursuant to Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 as amended

**Members of the Tribunal** : Mr P R Boardman MA LLB (Chairman), and Mr K Lyons FRICS

**Date of Tribunal’s Decision and Reasons** : 7 December 2012

**Introduction**

1. The application by the Applicant/Landlord is for the Tribunal to determine whether a breach of covenant or condition in the lease has occurred
2. The application by the Respondent/Leaseholders is for a determination whether, and, if so, to what extent, the costs incurred by the Applicant/Landlord in relation to these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Landlord

3. The grounds of the application by the Applicant/Landlord, as set out in the Applicant/Landlord's statement of case, were that :
  - a. under paragraph 1 of the first schedule to the lease the Respondent/Leaseholders covenanted :
 

*"Not to use the Premises nrt permit the same to be used for any illegal or immoral purpose or any trade business or manufacturing nor for any purpose other than as a private residence in single occupation only and not to do anything in the Premises which is or may become a nuisance to the Landlord of the leaseholders or occupiers of nearby premises"*
  - b. the Respondent/Leaseholders had admitted that they were subletting the Premises for short term lets, and had advertised the Premises on websites as a holiday rental home, but were denying that this was a breach of covenant
  - c. there were three breaches of covenant
  - d. the covenant not to use the Premises for any purpose other than as a private residence in single occupation was broken by taking in paying guests and/or using the Premises for holiday lets : **Thorn v Madden** [1925] Ch 847; **Tendler v Sproule** [1947] 1 All ER 193; **Caradon DC v Paton** [2000] 3 EGLR 57
  - e. the covenant not to use the Premises for any trade or business was broken by taking in paying guests : **Thorn v Madden**, and **Tendler v Sproule**
  - f. the covenant not to do anything in the Premises which is or may become a nuisance had been broken as a result of the holiday lettings by the hanging of washing over the balcony of the Premises, which was unsightly and contrary to paragraph 5 of the first schedule to the lease
  
4. The material provisions of section 168 of the 2002 Act are follows :

**Section 168**

- (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 the breach has occurred*
- (3) *But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made*
- (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 a covenant or condition in the lease has occurred*
- (5) *... ..*

## HM Land Registry entries

5. Entries for title number DT118436 showed the Applicant/Landlord as the freehold owner of Keverstone Court, subject to the lease of the Premises (and to leases of other flats at Keverstone Court)
6. Entries for title number DT175412 showed the Respondent/Leaseholders as leasehold owners of the Premises, subject to the lease

## The lease

7. The material provisions of the lease are as follows

### ***Particulars***

*Subscription: seven hundred and fifty pounds per annum payable by equal half yearly payments in advance on the 25th March and 29th September of each year or such sum as may from time to time be determined by the Society in accordance with its Rules*

### ***4 Leaseholder's covenants***

*(2) To pay the Subscription to the Society at the times and in the manner specified in the Particulars*

*(12) Not during the last three years of the term to assign or underlet the Premises or the Parking Space without the Landlord's written consent which shall not be unreasonably withheld*

*(13) Within two months after any assignment or underlease transfer or charge of the Premises of the Parking Space to leave copies of the document certified by a solicitor to be true copies with the Landlord and with the Society paying a reasonable fee not being less than £15 plus value added tax on each such registration*

*(19) To observe the Restrictions set out in the First Schedule which are intended to benefit the Landlord the Society and also the leaseholders of other apartments or lodge [sic] in the Buildings*

*(20) To comply with such reasonable regulations as the Society may from time to time make for the proper or better management of the Buildings*

### ***The First Schedule***

#### ***Restrictions***

*1 Not to use the Premises nor permit the same to be used for any illegal or immoral purpose or any trade business or manufacture nor for any purpose other than as a private residence in single occupation only and not to do anything in the Premises which is or may become a nuisance to the Landlord or the leaseholders or occupiers of any nearby premises*

## Response from the Respondent/Leaseholders

8. The Respondent/Leaseholder stated that :
- a. the freehold Land Registry entries included a restrictive covenant in the Charges Register not to erect notice boards except auctioneers' or house agents' notice boards for the sale or letting of Keverstone Court or any flat therein, which clearly suggested the expectation of flats being let
  - b. they had purchased the Premises from someone who was renting it out
  - c. a lady at Hamilton Townsend, the managing agents, told Ms Baig that lets were permitted, but was unable to find anything in the lease stipulating the periods of lettings
  - d. the Respondent/Leaseholders' lawyers had told them, both before and after their purchase of the Premises, that there was nothing in the lease restricting holiday lets
  - e. the cases cited by the Applicant/Landlord as authorities did not apply to this case, as the Respondent/Leaseholders used the Premises on a frequent basis
  - f. in an e-mail dated 13 March 2012 the Respondent/Leaseholders confirmed that they had now removed the Premises from the holiday letting site, and that they were no longer advertising it for rental
  - g. the Applicant/Landlord had confirmed, in a letter from their solicitors dated 3 July 2012, that some flats were sub-let on formal long-term lettings, and there was no difference, so far as a private residence was concerned, between a short let and a long let
  - h. the lease did not contain any restrictions on lettings
  - i. the fact that a person living at the Premises was doing so for a short holiday did not change the fact that their occupation was residential : the 2010 tribunal case of **Maymo Management Company Limited v Moira Hall**
  - j. the **Caradon DC v Paton** case was on different facts, where the court found, in a right to buy case, that the property was not occupied by the owners at all, whereas the Respondent/Leaseholders used the Premises on a frequent basis
  - k. the Respondent/Leaseholders had not taken in paying guests
  - l. the use for holiday lets did not constitute a business : **Maymo**

#### **Reply by the Applicant/Landlord**

9. The Applicant/Landlord responded to the Respondent/Leaseholders' submissions. The Applicant/Landlord also asked the Tribunal not to make an order under section 20C of the 1985 Act. The Applicant/Landlord needed to recover its costs in order to ensure solvency

#### **Response from the Respondent/Leaseholders 20 November 2012**

10. The Respondent/Leaseholders responded to the Applicant/Landlord's submissions. They stated that advertising have stopped in January, and no further bookings had been taken. There had been a few bookings during the early part of the year and summer, but for much of the time Ms Baig and her family were using the Premises or the Premises had been vacant

#### **Surrejoinder by the Applicant/Landlord**

11. The Applicant/Landlord responded to the Respondent/Leaseholders' submissions

## Other documents

12. Other documents in the various bundles submitted by the parties were (in chronological order of document) :
- a. the lease
  - b. the first page of a document from Serv-Estate Limited dated 1 March 1993 entitled "Newsletter", stating that :

*"We have been asked by the Residents' Society Liaison Committee to write to all residents and owners of property at Keverstone Court to update you on various items of general interest and/or concern which have come to their attention and which they feel you would wish to know about/request your adherence*

*1 Use of Apartments for Holiday Lettings*

*All owners are advised that the Liaison Committee have taken Legal Opinion which concludes that short term holiday lettings are not permitted within the terms of the leases. The relevant clause in the leases appears in the First Schedule No 1 which prohibits the use of the premises for a business or any other purpose other than as a private residence in single occupation only. It also prohibits anything being done which causes nuisance to other leaseholders*

*Last summer the Liaison Committee received a number of complaints concerning inconsiderate car parking, children playing in the lift, garage gates (emergency ones) being left open, cycles being chained to railings and damaging the paintwork etc. Some of these appeared to emanate from persons using the Apartments for holiday lettings*

*Owners are asked, therefore, not to allow short-term holiday lettings in the future and their cooperation is greatly appreciated"*
  - c. minutes of the committee meeting of Keverstone Court Residence Society Ltd 3 June 2011
  - d. an e-mail from Mr Alex Becker to David Freedman, Aubrey David, dated 21 June 2011 stating that they wished to sub let the Premises for short periods during school holidays to cover some of the outgoings and asking whether permission was needed
  - e. an e-mail from David Freedman, Aubrey David, dated 22 June 2011 stating that there was nothing in the lease which prevented or restricted the right to sublet
  - f. a holidaylettings.co.uk webpage : "Keverstone Court.....1 of 15 holiday rentals in Boscombe"
  - g. a tripadvisor.co.uk webpage : "Find Holiday Rentals..... Keverstone Court"
  - h. a letter from Hamilton Townsend dated 3 January 2012 stating that holiday lets were prohibited under paragraph 1 of the first schedule to the lease which stated that the Premises could not be used for trade or business and must be used as a single private residence
  - i. an e-mail from Mr Alex Becker to David Freedman, Aubrey David, dated 6 January 2012 stating that there were just a few lettings to offset some of the service charges and it had not been, and never would be, a business or trade, and asking for confirmation that they could continue

- j. an e-mail from David Freedman, Aubrey David, dated 6 January 2012 stating that so long as they were not carrying on a business, ie lettings all year round, he could not see that there could be an issue of any business activity; even more if it was not for profit
- k. a letter from Ms Baig dated 11 January 2012, stating that :
  - they had asked their lawyers if there was anything in the lease restricting them from renting the Premises for holiday lets on a non-profit basis to offset some of their costings, and he had confirmed that there were no such restrictions
  - their flat was not being rented out as a business, or for the intention of making any form of profit
  - it was a jointly owned holiday/weekend home, that they had been renting on short-term lets to carefully vetted single families
  - although there were large areas of the calendar blocked out within trip advisor, they used that to schedule their own usage of the Premises, which allowed prospective families to view its availability
- l. a letter from Hamilton Townsend dated 24 January 2012
- m. a letter from Brethertons dated 16 February 2012
- n. various e-mails dated from 21 February to 27 February 2012
- o. an e-mail from holidaylettings.co.uk to Joel Becker dated 23 February 2012 stating that the advert for Home 148178 Keverstone Court had been removed from the Holiday Lettings website
- p. an e-mail from the Respondent/Leaseholders dated 13 March 2012
- q. an e-mail from Brethertons dated 15 March 2012
- r. an e-mail from Sally James dated 25 March 2012
- s. a letter from the Respondent/Leaseholders dated 26 March 2012 to the directors of the Applicant/Landlord
- t. the letter from Brethertons dated 16 April 2012
- u. a letter from Hamilton Townsend dated 16 April 2012 with minutes of the AGM held on 23 March 2012
- v. a cheque from Townsends (Bmth) Ltd for £1209.46 dated 8 May 2012 made payable to "A Becker", with a note of the same date from Hamilton Townsend stating that "due to ongoing legal proceedings we are unable to accept your service charge payment"
- w. a letter from the Respondent/Leaseholders dated 15 May 2012 to the directors of the Applicant/Landlord
- x. a letter from the Respondent/Leaseholders dated 12 June 2012 to the directors of the Applicant/Landlord
- y. a letter from Brethertons dated 14 June 2012
- z. a further letter from Brethertons dated 14 June 2012
- aa. a letter from the Respondent/Leaseholders dated 30 June 2012 to the directors of the Applicant/Landlord
- bb. a letter from Brethertons dated 3 July 2012
- cc. a letter from Brethertons dated 12 July 2012
- dd. a letter from the Respondent/Leaseholders dated 10 August 2012 to the directors of the Applicant/Landlord
- ee. various photographs attached to the Applicant/Landlord's statement of case

- ff. various photographs attached to the Respondent/Leaseholders' response
- gg. various documents referred to in the Respondent/Leaseholders' response as "we have done a simple search and discovered a number of businesses that have traded and are trading from the development, a few of which were run by directors of the Applicant/Landlord"
- hh. a document referred to in the Respondent/Leaseholders' response and entitled "list of communications for LVT"
- ii. a witness statement by Timothy Townsend dated 18 October 2012
- jj. a witness statement by Brian Newman dated 19 October 2012
- kk. Balgores Best Price Guide to 6 November 2012
- ll. an e-mail from Nick Lear dated 13 November 2012
- mm. a cheque from Townsends (Bmth) Ltd for £1209.46 dated 14 November 2012 made payable to "A Becker", with a note of the same date from Hamilton Townsend stating that "due to ongoing legal proceedings we are unable to accept your service charge payment"
- nn. a document attached to the Respondent/Leaseholders' response dated 20 November 2012 entitled "copy of mobile phone bill"
- oo. a document attached to the Respondent/Leaseholders' response dated 20 November 2012 entitled "calls made from landline (home phone)"

### **Inspection**

13. The Tribunal inspected the Premises on 7 December 2012. Also present were Mrs Emily Orner of Hamilton Townsend on behalf of the Applicant/Landlord, and Ms Baig and Mr Alex Becker on behalf of the Respondent/Leaseholders. Keverstone Court comprised four blocks built in the late 1980s and early 1990s. Block A, in which the Premises were situated, had two flats on each of seven floors, and a penthouse. The Premises were on the ground floor in the south-west corner above an underground car park. The Tribunal inspected the interior of the Premises, and Mr Alex Becker gave the Tribunal a helpful floor plan. The lounge led to a balcony. The Tribunal walked round the estate

### **The Tribunal's findings**

14. The Tribunal, in arriving at its decision in this case, has taken account of all the parties' submissions and documents and of all the authorities referred to by the parties
15. The Tribunal finds that :
- a. the Respondent/Leaseholders accept that they have sublet the Premises on short lettings from time to time
  - b. the Respondent/Leaseholders will be prohibited from doing so only if the lease so provides, expressly or impliedly
  - c. there is no express provision in the lease prohibiting them from doing so, apart from the requirement in clause 4(12) to obtain consent to underletting during the last three years the term, which does not of course yet have any current application
  - d. in relation to clause 4(20) of the lease, the Tribunal's attention has not been drawn to any regulations prohibiting sub lettings; the document from Serv-Estate

Limited dated 1 March 1993 does not, on the face of it, purport to be a “regulation” for the purposes of clause 4(20), because :

- it is entitled “Newsletter”
  - its wording is expressed by way of information (*the Liaison Committee have taken Legal Opinion which concludes that short term holiday lettings are not permitted within the terms of the leases*) and request (*Owners are asked, therefore, not to allow short-term holiday lettings in the future and their cooperation is greatly appreciated*), not a regulation
- e. in relation to the question whether the Respondent/Leaseholders’ short term lettings of the Premises have amounted to a breach of the restriction in paragraph 1 of the First Schedule to the lease *not to use the Premises nor permit the same to be used.....for any purpose other than as a private residence in single occupation only*, the Tribunal finds that the authorities relied on by the Applicant/Landlord are of only limited assistance, in that **Thorn v Madden** and **Tendler v Sproule** both involved taking in third parties (whereas the Respondent/Leaseholders have not, according to the evidence before the Tribunal, lived in the Premises at the same time as their sub tenants), and **Caradon DC v Paton** involved a restriction not to use or permit to be used the property for any purpose other than that of “a private dwellinghouse” (whereas the restriction in the Respondent/Leaseholders’ lease is not to use the Premises for any purpose other than as “a private residence”)
- f. however, the Tribunal accepts the submissions on behalf of the Applicant/Landlord that the Respondent/Leaseholders’ short term lettings of the Premises have amounted to a breach of the restriction in paragraph 1 of the First Schedule to the lease *not to use the Premises nor permit the same to be used for ..... any trade business*, in that the Tribunal finds that it is clear :
- that they have derived an income from the lettings
  - that activity in letting the Premises for an income amounts to a “business” for the purposes of paragraph 1 of the First Schedule to the lease : **Thorn v Madden** and **Tendler v Sproule**; to the extent that the LVT in the case of **Maymo Management Company Limited v Moira Hall** found that the activity of letting for an income did not amount to a business in that case, the Tribunal is not bound by that decision, and declines to follow it
  - the fact that the Respondent/Leaseholders might have lived in the Premises themselves at times when they were not letting the Premises, does not affect the fact, as the Tribunal finds, that their activity in letting the Premises for an income at other times does amount to a business for the purposes of paragraph 1 of the First Schedule of the lease
- g. however, there is no evidence before the Tribunal of any current lettings of the Premises and accordingly no evidence of any current breach of covenant for the purposes of section 168(4) of the 2002 Act
- h. in relation to the Respondent/Leaseholders’ submission that the freehold Land Registry entries included a restrictive covenant in the Charges Register not to erect notice boards except auctioneers’ or house agents’ notice boards for the sale or letting of Keverstone Court or any flat therein, and that that clearly suggested



the expectation of flats being let, the Respondent/Leaseholders are bound by the terms of their lease, even if the freehold covenants are less prohibitive, or, indeed, if there were no freehold covenants at all

- i. in relation to the questions whether there had been any previous lettings by any previous owner of the Premises, or whether there were any lettings of any of the other flats at Keverstone Court, or whether there had been any representations on behalf of the Applicant/Landlord that lettings were permitted, or whether there were any breaches of the restriction not to use any of the other flats at Keverstone Court for any trade or business, those questions are not relevant to the issue before the Tribunal, namely whether the Respondent/Leaseholders are in breach of covenant in relation to the Premises, but the questions might be relevant in any court proceedings to any questions of waiver of the right to forfeit or of relief from forfeiture
- j. in relation to the Respondent/Leaseholders' application for an order under section 20C of the 1985 Act, the Tribunal's attention has not been drawn to any provision in the lease which might allow the Applicant/Landlord to include the costs of these proceedings in any future service charge, but, if the Applicant/Landlord is entitled to do so, the Tribunal :
  - declines to make an order under section 20C of the 1985 Act, in that the Tribunal has found, in favour of the Applicant/Landlord, that the Respondent/Leaseholders' short term lettings of the Premises have amounted to a breach of covenant
  - reminds itself that any such costs which might be included in a future service charge will be subject to the test of reasonableness set out in section 19 of the 1985 Act

Dated 7<sup>th</sup> December 2012



.....  
P R Boardman  
(Chairman)

A Member of the Tribunal  
appointed by the Lord Chancellor