FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00EJ/LBC/2019/0003**
Property	**:**	**44 Sandringham Court, Chester le Street, DH3 3SQ**
Applicant	**:**	**Adriatic Land 4 Ltd.**
Representative	**:**	**Town & City Management Ltd.**
Respondents	**:**	**Kevin Robertson and Sally Marshall**
Type of Application	**:**	**s. 168(4) of the Commonhold & Leasehold Reform Act 2002**
Tribunal Member	**:**	**Judge P Forster** **Ms J A Jacobs MRICS**
Date of Determination	**:**	**7 June 2019**
Date of Decision	**:**	**13 June 2019**

DECISION

Decision

1. The respondent has breached clause 4.24 of the lease dated 7 April 2006.

Introduction

2. This is an application under s.168(4) of the Commonhold and Leasehold Reform Act 2002 for the tribunal to determine whether there has been a breach of covenant.

3. The applicant is Adriatic Land 4 Ltd. and the respondents are Sally Marshal and Kevin Robertson. The property is 44 Sandringham Court, Chester le Street, DH3 3SQ.

4. By a lease dated 7 April 2006 made between Grainger Homes Ltd. as the Landlord and Sandringham Court (Picktree) Management Ltd. as the Management Company and the respondents as tenant, the property was let for a term of 125 years from 1 January 2004 upon the terms and conditions therein.

5. Under clause 4.24 of the lease the tenant covenanted with the landlord and separately with the management company:

> "*not at any time to carry on or permit to be carried on upon the Demised Premises any trade or business whatsoever not 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*".

The applicant's case

6. The applicant alleges that the respondents are in breach of clause 4.24 by letting the property as a short-term holiday let. Evidence was produced that the property had been advertised for rent on short-term letting websites including Airbnb.

The respondents' case

7. The respondents' case is that they purchased the property in April 2006 as an investment property in order to sub-let to tenants. They did not intend to live in the property. This was clear to the freehold owner because the respondents bought two leasehold properties in the same block of flats. The respondents sub-let the property from about August 2006 on assured shorthold tenancies to various tenants. The income generated was insufficient and on advice, the respondents listed the property on several short-term letting websites. The respondents did consider the terms of their lease but did not understand that such might constitute a breach of the lease.

8. In terms of the wording of the covenant, the respondents submitted that the use of the property for short-term lets, was not in breach of clause 4.24 because:

   a. *"a "business" was not being conducted from the property, in so far as the occupier resided there for the term of their sub-lease of the property and was not operating a business or trade from the property. So far as the respondent was concerned, they were merely renting out accommodation, as is the case with most of the properties in the development. Had the covenant's intention been to exclude short term letting then it would have said that the letting should be on assured shorthold basis only to the exclusion of holiday lets".*

   b. *"As there is no mention in the covenant about the minimum term of any sub-letting, the respondents placed no limit on the period of occupancy as part of the rental agreement"*

   c. *"family" is not defined …[in] the lease. It is not explained whether the premises must be occupied by individuals who are actually blood family members, whether it excludes couples who are not married, or co-sharing of the premises by colleagues or students, for example…The covenant is unduly restrictive and should be revoked".*

9. The respondents argued that they should be released from the covenant by the tribunal exercising its powers to discharge or modify a restrictive covenant under s.84(1) of the Law of Property Act 1925 "*by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete".*

The law

10. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 provides that "*A landlord under a long lease of a dwelling may make an application to the First-tier Tribunal for a determination that a breach of a covenant or condition in a lease has occurred"*

The decision

11. We are asked to determine whether the respondents have breached clause 4.24 of the lease. The first step is to construe the meaning of the clause. The basic principles of construction are summarised by Lord Neuberger in Arnold v Britton [2015] UKSC 36 at paragraph 15:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language the contract to mean", to quote Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 at 14. And it does so by*

> *focussing on the meaning of the relevant words….in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

12. For the purpose of the present application, the relevant words in the clause are "*as a private dwelling house"*. There is no need to consider whether a business is being carried on or to construe what is meant by "*occupation by one family"* nor to consider the length of any sub-letting. The application has been prompted by a complaint from another leaseholder in the block who objects to the use of the flat for short-term lettings.

13. There are a number of cases which illustrate what is meant by use of premises as a private dwelling house. In Falgor Commercial SA v Alsabahia Inc [1985] 1 E.G.L.R. 41 CA (Civ Div) a covenant "*to use premises as a single private residence"* was broken when the tenant allowed others to reside there under occupational licences for payment. In Tandler v Sproule [1947] 1 All E.R. 193 it was held that a tenant in residence who takes in lodgers is in breach of a covenant to keep a house as a private dwelling-house. Similarly, in Caradon DC v Paton [200] 3 EGLR 57 CA (Civ Div) it was held that letting a property for short-term holiday use contravenes a covenant against use other than as a private dwelling-house.

14. Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC) considered whether Airbnb lettings breached a covenant to use only as a private residence. In that case the lessee had covenanted not to use or permit the flat to be used other than as a private residence. The lessor argued, in reliance on Caradon DC v Paton, Tendler v Sproule and Falgor Commercial SA v Alsabahia Inc that the lessee's granting of a series of short-term lettings of the flat had breached the covenant. The tribunal found that she had breached the covenant because, by granting the lettings, she had used the flat other than as a private residence. The Upper Tribunal upheld that decision applying Arnold v Britton, stating that in construing the covenant the emphasis had to be on the meaning of the words used in their particular, fact-specific context.

15. In the context of a residential building that comprises flats let on standard terms which were intended to be enforceable by the tenants against each other, through the agency of the landlord, an intention to restrict the use of the property to use as a private dwelling house alone is neither improbable nor surprising. Considerations of estate management and good housekeeping provided a rational explanation why parties to such a lease might regard it as mutually beneficial to restrict the use to a private dwelling house. To an owner-occupier or to sub-tenants under an assured shorthold tenancy, to have neighbours who are themselves owner-occupiers or sub-tenants might be preferable to neighbours who are occupying on short lets with no interest in the property.

16. The natural and ordinary meaning of the covenant is its literal meaning, namely that the use of the flat should be limited to use as a private dwelling house. Not to read the covenant in such a way would undermine its purpose. To allow the exploitation of the flat by letting it out on sub-lets to third parties would strip the critical words from the covenant and reverse its clear intention.

17. Therefore, the covenant does not bear the meaning suggested by the respondents. On the facts of this case, we find that the respondents are in breach of clause 4.24 by sub-letting the property on short-term lettings.

18. It is not clear to what extent, if at all, that the respondents seek to rely on the doctrine of estoppel. There are a number of forms of estoppel, including promissory estoppel and proprietary estoppel and there is a degree of overlap between them. Estoppel by convention has been the most important in breach of covenant cases. An estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption – see Republic of India v India Steam Ship Co Limited ("the Indian Endurance and the Indian Grace) [1998] AC 878. In the present case, the respondents stated that they purchased the property as an investment property in order to sub-let to tenants and they did not intend to live in the property. They say this was clear to the freehold owner because the respondents bought two leasehold properties in the same block of flats. The point at issue here is not the right to sub-let per se but the right to use the property for something other than as a private dwelling house. On the facts as presented to us, no grounds are established that might constitute an estoppel.

19. The respondents seek to rely on s.84(1) of the Law of Property Act 1925 but have quoted selectively and ignored the fact that the power to discharge or modify restrictive covenants affecting land is "*on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise*". What the respondents have in mind is an application under the Landlord and Tenant Act 1987 to vary the terms of the lease but that is not the application before the tribunal.

20. For the reasons given, the application is allowed, we find that the respondents are in breach of clause 2.24 of the lease.

Mr P Forster
Tribunal Judge
7 June 2019