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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/45UB/LBC/2016/0030**
Property	:	**Flat 4, Chelmer House, South Street, Lancing, West Sussex BN15 8BD**
Applicant	:	**Chelmer House (Lancing) Limited**
Representative	:	**Mr Daniel Bromilow, Counsel**
Respondent	:	**Adeola Mueller**
Representative	:	**Professor Luke Maughan - Pawsey**
Type of Application	:	**Determination of alleged breach of covenant**
Tribunal Members	:	**Judge E Morrison** **Mr N I Robinson FRICS**
Date and venue of Hearing	:	**13 April 2017 at Brighton Family Centre**
Date of decision	:	**2 May 2017**

DECISION

The Application

1. By an application dated 3 November 2017 the Applicant landlord applied for a determination that the Respondent tenant has breached various covenants or conditions in her lease.

2. The lease of Flat 4 is dated 16 September 1977 and is granted for a term of 150 years from 25 December 1974. By clause 4(5) of the lease the tenant covenants with the landlord and for the benefit of the other flat owners to observe and perform the regulations in the Fourth Schedule. Each of the relevant regulations is set out below.

Summary of Decision

3. The Respondent has breached the covenant in clause 4(5) of the lease by failing to observe and perform the regulations set out in paragraphs 1, 2 and 16 of the Fourth Schedule.

The Law and Jurisdiction

4. Sections 168(1) and (2) of the Commonhold and Leasehold Reform Act 2002 provide that a landlord under a long lease of a dwelling may not serve a notice under section 146 of the Law of Property Act 1925 in respect of a breach of covenant unless either the tenant has admitted the breach, or a court or tribunal has finally determined that a breach has occurred.

5. Section 168(4) permits a landlord to apply to a tribunal for such a determination.

Agreed facts

6. Chelmer House is a 1970s block consisting of nine flats arranged over two floors, situated close to the seafront at Lancing. In 2007 the Applicant, a company owned by the lessees, acquired the freehold by way of enfranchisement. All the lessees are directors of the company.

7. The Respondent has not lived at Flat 4 since 2003. Between 2003 and 2015 the flat was let out on a series of assured shorthold tenancies (as are some of the other flats). In the summer of 2015 the Respondent and her husband listed the flat, which has one bedroom, on the accommodation website, Airbnb.com, as available for short-term lets for up to five "guests".

8. Thereafter the Respondent let out the flat to various persons via Airbnb. She was unaware that the other lessees/residents of Chelmer House had any concerns about this until 14 August 2016, when one lessee complained, and others followed suit. She then permitted the flat

to be used by individuals who had already booked through Airbnb for the following three weekends. There were no complaints in relation to those persons' behaviour. There is no evidence that Flat 4 has been let out at all since 11 September 2016.

Representation and evidence before the Tribunal

9. The bundle before the Tribunal included the Applicant's statement of case, three witness statements on behalf of the Applicant, two witness statements by the Respondent and her husband, and various other documents relied on by the parties. At the hearing the Respondent handed in a statement of case which she said had been omitted from the bundle. Although the Applicant denied ever having received this, there was no objection to the Tribunal considering it.

10. The Respondent also proffered written character evidence from a church pastor and a witness statement from a Shula Rich. This evidence was irrelevant to the issues before the Tribunal, and has not been considered.

11. The Tribunal heard oral evidence from all five witnesses who had provided witness statements.

12. The Applicant was represented by Counsel, the Respondent by an academic lawyer. As the Respondent and her representative contended that they had not been given enough time to consider two legal authorities relied on by the Applicant, the Tribunal directed that the Respondent could file written submissions relating to the applicability of these authorities within 14 days. Submissions were received on 27 April 2017, and, to the extent that they fall within the scope of the direction, have been fully considered.

The Applicant's evidence

Mrs Diane Pollard

13. Mrs Pollard owns Flat 5, and lives there intermittently. Having noticed that strangers were staying for a night or two in Flat 4, she checked Airbnb.com and found the flat advertised for short-term lettings. In her witness statement she stated that sometimes music was played very loud and she could hear it though the wall, that she could hear people moving round Flat 4, that doors were slammed and noise was made. She had seen men smoking on the communal walkways, and sometimes rubbish was left in the communal areas. On one occasion the carpet in the communal entrance hallway had been stained. Mrs Pollard explained that she hadn't kept a diary and could not put dates to the matters complained of.

Mr Helder Nogueira

14. Mr Nogueira owns and lives at Flat 3. In June 2016 he noticed that different people were staying at Flat 4 for a night or two each weekend. He also found the flat listed on the Airbnb website. He referred to three separate occasions when he had heard loud music playing in Flat 4. On one occasion at approximately 1.30am he asked a group of young girls staying there to be quiet but they took no notice. On another occasion he approached a group of young men staying at Flat 4 who were shouting in the communal walkway and playing very loud music at about midnight. Mr Nogueira asked them to be quiet and they complied. He could not recall the dates of these two incidents. The final incident was on the night of 13/14 August 2016 when he approached the occupants of Flat 4 at 4 am regarding their noise levels but to no avail. It was after this incident that Mr Nogueira raised his concerns with the Respondent and the other lessee directors.

15. Mr Nogueira also stated that he had seen the Respondent's "clients" smoking in the communal areas. In his witness statement he said that he had noticed rubbish bags in front of the building. In his oral evidence he said he had seen someone leave a rubbish bag on 14 August. He also noticed that the communal carpet had been stained.

Mr Adrian Jackson

16. Mr Jackson, who owns and lives at Flat 1, said he had noticed about 7-8 groups of people using Flat 4, including single individuals, couples and groups of four and five young men and women. He had "often heard a lot of noise and door banging "and seen people smoking in the communal areas. On 13 August 2016 he saw a group of young men and girls in the communal landing entrance area "in a very boisterous state".

Documentary evidence

17. The Applicant relied on various documents downloaded from the Airbnb website showing how Flat 4 was listed, with reviews posted by various people who had stayed there. There was a photograph of the stained carpet in the entrance hall.

The Respondent's evidence

Mrs Adeola Mueller

18. Mrs Mueller said that she had applied safeguarding measures and precautions to prevent noise or nuisance by persons occupying Flat 4.

19. She had created house rules that were in line with the regulations under the lease. These included the following:

    No smoking in the flat or common parts

Keep noise level down at all times

No parties in the flat

No loud music

Only the number of guests checked-in are allowed, no unauthorised additional overnight guests.

These rules were posted in the flat on the back of the front door, and on check in Mrs Mueller drew attention to them. She expected that guests would obey the rules.

Similar rules were stated on the Airbnb website listing, and Airbnb had a robust system in place whereby any occupants were vetted, and those who misbehaved could be reported and prevented from using Airbnb.

20. As a further precaution, Mrs Meuller had fitted a noise monitor which would send an alert to her mobile 'phone if the decibel level in the flat exceeded a certain level. At no time had she received any alerts through this system. On cross-examination she said that she had tested the system when she had installed it. She denied that her contact telephone number had been entered on the system with an incorrect international dialling code.

21. Mrs Mueller also said that she had "hosted" only single families and couples. She saw them at check in and check out, and lived a short distance away in Worthing, so she could have attended the flat quickly if she became aware of any problems. She and her husband prepared the flat before guests arrived, and cleaned it afterwards. They provided fresh bed-linen and towels. Breakfast was not provided, although sometimes chocolates or flowers or milk would be left as a welcome gesture. She and her husband also hosted several other Airbnb listings in Worthing.

22. At no time prior to 14 August 2016 had Mrs Mueller been aware of any concern about her guests' behaviour. She initially told the Tribunal that only one female guest had booked the flat that weekend, but later revised this to include a partner. She had not seen any other people, and had no concerns herself at either check in or check out. She didn't see any rubbish bags left outside. Following complaints made by other lessees on 14 August, she arranged for the communal carpet to be cleaned, even though there was no proof that the stain had been caused by her guests. She didn't accept that undue noise had been made, as she had received no alerts through the noise monitor system. Nor did she accept that doors had been slammed; she said all the common way doors were fitted with door closers.

23. Mrs Mueller already had bookings for the following three weekends, which went ahead, but since 11 September 2016 the flat had been unoccupied.

24. On cross –examination it was put to Mrs Mueller that she was not telling the truth in stating that only single families or couples stayed at the flat. Reference was made to reviews left by guests on the Airbnb site. One review referred to "plenty of room for 2 couples to stay in". Another review said "Friends and I had a great stay". Another referred to a "free breakfast".

Mr Mark Mueller

25. Mr Mueller confirmed what his wife had said about their involvement at check in and check out, and said that he assisted with the cleaning and laundry. At the check out on 14 August the flat was in a reasonable state with no rubbish left outside. He was aware of no complaints until that date.

26. Another guest review on the Airbnb site referred to having "toast and spreads for breakfast". On cross-examination as to whether he was telling the truth as to the provision of breakfast, Mr Mueller had difficulty in responding and appeared to be seeking guidance from his wife. He eventually accepted that coffee, tea and some spreads were in the cupboards, and on occasion other food items were also provided.

The alleged breaches

27. The regulations of the Fourth Schedule said to have been breached will be addressed in turn.

Paragraph 1 - Not at any time to use or occupy the Demised Premises to be used or occupied except (a) at to the Flat as a private residential flat in the occupation of one family only ...

28. In a letter from a lawyer consulted by the Respondent dated 22 February 2017, this breach was admitted "in light of the Upper Tribunal's decision in *Nemcova v Fairfield Rents Limited* [2016] UKUT 0303 (LC)". In *Nemcova* it was held that a series of short-term lettings of a flat breached a covenant not to use the flat "for any purpose whatsoever other than as a private residence".

29. The wording in this lease is not precisely the same as that in *Nemcova*. However the determination at paragraph 53 of that decision, namely "that in order for a property to be used as a private residence there must be a degree of permanence going beyond being there for a weekend or a few nights in the week" applies with equal force. In the case of Flat 4, there is no evidence that any of the Airbnb "guests" have stayed for more than a night or two, or on more than one occasion. This is a not user "as a private residential flat" and the Tribunal finds this provision has been breached by the Respondent.

Paragraph 2 - Not at any time to use or permit the use of either the Demised premises or any part thereof for business purposes.

30. Mr Bromilow for the Applicant submitted that this clause had been breached by the Airbnb lettings. Mrs Mueller had not lived at the property since 2003. During the period in question it was used only for Airbnb guests who were paying to stay there. In return for payment the occupants were receiving accommodation and services. The arrangement was much more akin to that of a hotel than letting a flat on an assured shorthold tenancy; the latter, in isolation, might not amount to use for business purposes, whereas the former certainly was. He referred the Tribunal to the authority of *Tompkins v Rogers* [1921] KB 94 where it was held that taking in paying lodgers was use of a dwelling house for "business trade or professional purposes".

31. Professor Maughan-Pawsey sought to distinguish that case by suggesting the lodgers in *Tompkins* presumably got a cooked meal. Mrs Mueller was not really providing services; there was no contractual obligation to provide breakfast. In the post-hearing submissions it was suggested that the occupiers' only contractual entitlement was to accommodation, without ancillary services, and this factual matrix distinguished the situation from that in *Tompkins*. The Tribunal was also referred to a decision by the Leasehold Valuation Tribunal, *Maymo Management Company Limited v Hall* CHI/00HE/2010/0007. It was argued, based on this case, that any business was run not at 4 Chelmer House, but by Airbnb from its offices in San Francisco (although there was no evidence adduced as to Airbnb's business at the hearing).

32. The Tribunal accepts the Applicant's arguments and finds that there has been a breach of paragraph 2. The Respondent was using Flat 4 during the relevant period solely for commercial gain, as opposed to personal use. Flat 4 was just one of a number of accommodations let out for profit by the Respondent using the Airbnb platform. Unlike a more conventional tenancy arrangement, the persons using Flat 4 were provided with various goods and services similar to those provided by a hotel or conventional bed-and-breakfast, including all linen and (according to the Airbnb listing) shampoo, hairdryer, iron and wi-fi. Drinks and sometimes food were made available.

33. This determination is supported by the case of *Falgor Commercial SA v Alsabahia Inc* [1986] 1EGLR 41, where the lessee granted occupational licenses to visitors to reside in the flat in return for payment. The flat was furnished, and cleaned daily. Although the Court of Appeal found that the lessee was not carrying on a business 'in' the flat, it was held that that the use was a business purpose in the sense of making money out of it.

34. The *Maymo* case is a first instance non-binding decision, which addressed the issue of whether conventional holiday lettings breached a covenant to use a flat only for residential purposes and as a single

private residence. There was no covenant specifically against use for business purposes. The tribunal concluded that holiday lettings did not breach the covenant, and thought that any business was being conducted elsewhere. However the brief decision concerns a different issue, a different covenant, appears to be at odds with the Court of Appeal case of *Caradon Distict Council v Paton* [2000] 3 EGLR 57, and precedes the cases of *Nemcova* and *Falgor*. It does not assist us.

Paragraph 3 - Not to do or permit or suffer in or upon the Demised Premises or any part thereof any sale or auction or any illegal or immoral act or any act or thing which may be or become a nuisance or annoyance or cause damage to the Lessors or the tenants of the Lessors or the occupiers of any part of the Building or of any adjoining or neighbouring premises.

Paragraph 6 - Not to play or use or permit the playing of any musical instrument television radio loudspeaker or mechanical or other noise making instrument of any kind nor to practise or permit the practising of any singing in the Demised Premises either: (a) between the hours of midnight and 7am or (b) so as to cause any nuisance or annoyance to any of the other owners tenants or occupiers of the Building ...

35. The Applicant submitted that where there was a dispute as to the facts, the evidence of its witnesses should be preferred, as neither Mrs nor Mr Mueller had answered questions put to them in a satisfactory way, and had shifted their position to suit the documentary evidence as it was put to them. There had been a breach of both paragraphs 3 and 6 as the other lessees had been caused annoyance by the conduct of the Respondent's clients in banging doors, disruption by coming and going late at night, playing loud music and smoking.

36. Although it was accepted that Mrs Mueller herself had not done the acts complained of, it was said that she had both permitted and suffered the misconduct. The word "suffer" had a wider meaning than "permit". The decision in *Courtney Lodge Management Ltd v Blake & Others* [2004] EWCA Civ 975 held that a person might "suffer" a nuisance even if she had no legal power to prevent it if , having influence –which if exerted, might lead to a cesser of that nuisance – she failed to exert it at all, at least if, as a matter of fact, exertion of the influence would, on a balance of probabilities, have brought about an end to the offending state of affairs [23].

37. Mr Bromilow argued that while the existence of the house rules and noise monitor showed Mrs Mueller had made some effort to get her guests to behave, they also showed she was aware of the potential for problems. It should have been obvious to her that there was a significant risk that provisions in the Fourth Schedule of the lease would be breached by letting out the flat, advertised to sleep 5 or 6 people, in circumstances where she had no control over what guests got up to after check in. Posting rules could not be expected to stop people on holiday misbehaving, and she should have forseen that. Therefore

Mrs Mueller had suffered the misbehaviour, even before it had occurred, by letting out the flat in the way that she had.

38. Professor Maughan-Pawsey did not challenge the factual evidence in but disagreed that the Respondent could be said to have "suffered" misbehaviour even before it occurred; she did not have to assume that people would break the rules. In the post-hearing submissions, he also argued that a temporary fleeting incident was not sufficient to constitute a "nuisance". He did not challenge the Applicant's argument that the conduct complained of was capable of being an annoyance.

39. As to the facts, the Tribunal is satisfied from the evidence of Mr Noguiera (to some extent supported by the other witnesses) that on three occasions, the final one being on the night of 13/14 August 2016, the persons occupying Flat 4 caused annoyance to other lessees/occupiers of Chelmer House by making noise late at night/in the early hours, at a level to create disturbance. This finding is not undermined by the fact that Mrs Meuller received no noise alerts, as there is no evidence that the noise monitor was in operation and/or in working order at the relevant times. Neither Mr nor Mrs Mueller were aware of what their guests were doing at Chelmer House between check in and check out.

40. However, the Tribunal does not accept that the Respondent can be held liable for this behaviour and finds there has been no breach of either paragraph 3 or 6. The meaning of "permit" and "suffer" in the context of lease user restrictions is addressed at paragraph 11.199 of *Woodfall on Landlord & Tenant*. A covenant not to do something will not generally be broken if the prohibited thing is done not by the covenantor but by a third person. The word "permit" in this context means either to give express permission or to abstain from taking reasonable steps to prevent an act where it is in within the covenantor's power to prevent it. The word "suffer" is construed as in the *Courtney Lodge* case referred to above.

41. In our view, the Respondent took reasonable steps to prevent a breach of these regulations. She posted appropriate rules on the Airbnb internet listing, and in the flat. If the rules had been complied with, there would have been no disturbance to other residents. Her evidence that she drew attention to the rules on check in of her guests was not challenged and is accepted. Although there is no evidence that the noise monitor system was actually working, she thought that it was, and was in a position to take immediate remedial action had she been aware of a problem. This is substantiated by her actions once she was made aware, on 14 August 2016, of the other lessees' concerns. The Tribunal does not accept the Applicant's argument that the Respondent should have anticipated trouble before it actually occurred, to the extent of requiring her not to make the flat available at all through Airbnb. We find she took reasonable steps and exerted reasonable influence to prevent unacceptable behaviour, and that once she was aware that such behaviour had occurred, she took prompt action to prevent its

reoccurrence by taking no further Airbnb bookings. She therefore neither permitted nor suffered the conduct complained of.

Paragraph 16 - At all times when not in use to keep shut the entrance door to the Flat forming part of the Demised Premises and between the hours of midnight and 7 am to ensure that no noise is made in any part of the Building and in particular between such hours to ensure that the main entrance door to the building and the entrance door to the said Flat are closed as quietly as possible and that no disturbance or annoyance is caused to the tenants or occupiers of the other flats in the Building

Paragraph 17 (a) – Not to use or permit the user of the hall staircase and passages in and about the Building or of any other of the Common Parts otherwise than in accordance with the proper exercise of the Included Rights

42. Mr Bromilow submitted that the Respondent had failed to observe the positive obligation in paragraph 16 to "ensure" that no noise was made between midnight and 7 am. Further, standing on the common walkways to talk and smoke was not within the Included Rights of the Second Schedule.

43. Professor Maughan-Pawsey suggested that to "ensure" meant something less than to guarantee. The respondent had taken reasonable steps.

44. The Tribunal accepts the Applicant's argument that paragraph 16 imposes an unqualified personal obligation on the lessee and that on the three occasions specified by Mr Nogueira there was a breach of paragraph 16 for which the Respondent can be held responsible. It also accepts the evidence that on occasion the Respondent's guests smoked on the walkways. However the Respondent did not "permit" this- indeed she expressly forbade it- and there is no evidence that it reoccurred after 14 August 2016. She is therefore not in breach of paragraph 17(a).

Paragraph 18 - Not at any time to do or permit the doing of any damage whatsoever to the Building the fixtures and fittings or chattels in the curtilage thereof or the paths adjoining thereto and forthwith on demand by the Lessors to pay to the Lessors the cost of making good any damage resulting from a breach of this regulation.

45. Mr Bromilow contended that the Respondent's guests had stained the communal carpet and the Respondent had permitted this. Professor Maughan-Pawsey denied the evidence met the standard of proof.

46. On a balance of probabilities, the Tribunal finds that the Respondent's guests stained the carpet. The damage occurred during the weekend of 13/14 August 2016 and no other explanation has been proffered by anyone. However the Tribunal finds no evidence that the Respondent permitted this, and therefore there has been no breach of paragraph 18.

Paragraph 20 - Each morning to empty rubbish (if any) of the previous day suitably wrapped in the refuse receptacles or other means of refuse disposal (if any) provided by the Lessors

47. Mr Bromilow submitted that this was another absolute positive obligation that was breached when rubbish bags were left outside the flat in the communal area.

48. Professor Maughan-Pawsey suggested there could only be a breach once the situation had been drawn to the Respondent's attention, and there was no evidence of that having happened.

49. The Tribunal does not find that the Applicant has established, on a balance of probabilities, that rubbish was left outside the flat by its occupants. The evidence of Mrs Pollard and Mr Nogueira in their witness statements concerning this issue was sparse and inspecific. It was only at the hearing that Mr Nogueira suggested he had actually seen a guest leaving a bag of rubbish on 14 August; it is unclear why, if this is what happened, he did not mention that in his witness statement. The Muellers' evidence was that they saw no rubbish at check out. Given that those using Flat 4 had no obligation to dispose of their rubbish (this was done by the Muellers after check out) there would appear to be no obvious reason why they would attempt to do so, and the Tribunal is not persuaded otherwise by the very limited evidence from the Applicant. There has therefore been no breach of paragraph 20.

Dated: 2 May 2017

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.