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Landlord granted injunction against tenant using Airbnb, upheld on appeal: *Bermondsey Exchange Freeholders Limited v Ninos Koumetto (Trustee in Bankruptcy of Kevin Geoghehan Conway)* [2018], County Court at Central London

By Reanne MacKenzie

Introduction

1. The rise of websites such as Airbnb has seen an increase in short term holiday style letting of traditionally long-term residential properties. In 2015 London's housing legislation was amended specifically in response to the rise of Airbnb and other websites: a homeowner is able to let out their house, flat or spare rooms for up to three months a year¹. In London, unlike other cities such as Berlin or Barcelona, there are no city-wide regulations (or restrictions) regarding the use of Airbnb. This case emphasises that it falls to construction of the terms of the lease between the freeholder and leaseholder to ascertain whether a leaseholder's use of Airbnb is permitted.

Judgment on appeal

2. The County Court at Central London (His Honour Judge Luba QC upheld the Injunction Order granted by District Judge Desai at first instance, restraining the Defendant leaseholder from letting out his flat on Airbnb and such other portals.

¹ Section 44 Deregulation Act, 2015.

The claim and first instance judgment

3. The Claimant was the freehold owner of a development of flats located in Bermondsey. The Defendant was the leaseholder owner of one of the flats and in the past the flat had been his home. Many of the flats in the development were sub-leased by the leasehold owners on assured short hold tenancies (“AST”), normally lasting a minimum of 6 months. It is a residential development, apart from the ground floor which is leased for commercial purposes.
4. The Defendant had previously let the property on an AST, but in 2015 the Claimant became concerned that the Defendant was using the flat to provide short term holiday letting accommodation through sites such as Airbnb.
5. The Defendant was asked to desist, but denied he was using the flat in the manner complained of and in any event did not consider that the terms of the lease prevented him from doing so.
6. The Claimant brought a claim seeking an Injunction Order relying on evidence from sites such as Airbnb showing the “entire flat” was available, as well as booking calendars and email reviews etc.
7. At trial the Defendant had four lines of defences: (i) he denied that the flat was being used in the manner alleged at all; (ii) if the flat was used in this way the Claimant had consented to it; (iii) the use complained of did not amount to a breach of lease; and (iv) such use had in any event ceased and would not recur therefore there was no need for the injunction.
8. The Judge was not persuaded by any of these points.

The terms of the lease

9. The relevant terms of the lease were the “Tenant’s covenants with the Landlord” at clauses 2.10 (covenant against alienation) and clause 2.4 (user covenant):

Clause 2.10(2): “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 underlease of the whole Demised Premises.”

Clause 2.10(3): “...not to assign or underlet the whole of the Demised Premises without the prior written consent of the Landlord.”

Clause 2.4: “Not to use or permit the use of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation only...”

10. The Judge found that the Defendant had breached all three covenants and found there was a “qualitative difference” between letting a property on an AST to a person or family who occupies the property as their home and letting the property for short term lets or commercial hire through websites such as Airbnb.

The Appeal

11. The Defendant had two main submissions on appeal: (i) there had not been a breach of the lease and (ii) even if there had been a breach, the judge had erred in granting the injunction.

(i) Breach of the lease

12. The Appeal focused on clause 2.10(2). It was accepted that on its proper construction clause 2.10(2) had two limbs: (i) it prohibited parting or sharing with

possession of the premises; and (ii) it prohibited permitting someone else to occupy the premises. It was a covenant designed to capture both unauthorised leases and unauthorised licences.

13. The Defendant, on appeal, could not challenge the finding of fact that he had advertised and let the property using Airbnb, and/or other such websites. The Defendant was therefore limited to contending that such actions were not, as a matter of law, a breach of either sub-limb of clause 2.10(2).
14. The Judge on appeal found that this was not a case where the court needed to finally determine whether the arrangements the Defendant entered into with third parties via Airbnb were in law tenancies or licences and therefore which limb of clause 2.10(2) had been breached. This was not least because the Defendant's paramount defence at trial had been that he had not used Airbnb at all.
15. The Judge at first instance had found that there had been an underletting. On appeal the Defendant argued that this finding had not been open to her. The Judge on appeal was not persuaded and was not convinced that there were the necessary features to displace the *Street v Mountford* presumption that provision of exclusive possession of premises to another for a period and for payment constitutes a letting.
16. All the Judge at first instance needed to find, and did indeed 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 himself was not occupying the flat: this was a breach of clause 2.10(2).
17. The Defendant further submitted that clause 2.4 had not been breached, because even with paying guests the flat was still being used as a "residential flat": residential did not equate to "home" and its residential character had not been lost.

18. The Judge was not persuaded. “Residential flat” had to be construed in the relevant context of this being a private residential development where residents lived “cheek by jowl” only with other residents. The Judge at first instance had found there had been a series of short term, transitory occupations by strangers and that clause 2.4 clearly prohibited any commercial use of the flat, which included “hotels, or bed and breakfast style letting, for example through Airbnb.”

(ii) Granting of injunction

19. The Defendant argued that there had been no need to grant the injunction and that all that was needed was a declaration as to the construction of the lease because: (i) the activity complained of had taken place in 2015 and there has been no reoccurrence since Spring 2016; and (ii) a restraining injunction only ought to be ordered if there was a proven likelihood of future interference with a Claimant’s rights.

20. The Judge did not disturb the Judge at first instance’s careful weighing up of facts and arguments that is required when deciding whether to grant or refuse an injunction. The Judge at first instance properly exercised her discretion in deciding whether to grant the equitable remedy of an injunction. Factors that tipped the balance in favour included: (i) breach of the lease had been established; (ii) the relationship had broken down; (iii) it had not been possible to resolve the matter by undertaking; and (iv) the new opportunities offered by Airbnb might tempt other residents. On appeal, counsel for the Claimant also highlighted the other material available to the Judge at first instance, including the fact that this was not a case of admission and commitment not to repeat: the Defendant had denied all wrong doing and only ceased the complained of behaviour because he decided to occupy the flat.

21. The Defendant finally submitted that the terms of the injunction could not stand as they simply regurgitated the lease and were not clear as to what specific thing the

Defendant must not do. The Judge on appeal was reluctant to interfere with the wording of the order, especially one which both parties had been able to comment on and revise accordingly in draft form. However, the Judge was amenable to considering a variation of the Injunction Order to a suitably revised and agreed form.

Summary

22. Whilst this decision is not binding precedent, it does bring some clarity to a developing area. The focus is not determining whether a tenant's use of Airbnb amounts to a sub-lease or licence, but rather whether the terms of the lease are drafted sufficiently wide enough to capture these sorts of arrangements. It would behove landlords who do not want their tenants using Airbnb to ensure the covenant against alienation is drafted in sufficiently broad terms.

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