# TO AIR B&B OR NOT TO AIR B&B?

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At the date of writing there are over 300 properties in central London available on the Air B&B website. Letting someone borrow a flat for a weekend, or for a week over the summer, is surely of concern to no one? A little bit of extra income is always a nice thing to have, when times are tough. Sharing is so *Zeitgeisty*.

Enter the party-pooping property lawyer. One cannot help notice that, of the properties on offer, a number of them are flats. Those will be almost invariably be held on long residential leases, and those leases will contain covenants controlling how the flats can be used. Whether flats or houses, a number of them will also be subject to residential mortgages, which will also contain mortgage terms, and those mortgage terms may prohibit commercial use, require residential use, and limit the right to let. Whether flats or houses, the home contents and building insurance policy may contain contractual obligations as to how the insured property and its insured contents are to be dealt with, occupied and secured. Whether flats or houses, there may well be some restrictions on use imposed under planning law which the tenant may separately have covenanted to observe. The tenant may also have covenanted not to do anything that voids his landlord's insurance. We will focus on leases, but property owners without a buy-to-let mortgage product and insurance policies may also wish to read on.

Typically, a residential lease will regulate (a) *user* (by positively limiting use to residential, but sometimes also by setting out classes of prohibited uses, whether by general words ("commercial use"), or by reference to classes of prohibited activity ("not to use as a fried fish shop"), or some mixture of the two; and (b) *alienation*, by preventing letting of the whole

or part (whether subject to consent or not), restricting the ways in which alienation can occur, or limiting the time at which alienation can occur; and (c) *conduct*, by restricting by reference to covenants or regulations nuisance, noise, parties, music, annoyance, and immoral and illegal user and the use of common parts and shared facilities (which may hamper the ability to throw a good party).

And this is where the problems start.[1]

A bit like the adage about being pregnant, there is no rule that a covenant can be breached if it is only breached a bit. You are either in breach, or not. If you are in breach, then a number things can happen. You can be on the receiving end of an injunction to stop you doing it again. Or you can find yourself before the First Tier Tribunal (Property Chamber) trying to argue that there is no breach at all. If you fail on that, you may well find that you receive a notice under section 146 of the Law of Property Act 1925. After that, you may find that you are in the County Court defending possession proceedings on the grounds of breach of covenant. You will probably then apply for relief from forfeiture, promising never to do it again. By that time you will have picked up the landlord's costs in the County Court, and also, if your lease contains a standard costs covenant, for the FTT as well (though you will probably have to pay for that anyway: Freeholders of 69 Marina v Oram and Ghoorun [2011] EWCA Civ 1258).

At that point, the handy income from a few days or weeks of use suddenly seems less handy.

**Nemcova v Fairfield Rents**

*Facts*

Ms Nemcova has a flat in a residential block in Enfield. She advertised that flat online, using her own website, as being available for short-term lets, and let it out on that basis, generally

[1] We will leave to one side the question of what status and security the short term guest might enjoy if he or she outstays their welcome.

to people coming to London on business. The lettings were for about 90 days a year, with guests staying at the flat for 3 or 4 days a week. Under her residential long lease, she promised not to assign, underlet or part with possession of the flat in the last seven years of her lease without the landlord's prior consent. She promised not to alienate part of her flat only. She also promised to abide by various restrictions, including not using the flat otherwise than as a private residence. She therefore could underlet or grant occupational licences (conferring a right to occupy and not to possess), without restriction, the whole flat provided she did so prior to the last seven years of her lease.

*Argument*

Ms Nemcova argued that, in the absence of (i) a positive obligation requiring her to live in the flat, (ii) any express restriction on underletting (save as provided above), and (iii) a prohibition on business user, the use of the flat for short-term lets to visitors did not infringe any provision of the lease. The lease obliged her to use the flat as a private residence. This was not breached, she argued, as either she was using it for that purpose, or the short-term letting fulfilled that purpose. There was no obligation that the flat be *her* residence. All that mattered was that, as a matter of configuration and appearance, the flat looked like a residence.

*Result*

That argument was rejected by the First Tier Tribunal, and rejected also by the Upper Tribunal on appeal. Applying Caradon DC v Paton [2000] 3 EGLR 57 and Falgor Commercial SA v Alsabahia Inc [1986] 1 EGLR 41, the First Tier Tribunal decided that use as a private residence meant the same as use as a home. Use by a visiting businessman as a temporary pied-***à***-terre was by definition not use as a home, and hence not use as a private residence. That being the natural language and meaning of the covenant, it meant that it was not open to the tenant to argue that the covenant should be construed more narrowly, *contra proferentem*. The First Tier Tribunal found a breach of the private residence condition. Ms Nemcova appealed.

Quite apart from that, it is clearly established in the authorities that, once one gets involved in the activity of short-term lets, one is using one's flat for business use, and not purely residential use: see Tender v Sproule [1947] 1 All E.R. 193 and Falgor, above. On that basis, His Honour Judge Stuart Bridge rejected Ms Nemcova's appeal. He explained

> *53. I have reached the view, consistent with the decision of the Ft T, that the duration of the occupier's occupation is material. It does seem to me that in order for a property to be used as the occupier's private residence, there must be a degree of permanence going beyond being there for a weekend or a few nights in the week. In my judgment, I do not consider that where a person occupies for a matter of days and then leaves it can be said that during the period of occupation he or she is using the property as his or her private residence. The problem in such circumstances is that the occupation is transient, so transient that the occupier would not consider the property he or she is staying in as being his or her private residence even for the time being.*
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> *54. Having considered the context of the grant of the lease, and the nature of the intended relationship between lessor and lessee taking account of the obligations entered into, I am of the view that in granting very short term lettings (days and weeks rather than months) as the appellant has done necessarily breaches the covenant under consideration.*

The Judge correctly qualified his judgment, noting each lease turned on its own terms: "*Each case is fact-specific, depending upon the construction of the particular covenant in its own factual context. It is not possible therefore to give a definitive answer to the question posed at the beginning of this ruling save to say somewhat obliquely that 'It all depends'.*" However, even with that qualification in place, anyone familiar with the terms of a standard long residential lease ought to appreciate that short-term lets will commonly, perhaps almost invariably, amount to an actionable breach of a use and (if applicable) alienation covenant, and perhaps also of any properly promulgated regulations relating to conduct and behaviour. Tenants under long leases may be well-advised to consider carefully whether that pot of gold is really as attractive as it looks.

One saving grace: unless there has been acquiescence, a requirement to use flat as a residence will usually impliedly oust any business user – at least the landlord and tenant will not accidentally find that the long lease has drifted into Part 2 of the Landlord and Tenant Act 1954: Trustees of the Methodist Secondary Schools Trust Deed v O'Leary [1993] 1 E.G.L.R. 105.