

SHORT-TERM LETTING POST-COVID

Used for business purposes by those looking for something more comfortable, convenient or cheaper than hotels, and for leisure by those seeking larger, bespoke or more private accommodation, short-term let providers - such as Airbnb (other letting agents are available) - have boomed in recent years. For the most part, the experience is seamless, for hosts and guests alike, despite the occasional 'horror story' in which guests destroy the home, or arrive to find no such home exists. However, in recent years there has been a quiet rise in the number of cases considering whether hosts are allowed to use their properties in such a way. Most recently, the Upper Tribunal case of *Triplerose Ltd v Beattie* [2020] UKUT 180 (LC), in which it was necessary to determine whether such letting breached covenants contained within the long lease.

In *Triplerose*, the tribunal was concerned with two potential breaches of covenant where a residential flat had been let via Airbnb and Booking.com. The Beatties, who held the long lease, still used the property each week, but were not there all the time and the property was available to let on those nights the Beatties were away. This arrangement was temporary, pending sale of the property. The covenants with which the tribunal was concerned were a covenant against use of the flat other than as a private dwelling house, and a covenant prohibiting use for trade or business. The first covenant has been considered by courts and tribunals previously: in *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC) HHJ Bridge concluded that such use was a breach of a covenant prohibiting use other than a private residence. However, at first instance in this case, the First-tier Tribunal distinguished *Nemcova*, and decided that such letting arrangements did not amount to a breach of the second covenant, referring to the Court of Appeal's decision in *Florent v Horez* (1984) P&CR 166, that a leisure activity, hobby, occupation or similar activity carried on by a tenant in a dwelling did not amount to the carrying on of a business there unless there was some direct commercial involvement, or the use was more than ancillary or subordinate to the residential use. In this case, the FTT considered that the use was ancillary and subordinate, and allowed implicitly by the alienation provisions of the lease (which allowed the granting of ASTs for a duration not to exceed 6 months, without the landlord's consent).

On appeal, the UT confirmed the application of *Nemcova* and other authorities along the same vein, and that "*short-term occupation by paying strangers is the antithesis of occupation as a private dwellinghouse. It is neither private, being available to all comers, nor use as a dwellinghouse, since it lacks the degree of permanence implicit in that designation*" (paragraph 20). The factors identified by the FTT in favour of distinguishing the case from *Nemcova* were

not considered to warrant such departure; that the lease permitted short-term letting in the form of ASTs was consistent with use as a private dwellinghouse (the lease did not require that the user be the tenant).

As to whether such use fell foul of the prohibition on carrying on or permitting a trade or business to be carried on upon the property, Triplerose relied on the Court of Appeal's decision in *Tendler v Sproule* [1947] 1 All ER 193, that the taking in of paying guests was a breach of covenant not to use a premises for a business. The Beatties contended that there was a distinction between use of premises as a business resource and carrying on a business on the premises. The business of short-term letting, it was suggested, was being carried on elsewhere, not at the property, and the prohibition was against conducting business in the flat, not against using the flat for short-term residential purposes, albeit as part of a business. The UT agreed, noting that "*no activity was carried on upon the property which in itself amounted to a business*"; laundry services, the delivery of breakfast and the process of checking-in and -out (which did not happen at the flat), did not amount to carrying on a business on the property. Thus, the UT agreed with the FTT that letting the flat for short-term residential use did not breach the covenant against carrying on a business on the property.

With the business of short-term letting having been temporarily put on pause by the Covid-19 pandemic, no doubt many will turn their minds to considering such use as restrictions ease, either picking up where they left off, or starting such use for the first time, perhaps to generate additional income following (and entering) a period of economic uncertainty. For many, it may not cross their minds that such use might be prohibited by lease covenants, mortgage conditions or insurance terms, but in the legal world we are seeing a rise in this type of cases, and the decisions are, generally, flowing in one direction. It is a crucial matter to consider, and falling foul of such provisions may prove to be a costly mistake.

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