

No place like home?

Holiday & “Air BnB”-type property use and breach of covenant

**Ewan Paton, Guildhall Chambers
Property & Estates Seminar 26/9/19**

Fancy a break?

28 Sep - 30 Sep

Guests

Work trip

Type of place

Price

Instant Book

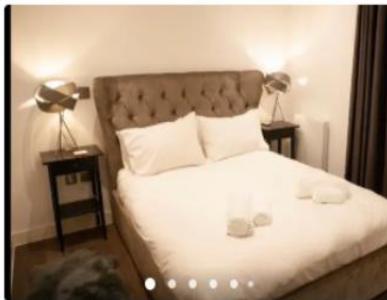
More filters

Show Map



25% of places in Bristol (VA,US) for your dates and guests are already booked.

39 places to stay



ENTIRE FLAT

CITY CENTRE APARTMENT BS2 LOCATION NEAR CABOT

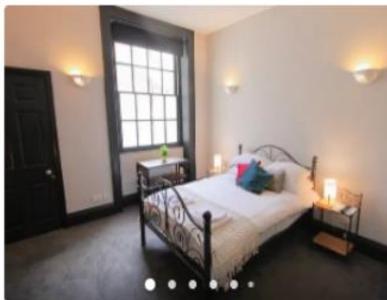
RARE FIND · This place is usually booked.

2 guests · 1 bedroom · 1 bed · 1 bathroom

★ 4.74 (74)

£90/night

£180 total



ENTIRE FLAT

Cosy Studio in the Heart of the City - Airbristol

RARE FIND · This place is usually booked.

2 guests · Studio · 1 bed · 1 bathroom

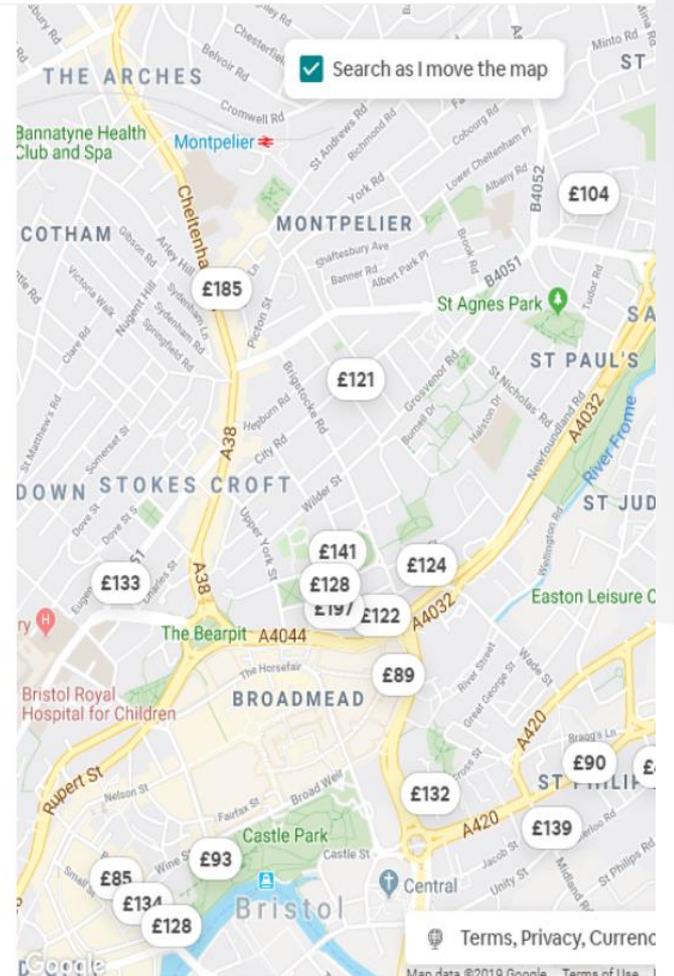
★ 4.31 (65)

£85/night

£170 total



ENTIRE FLAT



A booming industry....

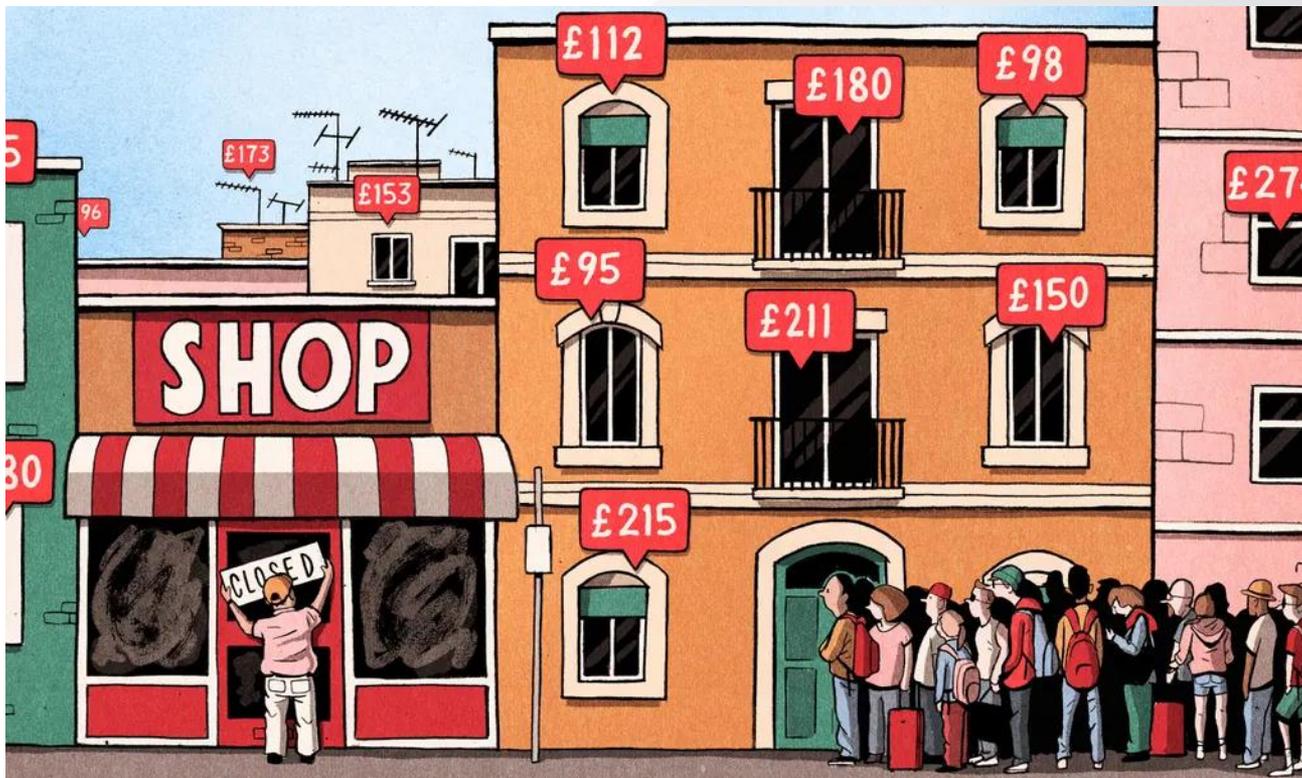
- There have always been holiday lets, but transformed by online short stay booking via brokerage/commission sites
- AirBnB is most famous (from air mattress on San Francisco floor to \$38B company), but see also Booking.com, FlipKey, HomeAway/Vrbo, HomeStay, 9flats etc.
- Potentially big yields compared to regular sub-letting
- But not everyone is happy: neighbours, local authorities, “traditional” B&B owners and hoteliers
- Internationally, some cities cracking down on it (including San Francisco)

Why am I here talking about it?

- Two types of private client interested in these issues..
- i) Would-be investors/holiday landlords/retirees, or homeowners who want a few extra £s:
“Can we do it?”
- ii) Neighbours of (i) or Man Cos– either in same block of flats, or street, or village:
“How can we stop it?”
- There is some law to consider.....

What is it, legally?

- Lease or Licence? – Ask the audience....



Surprisingly unclear....

- Exclusive possession/*Street v. Mountford*
- No minimum duration for a tenancy?
- *National Carriers Ltd v Panalpina* [1981] AC 675, 714B per Lord Roskill (“..the holiday-maker acquires an estate in land..”)
- Housing Act 1988 Sch. 1 para. 9 assumes holiday lets are tenancies
- Cf. some textbooks, citing the “coronation cases” on room bookings as licences
- And Lord Scott of Foscote in *Commissioners of Customs & Excise v. Sinclair Collis Ltd.* [2001] UKHL 30, para. 71.....

Lord Scott's analysis at para. 71

“A contract under which a room were taken for a week might well constitute a letting. A contract under which a room were taken for half an hour so that a man might consort with a lady would, I suggest, be very unlikely to be held to do so....”



The Aussies are probably right...

- *Swan v. Uecker* [2016] VSC 313 (Supreme Court of Victoria): AirBnB use of whole 2 bed leasehold flat, 3-5 days at a time
- Lease terminable if “tenant has assigned or sublet the whole or any part of the premises without the landlord’s consent”
- Air BnB agreement actually said: “Guests agree that a confirmed reservation is merely a licence granted by the Host to the Guest..”
- But *Street v. Mountford* and its Australian predecessors...substance not form: a tenancy
- But may not matter if other covenants..



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Restraints on such lettings? i) Public

- London is different: since GLC Act 1973, letting of property as “temporary sleeping accommodation” required planning permission, as a change of use: now Deregulation Act 2015 ss. 44 and 45 allows up to 90 nights a year, but LAs have reserved powers
- Northern Ireland – all tourist accom must be certified
- Elsewhere – it depends

Material change of use?

- *Moore v Sec of State for Communities & Local Govt & Suffolk Coastal DC* [2012] EWCA 1202, Sullivan LJ: It depends i.e. “question of fact and degree”..
- 9 bedroomed house became “Prestige Holiday Lettings” apartments, inspector found use now “quite different in character from that of a private family dwellinghouse” [use class C3]
- Cf. Older “single house” case *Blackpool BC v Secretary of State for the Environment* (1980) 40 P & CR 104 (10 weeks a year but owner and family also stayed there – no material change)
- Attitude of Bristol CC?

Restraints on lettings ii) Private

- Covenants
- Could be freehold restrictive covenants, properly protected on registered title or previously by class D(ii) land charge
- But issue most commonly arises in *leasehold* context (most such lettings are of flats/apartments/rooms)
- Leasehold covenants typically enforceable by landlord, Man Co and often *inter se* between lessees

Is *Paton* wrong?

- *Caradon District Council v. Paton* [2000] 3 EGLR 57 (CA)
- Former Cornish Council house, freehold covenant imposed on RTB purchase "not to use or permit to be used the property for any purpose other than that of a private dwelling house"
- let to holidaymakers for short periods in summer
- CA: dwelling house meant "home", so this was breach....
- Possibly context-specific, but these are very common words (as we'll see)

Some typical leasehold covenants

- **Alienation**
- “Not to assign, sublet, part with or share possession or occupation of the whole of the Premises or permit any company or person to occupy them save by way of an assignment or subletting of the whole of the Premises and in accordance with the following subparagraphs
-Not to grant any sublease of the whole of the Premises except with the consent in writing of the Landlord which shall not be unreasonably withheld or delayed”

Some typical leasehold covenants

- **Use**
- “The Premises shall not be used for any purpose other than as a private residence for occupation by a single household and in particular no trade, business or profession shall be carried on in or from the Premises.”
- “Not to use or permit the use of the Demised Premises or any part thereof otherwise than as a residential flat with the occupation of one family only.” (*Bermondsey Exchange* case: below)



Leasehold covenants: others

- “Not to do or bring in or upon the Premises... anything which may be or become or cause a nuisance, annoyance, disturbance, inconvenience, injury or damage to the Landlord or the owners or occupiers of the Other Apartments or of any neighbouring or adjoining property nor to use the Premises for any illegal or immoral act or purpose”
- “Not to invite the public generally (or any specified section of it) to come to the Apartment nor to use it for a purpose which attracts casual callers”.

Recent cases (i): *Nemcova*

- *Nemcova v. Fairfield Rents Limited* [2016] UKUT 303 (LC), (2017) 1 P&CR 4 (Upper Tribunal - Judge Stuart Bridge)
- London flat let out for <90 days a year, owner herself stayed there 3-4 nights a week
- Almost no constraints on sub-letting/parting, only relevant covenant was “Not to use the Demised Premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence”
- Judge Bridge: upheld FTT, breach.

Nemcova: “transience” test?

- Judge Bridge not sure about the *Paton* “home” concept, focussed more on duration: lettings for a “matter of days” were “so transient that the occupier would not consider the property he or she is staying in his or her private residence even for the time being..” (53)
- Rejected ‘it’s a residence if it’s still a flat’ argument
- Implications? UT is now “superior court of record” so this is equivalent of a High Court decision...binding.

Cases (ii) *Bermondsey Exchange*

- *Bermondsey Exchange Freeholders Ltd v Koumetto* [2018] 4 WLUK 619, HHJ Luba QC, County Court at Central London - former solicitor, now bankrupt, had been AirBnB-ing his London flat, though had denied at trial that he was
- County Court DJ held principally that this was breach of alienation covenants not to part with possession save by assignment or underlease of whole, and/or not to underlet without written consent
- Also breach of use covenant for “residential flat with the occupation of one family only”

Bermondsey Exchange: reasons

- Appeal focussed mostly on the “parting with possession”/subletting covenant
- Luba QC seemed to incline to Australian (and DJ’s) view that it was a letting not a licence, but either way it was breach
- On use covenant: *Nemcova* not referred to at all! (cited?), though same arguments (it’s still a flat; “home” etc.)
- Adopts similar “transient visitors” rationale - not “residential flat” use; and “context is one of residents living cheek by jowl and only with other residents”

What does HHJ Matthews think?

- *Snarecroft Ltd. v. Quantum Securities Ltd.* [2018] EWHC 2071 (Ch.) (Judge Matthews)
- A little bit different: lessee proposed to convert two Brick Lane flats into a 19 room (!) boutique hotel: breach of covenant “not to use the premises or any part thereof other than for residential purposes.”
- His view was that with ‘residential’:
“There is a non-transient, longer term idea at work here”: focussed more on stability and/or some connection to particular premises or room.

Conclusions and remedies

- Remedies: for or against: typically injunction, and “determination of breach” under s168 CLRA 2002 to tee up potential s146 notice/forfeiture
- What about money? Cough up the profits?
- Council/social housing: Prevention of Social Housing Fraud Act 2013 “unlawful profits orders”: £100k Air BnB case in Westminster last summer!
- Private law: no exemplary damages (tort only) or account of profits (equitable duties only - *Blake* etc.)
- But what about a modified *Wrotham Park/Morris-Garner* “negotiation damages” argument...?

“The end of Air BnB letting?”

- very difficult under most leases?
- May need negotiated releases/waivers (but with how many people?)
- Will people just chance it and rely on apathy and acquiescence?

