UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT – long residential lease - application under section 168(2), Commonhold and Leasehold Reform Act 2003 - covenant not to use premises for any purpose other than as a private residence - whether broken when tenant advertised and granted short-term lettings - appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN

IVETA NEMCOVA

Appellant

and

FAIRFIELD RENTS LIMITED

Respondent

Re: Flat 4,
Soper Mews,
Harston Drive, Enfield
Middlesex
EN3 6GQ

Determination by written representation

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36, [2015] 2 WLR 1593

C & G Homes Ltd v Secretary of State for Health [1991] 2 All ER 841, [1991] 1 EGLR 188

Caradon District Council v Paton [2000] 3 EGLR 57

Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101

Falgor Commercial SA v Alsabahia Inc [1986] 1 EGLR 41

Jarvis Homes Ltd v Marshall [2004] 3 EGLR 81

Rolls v Miller (1884) 27 Ch D 71

Tendler v Sproule [1947] 1 All ER 193

Thorn v Madden [1925] Ch 847

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Introduction

1. A long lease contains a covenant 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. If the leaseholder advertises on the internet the availability of the premises (a flat) for short term lettings and grants a series of such lettings, do the leaseholder's actions breach the covenant?

2. This issue arises following an application by the freeholder under section 168(4) of the Commonhold and Leasehold Reform Act 2002 seeking a determination that the leaseholder had breached covenants in the lease of a one-bedroom first floor flat situated within a purpose built residential block on the Enfield Island Village housing estate. The application was heard by the First-Tier Tribunal (Property Chamber) ('Ft T') on 5 August 2015, and a determination was made in favour of the freeholder on 26 August 2015.

3. Permission to appeal having been granted, it was ordered by the Tribunal on 29 February 2016 that the appeal was to proceed as a review of the decision of the Ft T and would be conducted under the Tribunal's written representations procedure.

4. The respondent is the freehold owner of the building in which the appellant's flat is situated. The lease is dated 17 September 1998 and was entered into for a term of 99 years commencing on 25 December 1997.

5. Pursuant to the lease the Lessee covenants with the Lessor as follows:

> 2.7 During the last seven years of the term hereby granted not to assign underlet or part with the possession of the Demised Premises or any part of them without the previous consent in writing of the Lessor such consent not to be unreasonably withheld.
>
> 2.8 Not to assign underlet or part with the possession of part only of the Demised Premises.
>
> 2.11 At all times after the date of this Lease to observe and perform any restrictions covenants conditions and stipulations contained or referred to in Part III of the Schedule.

6. Part III of the Schedule contains the following covenant on the part of the Lessee with the Lessor the Company the Management Company and the lessees for the time being of the other flats in the block:

(1) 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.

7. It is accepted that the appellant, as the current Lessee of the premises, is obliged to comply with the covenants in the lease. She further accepts that she has granted a series of short-term lettings of her flat and that she has advertised its availability on the internet.

8. At the hearing before the Ft T both parties were represented by counsel. The respondent contended that the actions of the appellant breached the covenant relating to the use of the flat as a private residence.

Submissions before the Ft T

9. The respondent's case in the Ft T relied upon three authorities: *Caradon District Council v Paton* [2000] 3 EGLR 57 (hereafter *Caradon*); *Tendler v Sproule* [1947] 1 All ER 193; and *Falgor Commercial SA v Alsabahia Inc* [1986] 1 EGLR 41 (hereafter *Falgor*). It was submitted that as a result of those authorities, the tribunal should construe the lease in such a way that the actions of the appellant breached the covenant relating to the use of the flat as a private residence.

10. The appellant, having admitted making short term lettings of the flat and advertising its availability, gave written evidence (accepted by the Ft T and not contested on appeal) to the effect that she paid council tax due for the flat, as well as the usual utility bills, and that the flat remained her main residence although it had recently remained empty for 75% of the year as she felt intimidated by her neighbours. She gave further written evidence to the effect that she only let the flat out for about 90 days a year and that her lettings were almost all to business visitors working in London as opposed to holiday lets. In oral evidence she stated that she currently stayed in the flat about three or four days a week, staying with her boyfriend on the nights she was away. In cross examination she stated that she had let the flat out on about seven separate occasions in the past twelve months. She had set up a web-site advertising her and her partner's homes as alternatives to hotels and she used the services of a reservation system website which cascaded details of the availability of her flat to several other websites.

11. Counsel for the appellant submitted before the Ft T that the appellant had not breached the covenant as alleged. It was necessary to construe the lease as a whole. He noted the lack of material restrictions on underletting or granting short term tenancies or licences, the lack of a positive requirement that the Lessee reside in the flat herself or occupy it as her principal home, and the lack of any covenant prohibiting business or commercial use or use of the flat for holidays. It followed, he contended, that provided that the flat was being used as a private residence by someone, the circumstances of their occupation were immaterial.

12. Counsel for the appellant submitted that the only meaning that can be ascribed to the words 'private residence' is whether the flat can physically be described as a private residence, namely whether it retains the physical characteristics of a private residence such as a kitchen, bathroom and living area, and he cited in support of this proposition the decision of the Court of Appeal in *Jarvis Homes Ltd v Marshall* [2004] 3 EGLR 81. He went on to distinguish the three authorities referred to by counsel for the respondent, concluding that no breach of covenant had occurred as the flat had at all times retained the physical characteristics of a private residence.

Decision of the Ft T

13. The Ft T directed itself that the appropriate starting point in construing the covenant was 'the ordinary and natural meaning of the words, read together with the whole of the Lease, having regard to the factual context surrounding entry into the Lease in so far as this can be identified.'

14. However, the Ft T rejected the appellant's submission that the only meaning that could be ascribed to 'private residence' was whether or not the flat had the physical characteristics of a private residence.

15. The Ft T proceeded to follow *Caradon* in holding that 'occupation of the Flat as a private residence, for the purposes of the relevant covenant, requires the Flat to be occupied as a home.' It continued:

> '40. Occupation as a home requires a degree of permanence. This is likely to be met if [the appellant] were to sublet the Flat on an assured shorthold tenancy for a term of, say, six months. It is not, in our view, met in the type of short term letting entered into by the respondent where the occupants only stay for a few days or possibly weeks. We do not think it conceivable that such an occupant would think of themselves as using the Flat as a home. On the contrary, as was said in *Caradon*, the occupant would probably have left his or her own home in order to take up the short term let of the Flat.'

16. The Ft T went on to hold that applying the ordinary and natural meaning of the words, there was no material difference between use as a private residence and use as a private dwelling house, referring to *Falgor*, where the two terms were used interchangeably. As those persons who would be occupying the flat on a short term letting would not be occupying it as their home, it followed that the appellant was using the flat for a purpose other than use as a private residence. There was no need to resort to the *contra proferentem* principle as the ordinary and natural meaning of the words of the covenant were sufficiently clear. The Ft T refused to distinguish *Caradon* on the basis that the current application had a different factual matrix.

17. The Ft T concluded:

> '46. In our view it is likely that the lessor's intention was to restrict the use of the flats in the Building to that of a private residence, meaning occupation of the flats as a *home* [emphasis of the Ft T]. Such a restriction is likely to have significant benefits for the lessees of the Building who would, we have no doubt, prefer to live with other owner-occupiers or long term tenants as opposed to those using a flat in the Building on a short term let for, perhaps, only a few days.'

18. It made the determination sought to the effect that the appellant had breached the covenant in her lease by using the Flat other than as a private residence.

Decisions in previous cases

Tendler v Sproule [1947] 1 All ER 193

19. The earliest decision to which the Ft T was referred was that of the Court of Appeal in *Tendler v Sproule*. In 1941, Ellis, the landlord, entered into an agreement with Sproule, the tenant, for the letting of premises for a term of three years. When the contractual term expired, Sproule held over as statutory tenant under the Rent Restriction Acts. In 1945, Tendler purchased the reversion and claimed possession of the premises based upon breach of covenant by Sproule who had taken in two lodgers. The tenancy contained a covenant:

> …not to use the said premises or any part thereof for any trade or business but keep the same as a private dwelling-house only and not to exhibit any notice plate of name or profession on any part of the said premises.

20. The Court dismissed the appeal, upholding the decision of the county court to grant immediate possession. It held that taking in two paying lodgers was a breach of the covenant not to use the premises for any business as well as a breach of the covenant to keep the premises as a private dwelling-house only. Morton LJ, giving the single reasoned judgment, said: that a house which, or part of which, is used to take in paying guests is not a house which is being kept as a private dwelling-house only.

21. The context of *Tendler v Sproule* was very different to the current case. The lease was a relatively short fixed term tenancy to which the Rent Acts applied. In the event of the tenant going out of occupation, he would have ceased to be a statutory tenant at all, and the landlord would have been entitled to obtain possession. The purpose of the letting was therefore very clearly for the tenant's own residential occupation, and that being the case the natural construction of the covenant to keep the premises 'as a private dwelling-house only' was that the tenant should not be able to take in lodgers on a commercial basis.

Falgor Commercial SA v Alsabahia Inc [1986] 1 EGLR 41

22. The FtT referred to the decision of the Court of Appeal in *Falgor Commercial SA v Alsabahia Inc*. A long residential lease was granted for a term of 999 years to the defendant company which granted occupational licences to visitors to reside in the flat in return for a monetary payment. The flat was equipped and furnished by the defendant and cleaned daily by its employee. No consent was sought or given for the grant of any licences, but no breaches of the covenants against alienation were alleged.

23. The question for the court was whether the defendant was in breach of a covenant contained at paragraph 3.26 in a schedule to the lease:

> (a) Not without the company's consent to use or occupy the flat otherwise than as a single private residence in one occupation only so that the total number in residence shall not exceed three persons.
>
> (b) Without prejudice to the general application of sub-clause (a) hereof not to carry on in the flat or any part thereof any business as defined by section 23(2) of the Landlord and Tenant Act 1954 or any statute amending or re-enacting the same.

24. There was no breach of para. 3.26(b) as the defendant was not carrying on any business 'in' the flat. However, Fox LJ held that there was a breach of para. 3.26(a):

> …The defendant is not using the flat as the defendant's private residence in any sense. It is not a case of a company using property for its directors or its staff or its own guests. Each of those classes, it seems to me, might have sufficient nexus with the defendant company as such to justify regarding their occupation as that of the defendant company itself. But what we have here is a situation that the defendant company is using the flat, not for any private residential purpose of its own, but as a residence for such members of the public as are acceptable to the defendant. In my judgment the judge's conclusion is right. This is an undertaking by the lessee not to use the flat otherwise than as a single private residence in one occupation. The lessee in the present case is using the flat. But the lessee is not using it as a private residence, if someone else (i.e. the licensee) is using it as a private residence, and the lessee does not reside there at all. The user as a private residence is not the lessee's user if it is that of somebody else altogether. And even if a lessee is actually residing on the premises, but invites members of the public to live there as paying lodgers, he is not keeping the house as a private dwelling-house only- that appears from the decision of the Court of Appeal in *Tendler v Sproule* [1947] 1 All ER 193.
>
> In my view, the defendant's user is not residence user at all it is the business of providing service accommodation, and it seems to me there is no question of the defendant using it as a residence, much less as a private residence

25. Fox LJ accepted it was legitimate for the company to exploit the lease for value, but that could be done by subletting it.

26. Sir Roger Ormrod, agreeing with Fox LJ, considered that para. 3.26 was 'obviously drafted very badly indeed' if it were intended that the lease including it would be used where the lessee is a company. He was persuaded that the defendant could have sublet the premises. That made sense as it would give the landlords some control over the use of these 'very expensive and prestigious' flats.

27. The context of *Falgor* - a long residential lease - is certainly closer to the current case, but unlike the lease with which we are concerned, the lease in *Falgor* contained qualified covenants against alienation of the whole (not to assign, transfer, underlet or part with possession) which bound the lessee. The lessee was a company, and the Court was clearly of the view that the intention of the parties was that the lessee should itself occupy the flat (that is by its officers, servants or agents). Where the company had granted arms-length occupational licences to visitors and had serviced the accommodation concerned, it followed that the company was not itself occupying the flat. The Court did not consider the possibility that the covenant could have been complied with in the event of anyone nominated by the company occupying the flat as a single private residence. In that sense, the decision does not sit easily with *Caradon* where the Court of Appeal adopted a different approach.

Caradon District Council v Paton [2000] 3 EGLR 57

28. *Caradon* concerned covenants entered into on the purchase by sitting tenants of dwelling-houses pursuant to the right-to-buy provisions introduced by the Housing Act 1980. Each purchaser covenanted 'not to use or permit to be used the property for any purpose other than that of a private dwelling-house' and that 'no trade or business or manufacture of any kind shall at any time be permitted to be set up or carried on in any part of the property.' The vendor council brought proceedings against owners of two such properties, claiming that they were being used for holiday lets during the summer months for one or two weeks at a time.

29. The owners submitted that the use being made of the properties was clearly that of private dwelling-houses, as opposed to business premises, and that they were using the properties for the period of the letting in the same way as they would use their own homes. It was submitted that there could be no objection to the properties being let for a period of (say) six months, and that it would be illogical to conclude that they were not being used as private dwelling-houses simply because the letting period was shorter.

30. Latham LJ posed as the first question whether or not the occupation of the holidaymakers could constitute the use of the property as a private dwelling-house. The second question (which would arise only if the answer to the first was in the affirmative) was whether such use would amount to a business or the carrying on of a business on or in the properties.

31. Latham LJ drew a distinction between use being made of the property by the owner and use being made of the property by others with whom the owner has entered into a contractual relationship. In the former case, Latham LJ was prepared to accept that a property being used

as a second 'holiday' home would be being used as a private dwelling-house; in the latter case, he was not prepared to accept that the use was as a private dwelling-house. The distinction being made was similar to that articulated by the Court of Appeal in *Falgor* (where it was held that the occupation must be that of the company itself) although *Falgor* was not cited to the Court of Appeal in *Caradon* and Latham LJ qualified his remarks as being 'apart from authority'.

32. One authority was cited on the meaning of the phrase 'use as a private dwelling-house': *C & G Homes Ltd v Secretary of State for Health* [1991] 2 All ER 841, [1991] 1 EGLR 188. The Secretary of State had purchased two properties intending to use them as supervised housing for former hospital patients who had suffered from mental disability and who were being returned to the community. Covenants restricted the owner of the properties from carrying on at or from the property any trade or business and from using the dwelling-house 'for any… purposes other than those incidental to the enjoyment of a private dwelling-house.' The Court of Appeal held that the proposed use was not for a purpose 'incidental to the enjoyment of a private dwelling-house', Nourse LJ stating at page 848 as follows (a passage cited by Latham LJ in *Caradon*):

> We were not referred to any judicial definition of a private dwelling house. It seems that judges, no doubt wisely, have been content to say whether, in any given set of circumstances, the description is or is not satisfied. The definition of a private house given in the *Shorter Oxford Dictionary* (1933) is 'the dwelling-house of a [private] person, of a person in his [private] capacity.' Where the owner himself is in occupation it can usually be said that he is using it as *his* private dwelling-house. But he can still use it as a private dwelling without occupying it himself, for example where he lets it to some other individual for use as his private dwelling house. Use as or for the purposes of a private dwelling house seems to assume that there is at least one private individual who, whenever he chooses, can occupy the house as his own, even though he may not be in actual occupation, for example where he allows his children and some friends to live there.

33. Nourse LJ concluded, at page 849:

> In summary, I would say that if a house cannot fairly be described as someone's private dwelling house it cannot be said to be being used as such.

34. Latham LJ took from these passages the clear indication that the concept is that the house should be being used as someone's private dwelling-house and that has to be considered in the context in which the covenant has been imposed. He then continued:

> What was the context within which the covenant we have here to consider [was] imposed? The covenant was imposed… when the properties were being purchased from the appellants' predecessors in title by the then council tenants. The appellants submit, and I accept, that the purpose of the covenants in question was to protect the amenities of the surrounding neighbourhood, and also to try to ensure that the

> properties that were being sold remained as part of the housing stock that could be available as homes for people to live in. The concept of a home, therefore, is one that can properly be used in order to determine whether or not, in any given situation, the property in question is being used as a private dwelling-house for the purposes of the covenant.

35. It is clear from this passage that Latham LJ was emphasising the context, in the sense of the circumstances in which the covenant was imposed, and the intentions of the parties to that covenant insofar as they could be discerned from the words used. He concluded, in a passage which seems to have substantially influenced the Ft T in the decision under appeal:

> In the light of all these considerations, I consider that the answer to the question posed by this case is dependent upon whether or not one can properly describe the occupation of those who are the tenants for the purposes of their holiday as being occupation for the purposes of the use of the dwelling-house as their home.
>
> Both in the ordinary use of the word and in its context, it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday. It follows from that analysis that the evidence before the judge, and before this court, really permits of only one conclusion, namely, that is, that the occupation of the holidaymakers of these two properties was not for the purposes of use as a private dwelling-house, within the meaning of the phrase in these covenants.

36. Clarke LJ agreed with Latham LJ, in a passage cited by the Ft T, giving the following reasons in addition:

> It appears to me that the concept of using a property as a private dwelling-house involves the use of it, at least in some way, as a home. I can understand that a person with two houses, who spends his holidays in one of them, may fairly be regarded as spending them in his second home. However, we are not concerned with that situation here. A person renting a holiday house for, say, one or two weeks is not using it, in any sense, as his home. On the contrary, he leaves his home in order to have his holidays somewhere else. Thus, my answer to the question posed by [counsel for the owners], namely what is the property being used for, is that it is being used as a holiday house. There appears to me a significant distinction between, say an assured tenancy for six months, and a one or two-week holiday let. In the one case, the property is likely to be being used as a home, and in the second case, it is not. In these circumstances, a person taking a holiday let is not, in my judgment, using the property as a private dwelling-house. It follows that the defendants permitted the properties to be used for purposes other than that of a private dwelling-house within the meaning of the restrictive covenants construed in their context.

Jarvis Homes Ltd v Marshall [2004] 3 EGLR 81

37. Counsel for the appellant referred the Ft T to *Jarvis Homes Ltd v Marshall* which concerned a restrictive covenant imposed on the sale of land and which is authority for the rather obvious point that 'private dwelling-house' and 'private residence' are not necessarily synonymous. The Ft T considered, rightly in my judgment, that *Jarvis Homes* turned on its facts and had no material relevance to the application before it.

Discussion

38. The issue under appeal concerns the construction of a covenant in a long residential lease. The leading modern authority on the construction of leasehold covenants is the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593. The case also concerned long residential leases, although the specific covenants were service charge provisions and the premises were holiday chalets on a caravan park. Lord Carnwath JSC observed at [116] that long residential leases 'are an exceptional species of contract, and as such may pose their own interpretative problems.'

39. The basic principles of construction of such leases are, however, those applicable to all contracts. Lord Neuberger of Abbotsbury PSC summarised those principles as follows at [15]:

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'

40. Taking due account of the 'documentary, factual and commercial context' of the words of the relevant clause, the Tribunal is required to discern their meaning. Context is therefore important. Context is not, however, everything. In the passage immediately following his statement of principle set out at [39] above, Lord Neuberger emphasises (at [17]) that:

> '…the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be

> construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.'

41. The emphasis is therefore on the meaning of the relevant words used in their particular, fact-specific, context. It follows that the assistance to be given from a prior decision of the courts which construes a similar provision in a particular way may be limited. Each lease is different; and so is each clause. It is necessary for considerable caution to be exercised when considering prior decisions as due weight being given to the context may lead to a different conclusion.

42. With these principles in mind, I proceed to construe the clause in question in its context. It is contained in a lease which is itself granted for a term of 99 years. A premium was paid at the time of grant. The lease contains no restriction on alienation of the property as a whole save for the last seven years of the term. It cannot conceivably have been the parties' intention that the lessee was the only person who was to be permitted to occupy the premises as a private dwelling-house. On the contrary, the nature of the relationship, a relationship that had the potential to endure through a number of successors in title, was such that the express purpose of the grant - use of the premises as a private residence - could be effected by anyone whom the lessee for the time being permitted to live there. There is some control on alienation: there is an absolute covenant prohibiting alienation of part which is a standard term in residential leases of flats. But as long as that covenant is complied with, the lease clearly contemplates the lessee being able to deal with the property with substantial freedom.

43. The clause prohibits certain uses of the demised premises. Such uses will be prohibited whether they are by the lessee herself or by others with her permission. Use for 'any illegal or immoral purpose' is first prohibited, then the clause widens in its impact so as to prohibit use for 'any purpose whatsoever other than as a private residence.' The clause therefore operates to prohibit all uses save use as a private residence.

44. The Ft T concluded, at [46] as cited above, by stating its view that the lessor's likely intention was to restrict the use of the flats to that of a private residence, that is as homes, such restriction being likely to have significant benefits for the lessees of the building who would 'we have no doubt' prefer to live with other owner-occupiers or long term tenants as opposed to those occupying on a short term let. For myself, I doubt that it is legitimate, in construing the lease, to speculate about the wishes of other lessees of the building. However, it is important to remember that the covenants of the lease were entered into not only with the lessor but also with the lessees for the time being of the other flats in the block. It is therefore an entirely proper inference that the current covenant was extracted in part for the protection of those other leaseholders.

45. The clause itself, and the lease as a whole, clearly contemplates that persons other than the lessee (and by that term I include the lessee's successors in title) may use the premises. The clause itself does so in its reference to the lessee permitting the premises to be used; the lease does so by conferring very wide (indeed almost unrestricted) powers on the lessee to alienate his or her interest by means of assignment or sub-letting or parting with possession of the whole of the premises. It would have been possible at the time the lease was granted for greater restrictions to have been imposed, for instance on the grant of short-term lettings or occupational licences, but none were. It would have been possible for the lease to have expressly stipulated that the lessee (that is, the lessee for the time being) reside in the premises or even occupy the premises as his or her only or principal home, but it did not. It would have been possible for the lease expressly to prohibit the use of the premises as a holiday let, but it did not.

46. It follows, in my judgment, that an occupier (I use a neutral term) who has been lawfully allowed into occupation of the premises (that is, in compliance with the covenants contained in the lease) may use the premises as a private residence. No breach of the covenant under consideration will occur if and so long as the occupier for the time being continues to use the premises only as a private residence. I do not therefore consider that the interpretation adopted by the Court of Appeal in *Falgor* (see para [25] above) sits comfortably with the leasehold covenant with which I am concerned.

47. I must apply the ordinary and natural meaning of the words used. The covenant refers explicitly to use ‘as a private residence’. It does not refer to the word 'home', nor does it require the occupier, in terms, to use the premises as his or her home. It is important to be extremely careful not to gloss the terms of the clause so as to impose a requirement that was not intended. It is necessary to take care in importing the concept of 'home', as the Court of Appeal did in *Caradon*. That concept may carry with it imputations of permanence, personal attachment, emotional ties or exclusivity. None of those are necessarily inferred by the words actually employed. The question to be asked is not whether the premises are being used as the occupier's home but whether they are being used as a private residence.

48. The clause does not state that the premises are to be used as *the* private residence of the lessee or the occupier, but as '*a* private residence'. The use of the indefinite article (‘a’) is significant. A person may have more than one residence as any one time- a permanent residence that he or she calls home, as well as other temporary residences which are used while he or she is away from home on business or on holiday. It is immaterial that the occupier may have another, more permanent residence elsewhere as there is no requirement that the occupier is using the property as his or her only (or main, or principal) residence. However, it is necessary, in my judgment, that there is a connection between the occupier and the residence such that the occupier would think of it as his or her residence albeit not without limit of time. In short, for the covenant to be observed, the occupier for the time being must be using it as his or her private residence.

49. The term ‘private residence’ is a composite term. It may be contended that a room in a hotel is not a ‘private residence’, but if a guest stays there enjoying the facilities for months or years a strong argument could be made that the room has become a private residence of the guest for the time being. For myself, I find it difficult to think of circumstances in which an individual’s ‘residence’ would not be that person’s ‘private residence’. It may be that where an occupier shared some part of the accommodation with someone else it would cease to be ‘a private residence’, being a shared residence which does not have the attribute of privacy. That is not however the factual situation with which I am dealing.

50. I do not consider that the demand and acceptance of payment by the lessee from the occupier has any effect on the nature of the use. It may remain a ‘private residence’ whether it is occupied by a tenant of the lessee who pays rent or by a friend of the lessee who is allowed to live there rent free as a philanthropic gesture.

51. I do not consider that the reason the occupier is there is decisive. A person may take the accommodation offered while he or she is working in the area or while he or she is enjoying a holiday from work. In either case, the underlying motive for the occupation does not necessarily mean that the occupier is not using the flat as a private residence.

52. The main thrust of the landlord’s submissions concerns the duration of the lettings being advertised and granted by the appellant. I must consider whether the duration of the letting affects the answer to the question whether the occupier is using the premises as a private residence. As I have emphasised, it is the use being made for the time being, by the occupier for the time being, that is material. If the occupier is in the property for a matter of days (rather than weeks or months or years), does that transform the nature of the use being made of the premises such that the occupier would not then be using them as a private residence?

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.

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.

Conclusion

55. 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'.

56. As far as this case is concerned, I do not accept the appellant's submission that the Ft T erred in law. I accept that the Ft T may have given too much weight to the three authorities which were cited by the respondent, rather than analysing closely the lease in general and the covenant in particular. However, having construed the lease, I have taken the view that the appellant's actions in granting very short-term lettings of the flat of which she was the leaseholder comprised breaches of the covenant. The Ft T was right therefore to have made the determination that it did under section 168 of the Commonhold and Leasehold Reform Act 2002 and this appeal must be dismissed.

Dated: 6 September 2016

His Honour Judge Stuart Bridge