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**Airbnb, Booking.com etc - can a tenant use their premises for such short term occupation?**

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# Programme



1. What is Airbnb?
2. Long lease/tenancy distinction
3. Breach of tenancy
4. Is it sub-letting or parting with possession?
5. Possession action & Money claims
6. Q + A

# Different Scenarios



- Tenant “lets” room(s) out but remains at property
- Tenant lives elsewhere
- Tenant “temporarily” absent and using property for short-term lets
- Occasional use for short-term lets
- Tenant under shared ownership agreement
- Tenant under long lease
- 3<sup>rd</sup> parties arranging short-term lets

# The motivation for the webinar

## *Triplerose Ltd v Beattie* [2020] UKUT 180 (LC)



- Long residential lease
- Breached a covenant restricting the use of the flat to use as a private dwelling
- Made it available for short-term occupation via the "Airbnb" and "Booking.com" websites
- Such activity did not breach a covenant prohibiting the carrying on of a trade or business "upon the property"
- There was a distinction between using premises as a business resource and carrying on a business "upon" the premises



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**What is AirBnB?**

# Airbnb



- Contact base between people who have rooms to let and people who wish to rent them
- On-line – commission from host and guests
- Short-term lets
- Airbnb impose 90-day limit in Greater London area (unless planning permission for more)
- Mayor of London registration call
- No breakfast!

# Greater London Council (General Powers) Act 1973



- Planning restriction

## “25A Exception to section 25

(1) Despite section 25(1), the use as temporary sleeping accommodation of any residential premises in Greater London does not involve a material change of use if two conditions are met.

(2) The first is that the sum of—(a) the number of nights of use as temporary sleeping accommodation, and

(b) the number of nights (if any) of each previous use of the premises as temporary sleeping accommodation in the same calendar year,  
does not exceed ninety.”

- Amended by Deregulation Act 2015, section 44
- Allows use of residential premises for temporary sleeping accommodation without being considered a “change of use” if use as a short-term rental for 90 or fewer nights in a calendar year

# Judgment of Paris



- June 5 2020 – likely appeal
- Tenant sublet flat for 534 days in 2016/2017 without the permission of the owner
- Airbnb at fault because it had a responsibility to inspect the advertisements
- Airbnb Inc. was ordered by a French court to compensate the owner of the flat
- Airbnb and the tenant were jointly ordered to pay nearly 52,000 euros to make up for the rent received for the subletting and an extra 5,000 euros in legal fees
- Airbnb also told to pay back the 1,558 euros in commissions it received





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**Long lease/tenancy distinction**

# What is a long lease?



- Long (more than 21 years) residential leases at low rent: Commonhold & Leasehold Reform Act 2002, section 76
  - Local Government & Housing Act 1989, section 186/Schedule 10 security of tenure
  - Commonhold & Leasehold Reform Act 2002, section 76(2e): shared ownership a long lease **if** staircased to 100%
- Housing Act 1985, Schedule 1 (para. 1) – long tenancy = no secure tenancy
- Housing Act 1988, Schedule 1 (paras. 3-3C) – low rent (£1k Greater London, £250 elsewhere) = no assured tenancy
- Housing & Planning Act 2016 (Schedule 7) provisions – not yet on force

# Why is the distinction important?



- **Terms of agreement**
  - Shared ownership/Long Lease and periodic/flexible/fixed-term distinction: **see next section**
- **Statutory oversight different**
  - Section 15A loss of assured status does not apply to shared ownership
- **Remedies different: see Possession action section**
  - Injunction and/or Possession action
  - Declaration of breach may be required
  - Forfeiture/Statutory grounds route

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**Sub-letting or parting with  
possession?**

# Why deal with this section first?



- It **may** end security of tenure once and for all
- See Housing Acts 1985 (section 93(2)) and 1988 (section 15A)
- City of Westminster v Harman (2019)
  - Tenant sub-let his LA flat through Airbnb from 2013
  - Possession order and £100,974 UPO
  - The property, which featured its own hot tub, amassed more than 300 online reviews before he was prosecuted by Westminster council
  - Bank statement evidence too
  - Harman used the name “Lara” when posting about the flat, but was caught out after his first name appeared among scores of online testimonials left by people who stayed there

# Traditional view on sub-letting

## *Hussey v LB Camden* [1995] 27 H.L.R. 5 at [10-11]



“It is common ground that the judge did not overtly apply his mind to the right question, namely whether for any period before January 1991 Mr Hussey had sublet or parted with possession of his flat. In my judgment it is not possible to infer from what the judge actually said that he must have found that Mr Hussey did part with possession of his flat and I did not understand Mr Bhose to feel able to argue the contrary. What the council does contend is that if the judge had considered the points there could only have been one answer as to parting with possession of his flat. **It is obvious that from time to time others were in sole occupation of it, but it does not follow that they enjoyed exclusive possession.** Mr Hussey’s right to enter and use the premises if and when he chose was not negatived. There might have been proof that he gave up his key, or of the manner in which rent was paid either to him by another or by another in his stead. There was no such evidence.” [Leggatt LJ]

# Sub-letting & Airbnb



- Street v Mountford [1985] A.C 809 presumption of tenancy – exclusive possession for a period and for payment for that period
- Bermondsey Exchange Freeholders Ltd v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghehan Conway) [2018] 4 WLUK 619
- Airbnb use amounted to a breach of covenants against subletting and permitting others to occupy the flat otherwise than by an authorised sublet or assignment, and of a user covenant requiring the flat to be used as a “residential flat with the occupation of one family only”

“57. Neither the short duration of the arrangement, nor any notional provision for ‘services’ (such as leaving the flat stocked with material from which to assemble a breakfast or other meal), nor reservation of a right of entry, nor any combination of those features, displace that presumption from applying to an Airbnb-style arrangement.” [HHJ Luba QC]

# Parting with possession



“A lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee **wholly ousts him from the legal possession of that part**. If there is anything in the nature of a right to concurrent user there is no parting with possession. Retention of a key may be a negative indicium, and the authorities on the whole show that nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession. **The fact that the agreement is in form a licence is immaterial, as the licence may give the licensee so exclusive a right to the legal possession as to amount to a parting with possession.**”

Stening v Abrahams[1931] 1 Ch. 470 Farwell J at 473



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**Breach of tenancy**

# Which terms will be breached?



## Periodic/Fixed-term

- Only or principal home
- Residential use
- Sub-letting/parting with possession (whole or part): Street v Mountford presumption

## Long lease (typical/common terms)

1. Not at any time to assign, sub-let or part with possession of part only of the Demised Premises
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 of the Demised Premises
3. Without prejudice to the absolute prohibitions hereinbefore contained not to assign or underlet the whole of the Demised Premises without the prior written consent of the Landlord
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 of one family only

# Secure/Assured Tenancies



- **Only or principal home:**
  - May lead to NTQ
  - Objective intention to return: LB Islington v Boyle [2012] H.L.R. 18
  - LB Southwark v Ibidun [2018] H.L.R. 5: the secure tenant had allowed other people to live at the property but had herself returned at the weekends and retained the property as her address for all formal correspondence; Moulder J held that the trial judge had been entitled to conclude that the secure tenant had not ceased to occupy the property as her only or principal home
- **Sub-letting of part:**
  - unlikely if T remains in occupation: Monmouth BC v Marlog (1994) 27 H.L.R. 30
  - See Hussey v LB Camden, City of Westminster v Harman and Bermondsey Exchange Freeholders Ltd v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghehan Conway) above



## Broad clauses preferable

### *Swan v Uecker* [2016] VSC 313

Croft J - “80...the context provided by the terms of the particular apartment lease are important. Although this apartment lease is a residential lease, many commercial leases restrict the tenant from sub-leasing, assigning the lease, granting any licence to occupy all or part of the leased premises or otherwise parting with possession without the landlord’s prior consent. **Broad terms such as this would prevent, for example, sub-letting or licensing without the landlord’s consent and would avoid the need—as in the present case—to characterise the nature of the same arrangement like the AirBnB arrangement for occupation of the whole of the leased premises as a sub-lease or a licence ”**

# Residential use



- Bermondsey Exchange Freeholders Ltd v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghehan Conway) [2018] 4 WLUK 619:

“66. For my part, I am in entire agreement with the Judge. The user covenant is clear. Clause 2.4 is breached when the flat is not being used as a residential flat but as short-term temporary accommodation for transient visitors paying for such use by way of commercial hire. Just such a breach was found by the Judge in the instant case and I can detect no error in that finding.” [HHJ Luba QC]

- Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC) - Tribunal concluded that the use of a flat for short term occupation by guests sourced via internet booking agencies was a breach of a covenant prohibiting its use “other than as a private residence.”

“33. On the facts found by the FTT the individuals who occupied the flat for weekends or other short periods after responding to internet advertisements were not using the flat as a private dwellinghouse for occupation by one family at any one time. By permitting that use Mr and Mrs Beattie were in breach of paragraph 18 of Schedule 4 of their lease. The first ground of appeal is therefore allowed.” [HHJ Bridge]

- Falgor Commercial SA v Alsabahia Inc [1986] 18 H.L.R. 123

“The user as a private residence is not the lessee's user; 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 E.R. 193.” [Fox LJ]

# *Tripleroose Ltd v Beattie* [2020] UKUT 180 (LC)



“10. ...They explained that, due to changes in Mr Beattie's employment situation, they had relocated their home away from Newcastle. They had made arrangements with a company called Quality Street Ltd for their flat to be advertised on the Airbnb and Booking.com websites as available to let for short term occupation but Mr Beattie still made regular use of it.”

“33. On the facts found by the FTT the individuals who occupied the flat for weekends or other short periods after responding to internet advertisements were not using the flat as a private dwellinghouse for occupation by one family at any one time. By permitting that use Mr and Mrs Beattie were in breach of paragraph 18 of Schedule 4 of their lease. The first ground of appeal is therefore allowed.”

“37. I therefore consider the FTT was right to find that letting the flat for short term residential use did not breach the covenant against carrying on business upon the property.”

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## Possession action & Money Claims

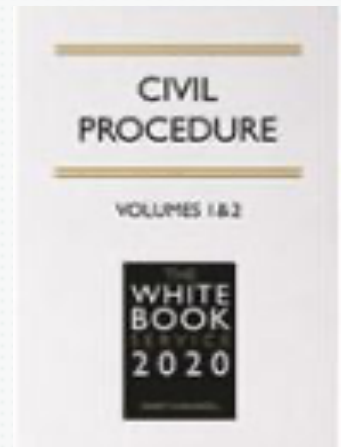
# Issues arising out of coronavirus



- Investigation restrictions
- No restriction on FtT determination of breach for long leases: Commonhold & Leasehold Reform Act 2002, sections 76/77, 168(4)
- Current stay but claims can be issued – CPR r. 55.29
- Most notices to quit unaffected by Coronavirus Act 2020, Schedule 29



Coronavirus Act 2020





# Injunctions



- Common in shared ownership cases
- Injunction applications may be an alternative in long lease/shared ownership cases: Bermondsey Exchange Freeholders Ltd v Ninos Koumetto (as Trustee in Bankruptcy of Kevin Geoghehan Conway) [2018] 4 WLUK 619
- Discretionary
- Likelihood of future breaches key

# Money claims



- Unlawful profit orders
  - Prevention of Social Housing Fraud Act 2013, section 5
  - City of Westminster v Harman (2019) County Court at Central London (£100k +)
- Tort of deceit
- Restitution for wrongs – e.g. disgorgement
- An account
- Eastend Homes v Singh (2020)



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# Question and Answer session

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