



Short Term Letting Associated Risks and Airbnb

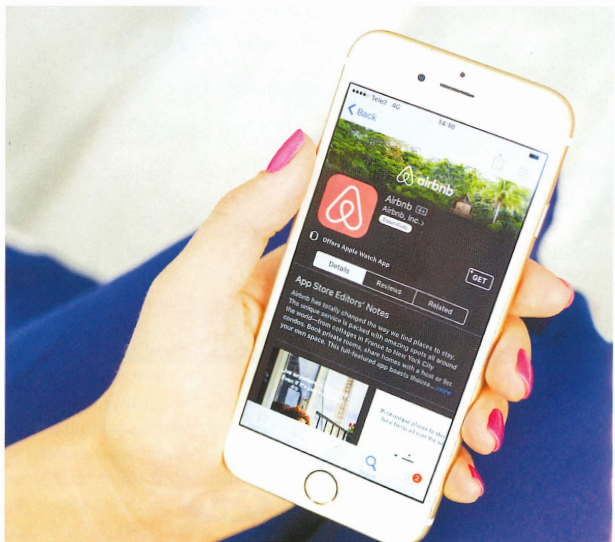
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Ann is a partner in RK's Real Estate Group and advises on a wide range of property related matters. She has more than 13 years' post qualification experience and her clients include various lenders, loan servicers, private individuals, developers and LPA Receivers. Ann's practice includes dealing with property sales, purchases and mortgages, development acquisitions and plot sales, and landlord and tenant matters. She has a wealth of experience in advising on service charge disputes, forfeiture proceedings, title rectification issues and other complex disputes involving real estate. Ann works closely with Rosling King's Dispute Resolution Group on landlord and tenant and all real estate litigation. She regularly speaks on real estate related matters at seminars and client workshops.

Whether you are a holidaymaker or a business traveller looking for a bed for a few nights, a new build developer or a property owner looking to earn some income from part of your property portfolio, it seems that the world has fallen in love with Airbnb. However, in England and Wales, there are certain considerations which need to be made before listing a property and these include, but are not limited to:

- Restrictive covenants
- Lease covenants
- Planning laws
- Mortgage terms and conditions

RESTRICTIVE COVENANTS
Restrictive covenants mostly



Above: Airbnb is constantly gaining in popularity



Above: "In London, the most frequent concern is the potential breaching of lease covenants by tenants, should they let the property as an Airbnb..."

affect freehold properties, particularly those on a new development or estate where there are rules governing the use of the properties on the development/estate. We have all seen a number of weird and wonderful old restrictive covenants on titles that have been around for decades or longer, such as "do not hang your washing out on a Wednesday" or "do not keep a caravan in your garden". However, we are now seeing a new type of covenant on new estates preventing owners from allowing their properties to be used for holiday lettings or for Airbnb. This has come about largely because of concern about noise nuisance and perhaps lack of care being taken over gardens or the estate generally. Whilst the owner may not be too concerned about breaching

restrictive covenants, especially if they are seeing a profit from letting their property on short term lets, there are actions that can be taken by their neighbours who have the benefit of these covenants.

LEASE COVENANTS

In London, the most frequent concern is the potential breaching of lease covenants by tenants, should they let the property as an Airbnb or for a short term let. A great number of leases of flats do not allow a tenant to:

- Sub-let the property.
- Share possession or occupation of the property.
- Use as a trade or business.
- Cause a nuisance to the Landlord or other occupiers.

By allowing their property to be let out on Airbnb or on

short-term letting, the tenant could be breaching the lease covenants.

If a tenant is found to have breached covenants in the lease, the Landlord would be entitled to take action against the tenant, which could ultimately lead to the lease being forfeited. If there is a mortgage, and the lease is forfeited, the mortgagee would lose its security.

There has been some recent case law dealing with breach of lease covenants and Airbnb. One that examined a significant number of the issues was *Nemcova v Fairfield Rents Limited* [2016] UKUT 303 (LC).

The tenant was the long leasehold owner of a flat in Enfield and admitted advertising and letting the property for short term lets, not simply for holiday letting but to business people.

The tenant stated that the property was still her main residence and that she only let out the property for around 90 days a year and paid the council tax and utility bills for the property, even when the property was let. However, the lease prevented the sub-letting of the property during the last seven years of the term of the lease and for the property being used for any illegal or immoral purpose and for any other use than as a private residence.

The tenant in this matter argued that there were no material restrictions on underletting or granting short term tenancies or licence and there was no restriction on use as a trade or business or for holidays. Private residence means that the property can be physically described as a private residence and, so long as the property was being used as a private residence by someone, there was no breach. The case was considered by the Upper Tribunal and they examined various facts including:

- It would have been possible for the landlord to expressly restrict holiday or short-term lettings, but it did not do so.
- An occupier lawfully allowed into the property would be capable of using the property as a private residence.
- The covenant referred to private residence, rather than the use of the property as a home.
- A person may take a holiday and yet still use a property as a private residence.

The Upper Tribunal did, however, decide that the duration of the stay was



Above: Letting out property on Airbnb may breach planning laws

material. It decided that a degree of permanence was required and that the occupation for just days or weeks was not sufficient. The Upper Tribunal accordingly found that short-term lets were in breach of the lease. Whilst it is clear that the court will look at the wording of each lease in question, private residences clauses are commonly found in long leases.

PLANNING LAWS

Letting out a property as a holiday home or on Airbnb may cause a property owner to breach planning laws. Section 44 of the Deregulation Act 2015, permits property owners in Greater London to let their properties for short term lettings without the need for planning permission for change of use, and more importantly, without breaching planning laws, provided that the total number of days the property is let out, does not exceed 90 and that during this time the property owner remains liable for council tax.

Anything over this time period could be a breach of planning.

MORTGAGE TERMS AND CONDITIONS

Before any property owner lets out a property on Airbnb or on short term lets, they should carefully consider any mortgage terms and conditions. Letting out on short term lets or on Airbnb could be in breach of their mortgage conditions. If the mortgage terms and conditions are breached, this could allow the lender to take action to enforce their security and possibly lead to the property owner having their property reposessed or other enforcement action being taken. There are only a few examples of the type of issues that a property owner has to consider when letting out on Airbnb or short term lets, but there may well be other considerations, such as obtaining appropriate buildings/contents insurance and tax and it is not something that the property owner should enter into lightly or without taking appropriate advice.