

Are account of profits available where tenant hosts are in breach of lease?

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Property analysis: Thomas Bumstead, associate, and Dev Desai, partner, at Watson Farley & Williams, examine a recent New Zealand tribunal decision regarding the use of premises for Airbnb hosting, arguing that it represents a salutary warning to tenants as well as an example of an additional remedy for disgruntled landlords.

Original news analysis: Short-term lettings—snags in the sharing economy 02/10/2017

What are the practical implications of this decision?

While this New Zealand Tribunal decision is not directly binding in England, it does provide a useful indication of how this situation has been dealt with in a similar common law jurisdiction.

In the context of English law, the leading case on the availability of the remedy for contractual breach is *Experience Hendrix Llc v PPX Enterprises Inc and another* [\[2003\] EWCA Civ 323](#), [\[2003\] All ER \(D\) 328 \(Mar\)](#) which provided that account of profits would only be available in exceptional circumstances.

We consider that the English courts would reach a similar conclusion faced with a tenant in such serious breach of lease. The remedy of account for profits for Airbnb subletting could make enforcement of restrictions on sub-letting more attractive to landlords. It is easy to understand why a landlord might be reluctant to enforce in circumstances where the neighbouring tenants are the only parties who suffer a loss of amenity through the disruption caused by irresponsible hosting. If the landlord is able to require the offending tenant to account for profits made through Airbnb then this could have a significant impact on enforcement of tenant covenants and moderating bad tenant behaviour.

What was the background?

Nice Place Property Management Limited (NPPM) v Jeff Walter Paterson (JWP) is a claim by NPPM for \$13,750 as an account of JWP's profits in sub-letting the premises through Airbnb. NPPM calculated its claim by multiplying the average nightly rate charged by the tenant (\$250) and the number of subletting instances which NPPM could prove (55).

The clause in JWP's lease prohibiting subletting was very clear: 'The tenant shall not assign or sublet the tenancy (including Airbnb and other temporary rentals platforms) without the landlords [sic] written consent'.

In both New Zealand and England an account of profits is a discretionary remedy which requires the defendant to:

- account to the claimant for the profits gained through its wrongdoing
- disgorge its gains whether or not the wrongdoing caused the claimant any financially measurable or corresponding loss

The tribunal ordered JWP to pay his profits to NPPM and applied the test in a punctilious manner. The landlord's \$13,750 claim was the gross amount of JWP's profits and so it was necessary to deduct any expenses incurred in order to calculate a net profit figure to be paid to the landlord. Therefore, the tribunal deducted JWP's rent over the relevant periods and a reasonable estimate for

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costs such as linen, servicing the apartment and administration. Once these deductions were applied, NPPM was entitled to \$2,150 on account of profits.

Interviewed by Max Aitchison.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.