A Licence to Lease? The Common Law Status of an airbnb 'Stay'

DAVID KELLY, ASSOCIATE, LEVENTIS LAWYERS

Many readers will have heard of or used *airbnb*, the web-based platform by which "hosts" (persons looking to generate income by allowing others to occupy premises on a short term basis, called a "stay") are connected with "guests" (persons looking to find short term accommodation generally at a comparatively reduced cost) all on a relatively immediate and informal basis using pro forma, click-wrap style agreements.

Some members of the profession might thus consider that the scene is set for extensive disputation, and that this sector of the so-called sharing economy will be fertile ground for regulation.[1] However, apparently a more fundamental legal issue arises, namely, whether sole, temporary occupancy of entire premises allowed by a stay is a licence, as *airbnb* would have it,[2] or a lease.

That question presently remains unanswered in South Australia, however, was recently considered by the Supreme Court of Victoria in *Swan v Uecker* [2016] VSC 313 (*Swan*) which concerned precisely this issue. In essence, Croft J there held that the host granted the guest a lease and not a licence on the ground that in substance such a stay conveyed exclusive possession.[3]

Absent a basis to distinguish *Swan*, Croft J's views would thus appear to provide the best indication of the approach likely to be taken elsewhere. Accordingly, a brief summary of the decision together with some thoughts on its potential consequences for persons offering or accepting an *airbnb* stay and or conventional demise of premises are warranted, and are offered below.

DRAMATIS PERSONAE

The appellant in *Swan* owned a two-bedroom apartment that she leased to the respondents in the usual manner. That lease (the "Head Lease") did not permit the respondents to sublease the apartment without prior consent. Subsequently, however, the appellant discovered that the respondents had made it available for stay via *airbnb*, including an option to occupy the whole apartment in the absence of the respondents for a fixed price per night for between three and five nights.[4]

Unimpressed, the appellant made application to the Victorian Civil and Administrative Tribunal (VCAT) for orders for vacant possession pursuant to s 330 of the *Residential Tenancies Act 1997* (Vic)[5] on the basis that the respondents had breached the Head Lease. Although the respondents conceded that they had allowed other people to stay in the apartment, and that the appellant did not consent to that occurring, VCAT dismissed the application on the basis that such stays were licenses only, and, therefore, no breach of the Head Lease had occurred.[6] Unsurprisingly, the appellant appealed.

Critically, the *airbnb* agreement relevantly provided as follows:[7]

Guest access: You will have use of the entire apartment, its bathroom, kitchen, lounge room, and balcony.

Interaction with guests: [We] will be available by phone for any guidance [we] can give and [we] will not be far away if you need [us] to come with a key, etc.

House rules: Since this is [our] home and [we] [are] leaving to allow you to have it all to yourself, [we] simply ask that you observe the normal courtesies such as being considerate about noise for the neighbours' sake and being careful with [our] TV, stereo, and kitchen amenities. [Underlining added].

THE APPEAL

The appeal proceeded on grounds primarily including that there was no evidence to support VCAT's finding that the respondents were able to access the premises during the stays such that guests did not have exclusive possession so as to render the arrangement a lease.

LEGAL HOLDINGS

Croft J allowed the appeal on each ground and set aside the orders of VCAT,[8] holding that, in view of the classic authorities on point:[9]

- The method of characterisation of an *airbnb* stay as a lease or licence depends upon the proper construction of the agreement – looking to substance and not form – and having regard to relevant surrounding circumstances. [40]
- There is a broad spectrum of residential accommodation available ranging from the usual hotel room licensing arrangements through to long-term serviced apartment agreements, which, on any view, would be taken to be leases. [40]
- The surrounding circumstances and provisions of the *airbnb* agreement indicate that although the occupancy granted by the hosts to the guests was for a very short time, the nature of that occupancy was of the type expected of residential accommodation generally, namely, exclusive possession. [46]

To these ends, Croft J more particularly found:

- The manner of booking and of payment does not affect the character of the occupation granted under an *airbnb* agreement. [47]
- Nothing in the *airbnb* agreement indicated that the respondents had the ability to access the apartment during a stay. [53]
- The reference to a "licence" in an *airbnb* agreement is no more than a label, and is not decisive. [53]

More broadly, Croft J also held that:

- When determining whether a person has exclusive possession of premises, it is not relevant (or at least not decisive) that by agreement that person can be made to leave the premises if that person overstays the period that has been agreed for them to stay. At common law, a lessor has the ability to make an overstaying lessee leave, just as a licensor can evict an overstaying licensee. Hence, a person's ability to make an overstaying occupant leave does not tend in favour or against the finding of exclusive possession prior to that entitlement arising. [67]
- When determining whether a person has exclusive possession of premises, it is not relevant whether that premises is a person's principal place of residence. A person may grant a lease in respect of their principal place of residence (for example, when going away for an overseas holiday) in the same way that a licence might be granted in respect of that premises. Hence, retention by hosts of premises as their principal place of residence during an *airbnb* stay does not tend in favour or against a finding of exclusive possession. It is entirely neutral on the point and consequently not a matter of logical relevance. [72], [73]

DOES ANY OF THIS REALLY MATTER?

The short answer is yes. The finding in *Swan* that the *airbnb* stay was a lease and not a licence meant that the respondents were in breach of the Head Lease, and therefore liable to an order for vacant possession. Leaving aside the good graces of others, there is no real reason to suppose that aggrieved head lessors in later cases will be more accommodating – especially where hosts may ultimately derive more income from stays than head lessors might derive from the rent. In view of that outcome, hosts who are lessees themselves may be well advised to clarify whether permission is needed before they permit guests to occupy entire premises without express authority from head lessors.

Additionally, given the cost and likely undesirability of legal action against an otherwise good head lessee, head lessors may also be well advised to try to anticipate and to deal with the possibility of *airbnb* stays and similar arrangements at the time of entering into a lease, including by negotiating a higher rent, and or agreed percentage of takings.

There is also the consequent possibility that rights and remedies provided for by legislation may come into play. For example, it may be that the law will impose upon a host the usual lessor's covenants, and, likewise, the usual lessee's covenants upon a guest, with all attendant protections and or liabilities, notwithstanding the express terms of the *airbnb* agreement thought to govern the stay in issue.

Less obviously, the distinction between a lease and licence may also affect the ability of a "guest" to bring an action and seek relief against those interfering with their quiet enjoyment of the land in tort for nuisance.[10] This is important because legal standing to bring such an action is afforded generally to lessees, but the position has been doubted with respect to licensees.[11]

Taxation obligations may also require attention, in particular, whether income generated from a stay is personal or business-related, especially if the dwelling offered to the guest is not occupied by the host.

There may also be ramifications for insurance in the event of damage, especially in relation to occupier's liability,[12] not further considered here.

CONCLUSIONS

If followed in other jurisdictions, the holding in *Swan* is likely to have implications for parties to *airbnb* agreements, or persons concerned or potentially concerned by those legal relationships, including (head) lessors and (head) lessees. Without legislation and or specific judicial consideration of the issue that gives rise to a different treatment of the matter, would-be hosts and guests may be wise to invest in legal advice before entering into such agreements.

Or stay at a hotel.[13] B

Endnotes

1 But see announcement dated 7 June 2016 indicating that an *airbnb* "stay" would not amount to 'change in use' to land under the *Development Act 1993* (SA): www.premier.sa.gov.au/index.php/john-rau-news-releases/664-airbnb-boost-to-sa-tourism.

2 www.airbnb.com.au/terms, [13]: *'Overstaying without the "host's" consent'.*

3 *Swan*, [75]. *Swan* also considered agreements for temporary occupancy of less than entire premises (e.g., a portion of a dwelling, or a dwelling at which a "host" remains present with a "guest"). It is tolerably clear that these kinds of "stays" are not leases because exclusive possession is not granted.

4 *Swan*, [19].

5 An analogous power exists in s 93, *Residential Tenancies Act 1995* (SA).

6 *Swan*, [27].

7 *Swan*, [20].

8 *Swan*, [81].

9 *Swan*, [30]-[48].

10 See e.g., *Hargrave v Goldman* (1963) 110 CLR 40, 60 (Windeyer J); *Hunter v Canary Wharf Ltd* [1997] AC 655; *Stockwell v Victoria* [2001] VSC 497, [241] (Gillard J). Relevantly, loss of a single night's sleep has been held to be actionable in nuisance: *Munro v Southern Dairies Ltd* [1955] VLR 332, 334 (Scholl J).

11 See e.g., *Oldham v Lawson (No 1)* [1976] VR 654, 657 (Harris J).

12 See ss 19-22, *Civil Liability Act 1936* (SA).

13 Namely, 'an establishment held out by a hotelkeeper as providing, without special contract, sleeping accommodation, and to some extent provisions and refreshment to a person who appears able and willing to pay a reasonable sum for the services and facilities offered and is in a fit state to be received': see e.g., *Smith v Scott* (1832) 1 LJ CP 143; *Gibson v King* (1842) 12 LJ Ex 9; *Railway Assessment Authority v Great Western Railway* [1948] LJR 244.