

**Residential  
Property**  
TRIBUNAL SERVICE

**Leasehold Valuation Tribunal**

**LON/00AW/LBC/2008/0034**

**London Rent Assessment Panel**

**Commonhold and Leasehold Reform Act 2002 - Section 168(4)**

**Address:** 9 Winchester Court, Vicarage Gate, London W8 4AB

**Applicant:** Winchester Court Freehold Limited (freeholder)

**Represented by:** Mr Stan Gallagher, counsel

**Respondent:** Ms Dena Naji (lessee Flat 9)

**Represented by:** Ms Elizabeth Haggerty, counsel

**Tribunal members:** Mr T J Powell LLB

Mr I Thompson BSc FRICS

Ms S Wilby

**Application:** 25th July 2008

**Directions:** 31st July 2008

**Hearing:** 4th December 2008

**Decision:** 4th February 2009

### Decisions of the Tribunal

- (1) The sub-letting of Flat 9 by the Respondent does not breach the terms of the lease;
- (2) The Respondent is not required to refund any Tribunal fees to the Applicant;
- (3) An order is made under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from passing the costs of the Tribunal proceedings through the service charge; and
- (4) No order is made for the Applicant to pay any costs to the Respondent.

### Background

1. This is an application made pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 seeking the Tribunal's determination as to whether there has been a breach of the terms of the lease granted in respect of Flat 9 Winchester Court, a flat owned by the Respondent.
2. The issue between the parties was whether the sub-tenancy granted by the Respondent was in breach of the terms of the lease and, more specifically:
  - (i) whether the sub-letting had permission of the landlord;
  - (ii) whether the sub-tenants are living together as man and wife or as separate individuals contrary to the terms of the lease, which apparently required lettings to be to one family only; or
  - (iii) whether the sub-letting constitutes a multiple occupation by two individuals.

### The property

3. The Tribunal was told that Winchester Court is a large block of 93 "high class" flats in London W8. Each flat is apparently demised on a long lease in materially the same terms. The Applicant is the leaseholder-owned company. The Respondent is the leaseholder of Flat 9 under a lease granted in 1973, which was then surrendered and re-granted in 1984 in the same terms, save as to term and rent.
4. The Tribunal did not consider that an inspection was necessary and neither party asked the Tribunal to inspect.

### The lease

5. The lease to Flat 9 was granted on 24th June 1977 and was extended by deed made on 24th April 1984.
6. Clause 1 (xvi) and (xvii) of the lease state respectively:

"(xvi) If the Tenant is more than one person all covenants agreements and obligations on the Tenant's part shall be construed as joint and several

(xvii) Section 61 of the Law of Property Act 1925 shall apply in the construction of this Deed and words importing the masculine gender shall where necessary be construed as importing the feminine gender and words importing the singular number shall where necessary be construed as importing the plural number and vice versa."

7. By clause 3 of the lease the Lessee covenants to observe and perform the obligations in the Fourth Schedule of the lease, of which the relevant paragraphs are (so far as material):

"8.(ii) Not to assign transfer underlet or part with possession of the Flat as a whole without the previous consent in writing of the Lessor such consent not to be unreasonably withheld ...

24. Not to use or occupy the Flat otherwise than as a private residence for the sole occupation of the Tenant and his family and servants or of any permitted sub-tenant and his family and servants..."

For the purposes of this Decision the above paragraphs are referred to as Paragraph 8 and Paragraph 24 respectively.

### The law

8. By section 168(4) of the Commonhold and Leasehold Reform Act 2002 a landlord under a long lease of a dwelling may make an application to a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred. As was made clear in the Directions, the burden of proof falls on the Applicant to satisfy the Tribunal that the alleged facts constitute a breach of the lease.

9. Section 61 of the Law of Property Act 1925 states:

"In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires - ...

(c) The singular includes the plural and vice versa;

(d) The masculine includes the feminine and vice versa."

### The hearing

10. At the hearing on 4th December 2008 the Applicant was represented by Mr Stan Gallagher of counsel, and the Respondent by Ms Elizabeth Haggerty of counsel. Witness statement and oral evidence on the part of the Applicant was given by the company secretary, Mrs Patricia Brennan; and by the Respondent in person. There was no witness statement from either of the sub-tenants, and neither appeared to give oral evidence.
11. The Tribunal was greatly assisted by the carefully drawn skeleton arguments prepared by counsel for the respective parties, which were filed with the Tribunal on

the morning of the hearing, together with copies of the authorities on which counsel wished to rely.

12. At the outset of the hearing Mr Gallagher conceded on behalf of the Applicant that consent to the sub-letting had been granted. To this extent he sought to amend the Applicant's statement of case to delete paragraph 11(b), which suggested otherwise. However, Mr Gallagher advanced an argument that the consent which had been given by the Applicant was 'vitiating' by the fact that the Applicant had been induced by a misrepresentation on the part of the Respondent as to the relationship of her sub-tenants. Mr Gallagher said that the nature of the sub-tenants' relationship, if not one of "family" vitiated the consent, so that the Respondent was in breach of Paragraph 8; and the other side of that coin was that their occupation (effectively as separate individuals not in a relationship) amounted to a breach of Paragraph 24.
13. Mr Gallagher explained that the Applicant's concern was to enforce the lettings scheme of the block for the benefit of all leaseholders and this must be done consistently and using objectively fair criteria. In particular, the Applicant was concerned to enforce the single-family occupation provision because of the known problems which can occur with the multiple-occupancy of flats.

### The Facts

14. Having considered the documents in the trial bundle, heard oral evidence and the parties' submissions, the Tribunal found the following facts.
15. The Applicant company has created a pro forma "sub-letting application form" which all tenants must use if they wish to obtain consent for sub-letting of their flat. Once completed, the form is required to be sent to Mr D J Naylor at an address in Chelmsford, together with various documents specified and a cheque for the specified "licence fee" of £300. The form contains a box with two empty rows for the names and "the home addresses" of the "proposed Tenant and family intended to be living in the premises". The documents to accompany the application form include "copy of passport", references from a UK bank, employer, current landlord, previous landlord and from a professional person (as a personal reference), and a copy of the proposed tenancy agreement.
16. The Respondent completed that form with all of her details and giving as the "proposed Tenant and family" the names of her proposed sub-tenants, Anna Murray, with a home address in London W2 and Ronnie Purcell, with a home address in London W4. The form was signed and dated 22nd October 2007 and it was sent, together with all of the required documents (save for a previous landlord's reference) with a cheque for the licence fee to Mr Naylor on or about 22 October 2007. The tenancy agreement shows that Mr Purcell and Miss Murray were to be joint sub-tenants of Flat 9. In their tenancy agreement they are described collectively as "the Tenant".
17. Before that form was submitted the Respondent had had several conversations with Mr Naylor in the previous week to ensure that all the documentation provided was correct. The Tribunal accepted the Respondent's evidence that she had discussed with Mr Naylor that unmarried couples would satisfy the requirements of the lease and that he had stated that "only sharers" were not allowed.

18. The references submitted to Mr Naylor revealed that the proposed sub-tenants were professional people, working in the City of London and it is fair to say that the references were impeccable. Staped to the application form was a handwritten note from the Respondent to Mr Naylor which stated of the proposed sub-tenants that "they are a lovely couple."
19. Mr Naylor telephoned the Respondent on the 25 October 2007 to confirm that the application was successful and that the sub-tenancy was allowed to proceed.
20. The porter at Winchester Court gave the proposed sub-tenants entrance key fobs to the building and they took up occupation of Flat 9 on or about 26 October 2007.
21. There have been no complaints about Mr Purcell or Miss Murray from any of the neighbours at Winchester Court. In all respects Mr Purcell and Miss Murray appear to have been exemplary tenants.
22. On or about 3rd December 2007 the Respondent's cheque for £300 in respect of the "licence fee" was banked by the Applicant.
23. By letter dated 18th December 2007 the Applicant's former solicitors Johnson Sellett Bloom (on the instructions of Mrs Brennan, the Applicant's company secretary) wrote to the Respondent stating: "We are instructed by Winchester Court Freeholder Limited. They have passed across to us the application for a licence to sub-let Flat 9 Winchester Court to Mr Purcell and Miss Murray. Our client has no objection in principle to the proposed sub-letting which we understand has already taken place."
24. The Respondent heard nothing further from the Applicant until Mrs Patricia Brennan, the company secretary wrote to her on 5th June 2008, more than seven months after the commencement of the sub-tenancy. That letter stated that the application for licence to sub-let "is continuing to be treated on the basis that it is a retrospective application." It suggested that the sub-tenants' occupation "has now the appearance of a multiple occupancy and as such the letting is therefore in breach of lease Fourth Schedule clause 24. There has been and remains no direct evidence of any relationship between the two occupants. Legal action for breach of lease and recovery of the flat will be taken unless, within 14 days of the date of this letter, we receive proof positive in writing i.e. an affidavit from the two occupants that they are family related and not merely flat sharers."
25. The Respondent provided the Applicant with a letter signed by Mr Purcell and Miss Murray dated the 10th June 2008 which stated: "This is to confirm that Anna and I are in a relationship." However, Mrs Brennan was not satisfied with the letter and she wrote again to the Respondent on the 17th June 2008 reiterating her demand for an affidavit from the occupants and requiring a clear statement by each occupant, amongst other things, of "the nature of the family relationship between those adults of different surname living in the flat and swearing the affidavit: a. formal marriage partners b. informal marriage partners."
26. In the absence of a response, Mrs Brennan passed the matter to the Applicant's new solicitors Alan Edwards and Co, who wrote to the Respondent by letter dated 7th July 2008 once again requiring an affidavit, or statutory declaration, as to the relationship between the sub-tenants. When the Respondent objected, the solicitors wrote a further letter on the 17th July, which included this paragraph: "Our

client has instructed us in regard to your third paragraph, that permitted couples are both those that are married and those cohabiting outside marriage, provided that clear evidence is given to confirm the family relationship. In this case, it has not been forthcoming."

27. The Respondent then procured and supplied to the Applicant's solicitors two statutory declarations both dated 23 July 2008, one from Mr Purcell and one from Miss Murray each stating that Mr Purcell and Miss Murray are "cohabiting together outside marriage."
28. On the 25 July 2008 Mrs Brennan signed a statement of truth attached to an application to this Tribunal under section 168(1) of the 2002 Act, an application which had been drafted (presumably some time before) by Mr Gallagher and which included amongst the documentary evidence the two statutory declarations dated 23 July 2008.
29. By letter dated 4 August 2008 the solicitors wrote to the Respondent again, firstly purporting to deny that any consent to the sub-letting had been granted and, secondly, stating that the statutory declarations were inadequate. The solicitors prepared their own form of statutory declaration, which they required the sub-tenants to sign which included the proposed wording: " 4. Our relationship, that is the relationship of the persons named at (1) and (3) above with each other, is one of family by reason of the fact that although not formally married we are living together as spouses in a quasi-conjugal relationship."
30. When pressed by the Tribunal for a definition of "quasi-conjugal relationship" Mrs Brennan said it was as if they were formally married; as if they were living together as spouses; and as if they share the same bedroom and go about life as a couple.
31. Mrs Brennan gave evidence that on an unknown date (but it was probably before 4th August 2008) she had cause to go into Flat 9, with the consent of the sub-tenants, to accompany a porter who was dealing with a heating issue. Mrs Brennan took the opportunity to assess the arrangements within the flat, which she considered was "not furnished as a home." She also noticed that each of the double bedrooms appeared to be in use and drew the inference that each of the sub-tenants had their own room. She took the opportunity to ask Miss Murray words to the effect of "Are you a couple?" or "You're not an item are you?" and she claims that Miss Murray replied "No," though Mrs Brennan qualified her oral evidence by saying; "I knew that they were not an item at that stage, unless I had misunderstood."
32. The Respondent protested at the continued intrusion into the private lives of the sub-tenants stating in an e-mail on the 15 August 2008 that her sub-tenants "are insistent that no such conversation took place" and that "they are no longer willing to discuss further especially since they have found out that your client has been broadcasting their sleeping arrangements" and that "they feel harassed." She declined to comply with any further demands from the Applicant or its solicitors believing at the time that her sub-tenants would shortly be leaving the flat, though by the date of the hearing on the 4th December 2008 they were still in occupation.

### The parties' submissions and evidence

33. Mr Gallagher argued that "family" in the context of the Paragraph 24 in the lease means "household" i.e. "the body of persons who live in one house or under one head, including parents, children, servants etc": and he relied upon the case of *Wrotham Park Settled Estates v Naylor* [1991] 1 EGLR 274 (Ch) at 276G, though it should be mentioned in passing that the quote of Hoffman J in that case, at 276L lays emphasis on the word "or" by placing it in italics.
34. He submitted at paragraph 14 of his skeleton argument that: "The essential point is that if "family" is to extend beyond blood relatives and married couples the household must satisfy the test formulated in *Wrotham* i.e. that there must be a recognised head of the household or family unit to hold to account, not simply a collective. "Family" in this context cannot simply mean an informal grouping of people who [are] co-dwelling; if it did, the restriction would have no meaning - anyone living in the flat would by definition satisfy the requirements."
35. Ms Haggarty for the Respondent sought to rely upon the Court of Appeal decision in *Barnes v Sheffield City Council* (1995) 27 HLR 719 as authority for saying that a "household" can consist of more than one person, without there being a family relationship between them. That case decided that groups of five female and four male students had occupied the property in question as persons "who formed a single household." At page 724 Sir Thomas Bingham MR gave a list of nine factors to be applied when trying to ascertain whether a group of occupants formed a "household" or not and, applying those factors, Ms Haggarty submitted that the current sub-letting arrangement was clearly at the "household" end of the spectrum. She also relied upon the subsequent case of *Roberts v Howlett and Others* [2002] 1 P & CR 9, where a group of four unrelated students, who were merely close friends, were found to have used the house in that case as a single "household."
36. In oral evidence, Mrs Brennan accepted that a tenancy is generally in joint names where the occupants are a couple. When asked to produce a copy of the Applicant's written policy on sub-lettings she was unable to do so and Mr Gallagher suggested that he was not aware of a written policy or, at least, there was none in the trial bundle. Mrs Brennan said the Board of the Applicant company had passed a resolution (which was not seen by the Tribunal) stating that sub-lettings must be in strict adherence to the lease. She said there was no objection to sub-tenants being joint tenants, but she made the proviso that there has to be a relationship between the joint tenants.
37. However, in her witness statement, Mrs Brennan emphasised at paragraph 6 that "In order for consent to be granted there must be a **single person** identified as the tenant and any other proposed occupant must be 'his family or servants.' By this clause 24 of the Fourth Schedule limitation is made to subletting only to **someone** who has control over and/or responsibility for another in close family connection or by reason of being in his employ." [emphasis added].
38. In relation to this, Ms Haggarty argued that clause 1(xvi) of the lease (combined with clause 1(xvii)) already anticipates that "the Tenant" may consist of more than one person; that "the Tenant" must include sub-tenants; and that therefore as joint-tenants Mr Purcell and Miss Murray necessarily constitute "the Tenant" under the lease and form one "household" or, in the language of the lease, one "family".

### The Tribunal's Decision

39. The application hinges on whether or not the sub-tenants are in a "family" relationship and therefore in one household. Strictly, the test is whether the sub-tenants were in a "family" relationship at the time the representation was made and the consent was granted. The Applicant says that if they were not, it was a misrepresentation by the Respondent to say that her proposed sub-tenants were "a couple," and that:
- (i) the Applicant was induced by that misrepresentation of fact to grant consent, such that the consent is 'vitiated', so that the Respondent is in breach of Paragraph 8; and
  - (ii) the Respondent is therefore also in breach of Paragraph 24 because there is more than one household occupying the flat.
40. The Tribunal was troubled by the manner and persistence of the Applicant's enquiries into the nature of the sub-tenants' relationship. It was stated prior to the tenancy that the sub-tenants were "a lovely couple;" both Mr Naylor and Mrs Brennan had been prepared to take that on face value when granting consent; the sub-tenants signed a letter to confirm that they "are in a relationship"; and they provided two statutory declarations to confirm that they were "co-habiting together outside marriage" - a form of wording proposed by the Applicant's own solicitors.
41. There was no complaint about the behaviour of the sub-tenants. It appears that Mrs Brennan only thought to reconsider the question of the nature of their relationship some seven months later, when she reviewed the papers and realised that, to her surprise, the flat commanded "such a high rent." However, her subsequent enquiries led Mrs Brennan to try and establish the sleeping arrangements of the sub-tenants, enquiries which the Tribunal felt bordered on the distasteful.
42. The Tribunal also questioned whether such 'evidence' should be considered at all. As mentioned to the parties at the hearing, the Tribunal is a 'public authority' within the meaning of the Human Rights Act 1998 and may well be acting unlawfully and in contravention of Article 8 of the European Convention of Human Rights (which enshrines the right to respect for private and family life) if it did so.
43. However, without deciding that point and having considered carefully the evidence given, and having found the facts set out above, the Tribunal determines that the Applicant has adduced insufficient evidence to prove that the sub-tenants are not in a "family" relationship and not in one household. All the evidence points to the contrary: namely, that the sub-tenants are in a "family" relationship - "a couple" in common parlance - and, on the balance of probabilities, they were not only in that "family" relationship at the time that consent was granted, but also continued to be so throughout the tenancy.
44. The Tribunal therefore determines that there was no misrepresentation by the Respondent, that the consent to the sub-letting was validly granted and is subsisting, and that there is no breach of the lease - i.e. no breach of either Paragraph 8 or Paragraph 24.



45. The Tribunal finds it astonishing that the Applicant sought to rely on evidence that the sub-tenants were making use of both of the double bedrooms in the flat. It is common knowledge that many couples have separate beds and bedrooms. It should not be the function of the Applicant or this Tribunal to enquire into tenants' sleeping behaviour.
46. If the Tribunal is wrong about the nature of the sub-tenants' relationship, the Tribunal would say that as there was no evidence at all from Mr Naylor, there was therefore nothing to say that he had been induced to grant consent by the Respondent's representation(s). Furthermore, the Tribunal would say that the Applicant has waived and/or is estopped from relying upon any breach of the lease by reason of its conduct in granting consent to the Respondent for the sub-letting, in the full knowledge that the letting was to be two people, with two different names, coming from two different addresses living together as joint tenants on one single sub-tenancy agreement, confirming oral consent with written consent, banking and keeping the licence fee, and thereafter allowing the position to continue for over seven months before raising the queries which led to the current application.
47. The Tribunal has made no finding about Ms Haggarty's submission that as a matter of the interpretation of the lease, the joint sub-tenants in this case constitute "the Tenant" and necessarily constitute one household within the flat. Such an interpretation of the lease, if correct, would permit numerous joint tenants to occupy any given flat, without breaching the lease, an outcome which the Applicant would clearly wish to avoid.
48. The Tribunal understands that the Applicant wishes to maintain the character of the block, by limiting multiple-occupancy of flats. So far as disruptive behaviour by any occupant of the block is concerned, presumably that would be covered by paragraphs 25 and 26 to the Fourth Schedule of the lease, which cover annoying, illegal or immoral behaviour. However, so far as the numbers of occupants is concerned, the Applicant may wish to consider that the statutory definition of a "house in multiple occupation" specifically excludes "any building which is occupied only by two persons who form two households" (see paragraph 7 to Schedule 14 to the Housing Act 2004).
49. For the future, therefore, the Applicant may wish to seek advice as to the possibility and advisability of changing its policy to allow sub-lettings to two people, regardless of whether they are in a "family" relationship or not, in the light of this development in the law. If a way can be found to avoid distasteful enquires of the nature seen in this case, and the cost of unnecessary Tribunal proceedings, that must be to the benefit of all leaseholders.

#### **Refund of Tribunal fees**

50. Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or part of any fees paid by another party.
51. In the light of its Decision above, the Tribunal does not require the Respondent to reimburse any of the Tribunal fees to the Applicant.

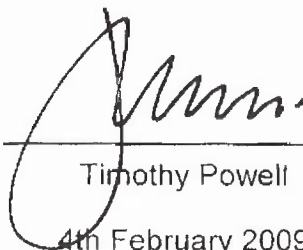
**Application under section 20C**

52. Section 20C of the Landlord and Tenant Act 1985 provides that a Tribunal can make an order preventing the Lessor recovering its costs of proceedings through the service charge, if the Tribunal considers it to be just and equitable.
53. The Respondent applied for an order under section 20C.
54. Again, in the light of its Decision above, the Tribunal considers it just and equitable to make an order under section 20C. Accordingly, the landlord is prevented from charging reasonable costs of the Tribunal proceedings through the service charge.

**Application for costs against the Applicant**

55. Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 provides that a Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings, where he has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
56. Although the Tribunal found that the enquiries made by Mrs Brennan of the sub-tenants and their domestic arrangements were bordering on the distasteful, the Tribunal was not satisfied that the Applicant's conduct in connection with the proceedings themselves was such as to justify an award of costs under paragraph 10.

Chairman:



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Timothy Powell

Date:

4th February 2009