Residential Property
TRIBUNAL SERVICE

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LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DECISION ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Premises:	76 Winchester Court, Vicarage Gate, London W8 4AF
Applicant:	Winchester Court Freehold Limited
Respondents:	Halat Company Limited and Farrow Properties Limited
Application Date:	17th November 2008
Hearing Date:	26th January 2009
Appearances:	Mr S Gallagher, Counsel for the Applicants
Also present:	Ms G Marrs of Alan Edwards & Co (Solicitors for the Applicant) Mrs P Brennan (Company Secretary of the Applicant Company)
	The Respondents were not present and were not represented

Members of Tribunal

Mr P Korn (chairman)
Mrs A Flynn

INTRODUCTION

1. This is an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**") for a determination that a breach of covenant or condition in the relevant lease has occurred.

2. The Applicant company owns the freehold interest in Winchester Court (the "**Building**") of which the Premises form part. The company is owned by the tenants of the Building, each tenant having a share in the company.

3. Halat Company Limited (the "**First Respondent**") is, according to the Applicant, the current registered leasehold proprietor of the Premises, the Premises being held under a lease (the "**Lease**") dated 13th November 1973 and made between Hundleton Homes Limited (1) and Solidrock Properties Limited (2) as extended by a deed dated 25th April 1984. Messrs Prince Evans (Solicitors) wrote to the Applicant on 15th October 2008 informing the Applicant that Farrow Properties Limited (the "**Second Respondent**") had purchased the Lease, but a copy office copy entry dated 13th November 2008 supplied by the Applicant lists the First Respondent as still being the registered proprietor as at that date. The Applicant further states that no application for licence to assign to the Second Respondent has been applied for and no notice of transfer has been given to the Applicant.

4. The Respondents were not present and were not represented at the hearing. Two applications were made on behalf of the Respondents for the hearing to be adjourned and a fresh date set but both applications were refused by a procedural chairman.

THE ALLEGED BREACH

5. The issue which forms the subject matter of this application is not the above-mentioned alleged assignment but instead an alleged subletting which, in the Applicant's view, constituted a breach of the terms of the Lease.

THE APPLICANT'S CASE

6. Mr Gallagher for the Applicant drew the Tribunal's attention to the following tenant's obligations contained in the Fourth Schedule to the Lease:-

   "8(i) not to assign transfer underlet or part with possession of any part of the flat (as distinct from the whole) in any way whatsoever,

   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 any permitted subtenant and his family and servants and in particular not to use the flat or any part thereof for the purposes of any business defined by section 23(2) of the Landlord and Tenant Act 1954 or any statute amending or re-enacting the same."

7. The Applicant's position was that the First Respondent or the Second Respondent had sublet the Premises to a Mr Linlin Diao, Miss Xin Yi Zhou and Mr Jingrun Fan (the "**Subtenants**") on an assured shorthold tenancy for a term commencing on 22nd October 2008 without obtaining the Applicant's consent. Although the Respondents had sought consent, they had failed to supply to the Applicant the following items requested by the Applicant in response to the original application for consent:-

    - a filled out application form
    - a copy of the proposed tenancy agreement
    - bank, landlord and professional references

8. As evidence of the completion of the subletting, Mr Gallagher referred the Tribunal to a copy of a completed Tenancy Agreement relating to the Premises dated 6th October 2008 and made between the Second Respondent and the Subtenants for a term of a year less a day from 22nd October 2008.

9. In addition to the absence of landlord's consent to the subletting and the failure to provide items reasonably requested by the Applicant to enable it properly to consider the application for consent, the Applicant also contended that the subletting was in breach of paragraph 24 of the Fourth Schedule (set out above), in that the Subtenants were not "a tenant and his family and servants or any permitted subtenant and his family and servants" in occupation of the Premises but were three individuals living separately. Alternatively, if they did constitute a "family" the Respondents had failed to provide any evidence of this beyond an assertion (in a letter from their solicitors dated 9th October 2008) that the proposed subtenants were "cousins" and would "therefore be living together as a family unit". It would have been apparent to the Respondents from the Applicant's standard subletting application form that evidence of relationship would be needed.

10. The Applicant had responded promptly to the request for consent to subletting once that request was actually received and gave clear reasons for refusing consent. Furthermore, the request for consent was made by or on behalf of the Second Respondent who was not the registered owner of the Lease (and if the Lease had been assigned to the Second Respondent the Applicant's consent to the assignment had not been sought or given).

APPLICANT'S INTERPRETATION OF RELEVANT PARTS OF LEASE

11. Mr Gallagher took the Tribunal through the relevant parts of paragraph 24 of the Fourth Schedule to the Lease and through what he considered to be the relevant case law and other material which could assist in an interpretation of the meaning of the phrase *"the sole occupation of the tenant and his family and servants or any permitted subtenant and his family and servants"*. He referred in particular to the cases of *Roberts v Howlett (2002) 1 P&CR 19*, *Wrotham Park Settled Estates v Naylor (1991) 1 EGLR 274* and the definition of 'family' in the *Shorter Oxford English Dictionary*.

12. To summarise Mr Gallagher's submissions on this point, the concept of 'family' was considerably narrower than the phrase 'single private dwelling house' used in *Roberts v Howlett*, should only extend beyond married couples and blood relatives sparingly, and in order to qualify a household had to satisfy the test in *Wrotham Park* that there needed to be a recognised head of the family unit to be held to account.

EVIDENCE OF MRS BRENNAN

13. Mrs Brennan – company secretary of the Applicant company – was called as a witness. She referred to her witness statements and explained the streamlined procedure for applications for consent to sublet, the reasons for the formality, the purpose of the various questions on the application form and how the answers were assessed (for example an incomplete or unsatisfactory answer to any one question was not necessarily fatal to the application).

14. Mrs Brennan also went through some of the details of correspondence between the parties and referred to letters from or on behalf of the Respondents being received many days after the date on the relevant letters, as detailed in her witness statements. She reiterated the point that the Applicant had received no credible evidence that the Subtenants were cousins. She also explained that she had a genuine concern – based on experience – about allowing into occupation students (on the basis of their claiming to be cousins) who might be very loud, might bring partners onto the Premises overnight and generally act in a way which was inconsiderate to other residents.

NO INSPECTION

15. The Tribunal members did not inspect the Property. Neither party requested an inspection and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issue in dispute.

THE LAW

16. Section 168(1) of the 2002 Act provides:

> *"A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 ... (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied."*

17. One of the ways in which subsection (2) can be satisfied is if *"it has finally been determined on an application under subsection (4) that the breach has occurred"*.

18. Subsection (4) *(i.e. Section 168(4) of the 2002 Act)* provides:

> *"A landlord under a long lease of a dwelling may make an application to a leasehold tribunal fort a determination that a breach of a covenant or condition in the lease has occurred."*

APPLICATION OF LAW TO FACTS

19. Whilst the bundle of documents contained some small indication as to what the Respondents' case might be, the Respondents' absence from the hearing (and the absence of any legal or other representative) meant that there was limited scope to challenge the Applicant's evidence and version of events. The Tribunal asked certain questions of Mr Gallagher and Mrs Brennan but had very little evidence helpful to the Respondents' case on which to base any seriously probing questions.

20. On the basis of the evidence submitted the Tribunal is of the view that the First Respondent and/or the Second Respondent sublet the Premises to the Subtenants in breach of the provisions of paragraph 8 (almost certainly 8(ii)) of the Fourth Schedule to the Lease.

21. The position in relation to paragraph 24 of the Fourth Schedule to the Lease is slightly more complicated. Whilst it is possible that the Subtenants are cousins, it appears that no evidence was brought to demonstrate this in circumstances where (a) it should have been clear that such evidence was required and (b) it should not have been difficult to supply such evidence. On the balance of probabilities, therefore, the Tribunal is not satisfied that the Subtenants are cousins.

22. Even if the Subtenants **were** cousins, the Tribunal considers on balance that they would not satisfy the 'family' test contained in paragraph 24 aforesaid. As the Tribunal finds that there would be a breach of covenant even if cousins did satisfy the 'family' test, it is not considered necessary or appropriate to

analyse this point in detail, save to remark that *Wrotham Park* and the dictionary definition do lend weight to the proposition that the hallmark of a 'family' is the existence of an accountable head of the family. However, that is not to say that it will necessarily always be fatal for there to be no recognised head of the family; for example the analysis might be different for a group of siblings in that arguably the closer blood ties could offset the absence of a mother or father.

DETERMINATION

23. The Tribunal determines that a breach of covenant in the Lease has occurred.

24. Mr Gallagher applied for an order under paragraph 10 of Schedule 12 to the 2002 Act that the Respondents pay towards the costs incurred by the Applicant in connection with these proceedings on the basis that the Respondents have *"acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings"*.

25. Mr Gallagher's argument on costs appeared to be that the Applicant had prepared for the case on the basis that the Respondents would attend the hearing and be represented and that the Applicant might have spent less time preparing if it had known that the Respondents would not be attending. The Tribunal has its doubts as to whether the Applicant would have spent significantly less time preparing, but in any event the Tribunal is not convinced that the Respondents' failure to attend the hearing was so demonstrably unreasonable (or vexatious etc) as to justify a penalty cost order. Whilst the procedural chairman decided to refuse the Respondents' late request for an adjournment, it does not follow that such request was of a level of unreasonableness that would justify a penalty cost order, and therefore no cost order is made under paragraph 10 of Schedule 12 to the 2002 Act.

CHAIRMAN.....
Mr P Korn

Date: 16th February 2009