UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0325 (LC)
Case No: LRX/120/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – alleged breach of covenant – Commonhold and Leasehold Reform Act 2002 Section 168 – construction of covenant – whether a breach had occurred – whether landlord had become estopped from relying upon the covenant or had waived the right to do so – whether covenant unenforceable as being an unfair contract term

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ROUNDLISTIC LIMITED

Appellant

- and -

NATHAN RUSSELL JONES
AIDEEN MARY SEYMOUR

Respondents

Re: 22 St Ann's Road,
London
SW13 9LJ

Before His Honour Judge Huskinson
On
11 May 2016

Royal Courts of Justice
- -

Henry Webb instructed by Colman Coyle LLP on behalf of the appellant
Mr Nathan Jones (the first named respondent) represented himself and the second named respondent.

The following cases are referred to in this decision:

Aaron William M Burchell v Raj Properties Limited [2013] UKUT 0443 (LC)

Swanston Grange (Luton) Management Limited v Langley-Essen LRX/12/2007

London Borough of Newham v Khatun and Others [2004] EWCA Civ 55

Director General of Fair Trading v First National Bank [2001] UKHL 52, [2002] 1 AC 481

Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace") [1998] AC 878

Mitchell v Watkinson [2014] EWCA Civ 1472

Stena Line v Merchant Navy Rating Pension Fund Trustees [2010] EWHC 1805 (Ch)

HM Revenue & Customs v Benchdollar [2009] EWHC 1310 (Ch)

Schulz v Technische Werke Schussental GmbH und Co KG [2015] 1 CMLR 39

The Republic of India v India Steamship Co Ltd [1997] UKHL 40; [1998] AC 878

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") dated 3 September 2015 which was given upon an application by the appellant as lessor made under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that the respondents as lessees had breached a covenant in the lease upon which they held the lower maisonette at 22 St Ann's Road, London SW13 9LJ ("the lower maisonette").

2. The respondents hold the lower maisonette from the appellant upon the terms of a lease dated 27 June 2012 between the appellant as lessor and Emma Louise Scott as lessee. This lease was granted as an extension which Ms Scott as qualifying tenant was entitled to require pursuant to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. This 2012 lease was expressed to be made in substitution for the existing lease, namely a lease dated 8 September 1978 and to be made upon the same terms and subject to the same covenants etc as contained in the existing lease save as regards the rent and term of years granted and save so far as modified by the 2012 lease.

3. Accordingly the respondents hold the lower maisonette subject to a covenant by them as recorded in paragraph 4 of the first schedule to the 1978 lease being a covenant in the following terms namely:

> "4. Not to use the premises hereby demised or permit the same to be used for any purpose whatsoever other than as a single private dwelling house in the occupation of the Lessee and his family."

This covenant is central to the present case and is hereafter referred to as "paragraph 4".

4. By an assured shorthold tenancy agreement dated 7 April 2015 the respondents let the lower maisonette to Mr R A D Jackson for a period of 12 months and Mr Jackson went into occupation.

5. The 2012 lease did not contain any covenant against subletting, but it did contain the above mentioned covenant regarding the user of the premises.

6. Prior to the granting of this subletting the respondents had been in contact with the appellant (the nature of such contact is described in more detail below) and the terms of paragraph 4 had been referred to. The respondents had expressed the view that paragraph 4 did not prevent them from subletting the lower maisonette. The appellant made clear that it took a different view, that it considered the respondents had been wrongly advised, and it stated that if the subletting proceeded then the appellant would seek an order for possession.

7. This exchange of views having occurred and the granting of the assured shorthold tenancy having been made, despite the views expressed by the appellant, the appellant made the

application under section 168(4) to the F-tT for a determination that there had been a breach of covenant.

8. In summary the F-tT decided:

(1) Paragraph 4 did operate to require that the occupation of the lower maisonette be occupation by the Lessee (i.e. by the respondents themselves) such that they were not entitled to sublet to a third party.

(2) However the appellant was estopped from relying upon paragraph 4 and/or had waived it.

(3) Even if it were to be found that there was no estoppel in relation to paragraph 4, or it had not been waived, paragraph 4 was an "unfair term" within the provisions of the Unfair Terms in Consumer Contract Regulations 1999 and consequently was not binding upon the respondents.

9. The F-tT, upon application by the appellant, granted the appellant permission to appeal. By order of the Deputy President of the Upper Tribunal (Lands Chamber) dated 15 February 2016 it was directed that the appeal was to be determined by the Tribunal as a review of the decision of the F-tT. No application was made by the respondents for permission to appeal against that part of the F-tT's decision which was adverse to them, namely the finding that the effect of paragraph 4 was to make it a breach of covenant by the respondents if they sublet the lower maisonette to a third party (which they did) rather than using it for their own occupation.

10. At the hearing before me the appellant was represented by Mr Henry Webb of counsel who provided a skeleton argument which he developed further by way of oral submissions. The respondents were represented by the first respondent in person namely Mr Jones. He did not provide a skeleton argument as such but he had provided a detailed statement of case to the Tribunal and he further developed in oral submissions to me the various points raised in that document. I was grateful to both parties for the helpful way in which they explained their respective cases.

The Facts

11. The property of which the lower maisonette forms part is a building known as 22-22A St Ann's Road, London SW13 and comprises two maisonettes known as 22 and 22A.

12. By a lease dated 8 September 1978 Invincible Properties Limited as lessor demised to Michael Benjamin Yahuda as lessee the lower maisonette for a term of 125 years at the rents and upon the terms and conditions therein contained. The first recital to the lease made clear the nature of the building and how it contained the two maisonettes. The second recital was in the following terms:

> "(2) The Lessor has previously granted a lease of or intends hereafter to grant a lease similar in length and term to this lease of the premises in the Mansion other than the

premises hereby demised and has in such lease imposed or intends in such lease to impose the restrictions set forth in the First Schedule hereto and covenants and stipulations similar to those contained in Clauses 2 3 4 and 5 hereof to the intent that the Lessee for the time being of any parts of the Mansion may be able to enforce the observance of the said covenants and stipulations by the lessee of the reminder thereof."

13. Clause 2 of the lease provided as follows:

> "2. The Lessee hereby covenants with the Lessor and with and for the benefit of the owner and lessee from time to time during the currency of the term hereby granted of the upper maisonette that the Lessee and persons deriving title under him will at all times hereafter duly perform and observe all and singular the restrictive and other covenants and stipulations mentioned in the First Schedule hereto."

Accordingly the lessee thereby gave the covenant in paragraph 4 of the First Schedule being the covenant referred to in paragraph 3 above.

14. By clause 6(b) the lessor covenanted with the lessee as follows:

> "6(b) that the Lessor will require the persons to whom it shall hereafter transfer or grant a lease of the other premises comprised in the Mansion to covenant to observe the restrictions set forth in the First Schedule hereto and to enter into covenants and stipulations similar to those contained in Clauses 3 4 and 5 hereof and until the Lessor so transfers or grants such a lease as aforesaid the Lessor will nevertheless contribute the requisite amounts over and over those contributed by the Lessee hereunder towards the costs and expenses involved under Clause [4] hereof."

15. The second schedule made provision for the rights and privileges granted to the lessee and these included in paragraph 5 "the benefit of the restrictions contained in the lease of the remainder of the Mansion granted or to be granted."

16. It appears clear that by 26 August 1980 no long lease had yet been granted of the upper maisonette. By a deed dated 26 August 1980 between the same parties as the parties to the 1978 lease it was recited that the deed was supplemental to the lease and that the parties were desirous of adding to the terms of the lease in the manner there appearing. Clause 1 of the deed provided as follows:

> "The Lessor covenants with the Lessee and his successors in title (a) that any future lease of the Upper Maisonette granted for a term certain exceeding twenty one years will be in similar form as the Lease and contain inter alia covenants on the part of the Lessee to perform and observe covenants and stipulations similar to those contained in Clauses 2, 3 4 & 5 of the Lease and (b) that until the Upper Maisonette is let on a lease as aforesaid the Lessor will repair maintain uphold and keep the Upper Maisonette so as to afford all necessary support shelter protection and access to the Lower Maisonette and that (if so required by the Lessee) the Lessor will so far as is possible enforce against the occupier of the Upper Maisonette the restrictions and stipulations similar to those contained in the First Schedule to the Lease entered into by the occupier of the Upper [sic] Maisonette on

the Lessee indemnifying the Lessor against all costs and expenses in respect of such enforcement (including in the case of any litigious proceedings the costs and expenses incurred as between a Solicitor and his client) and first providing such security in respect of costs and expenses as the Lessor may reasonably require".

17. There appears to be little or no evidence as to what was the state of occupation of the upper maisonette from August 1980 until the grant of the extension lease in June 2012. However the F-tT proceeded on a basis, which was not suggested by either party to be inaccurate (and which I adopt) that no long lease was granted of the upper maisonette at any stage and that the occupation of the upper maisonette was either by way of an officer of the lessor for the time being occupying for his/her own benefit or by the lessor granting tenancies including assured shorthold tenancies to occupational tenants.

18. In due course in 2012 the then lessee, namely Ms Scott, served the relevant notice under section 42 of the 1993 Act requiring the grant of a lease extension. The appellant was by this date the owner of the freehold of the building and accepted that Ms Scott was entitled to the grant of an extension. In the result the new lease was granted on 27 June 2012 for a term from 8 September 1978 expiring on 8 September 2188 (in lieu of the term set out in the existing 1978 lease) and at a rent of a peppercorn. The new lease did not make reference to the 1980 deed. The new lease was expressed to be made upon the same terms and subject to the same covenants conditions and stipulations in all respects as those contained in the existing lease save as to the rent and the term of years granted and save as modified therein. The new lease stated that it was to take effect as if such terms covenants etc were repeated in the new lease in full but with such modifications as were made in the new lease. The new lease in clause 6 provided:

> "No long lease created immediately or derivatively by way of sub-demise under the term hereby granted shall confer on the sub-tenant as against the Landlord any right under Chapter II of Part 1 of the Act to acquire a new lease."

19. The new lease was registered at the Land Registry. In due course the respondents took an assignment of the new lease and became the registered proprietors thereof. It may be noted that the official copy of the register of title of the new lease included in paragraph 3 of Part A: Property Register the following text:

> "(20.07.2012) The Lease prohibits or restricts alienation."

20. The respondents became registered with title to the lease on 2 October 2013. They purchased from Ms Scott. During their negotiations for the purchase the following matters occurred:

(1) The respondents, by their solicitors, made inquiries of the vendor (Ms Scott) upon various topics. The respondents were informed that the first floor flat (i.e. the upper maisonette) was freehold and was let shorthold. The vendor was asked whether any of the occupiers of the lower maisonette were tenants or lodgers, with a supplementary request, if the answer was yes, to give details and supply a copy

of any tenancy agreement. The answer given was "no". The name of the occupier was given as Mr Gregory Allder and he was stated to be a "friend".

(2) The respondents, through their solicitors, asked questions of the appellant which included at paragraph 5.2 a question as to whether all of the flats were let on leases similar to that specified. The answer given was that the first floor flat was freehold and was let on a shorthold tenancy. A further question asked of the appellant was for confirmation whether or not there had been any variation of the leases (either formal or informal). The only answer given was that there had been granted a licence to carry out works.

21. The circumstances in which the respondents bought the lease of the lower maisonette were in evidence before the F-tT and were recorded by the F-tT in paragraph 19 of its decision as follows:

> "The respondents are a former British Army Officer and a teacher, respectively. For a number of years they lived abroad but, about 5 years ago, they moved to the Barnes area of south west London. They began renting close to the subject premises, with the intention of putting down some roots after an extremely transient period of deployments abroad. In mid-2013 they began negotiations to purchase the Premises from the then owners, Emma Scott and Mark Fooks. Copies of the original and extended leases were provided to the respondents and, by leasehold information form dated 13 April 2013, the sellers confirmed that they had not complained or had cause to complain to or about the landlord, the management company or any neighbour. The sellers confirmed that they did not live in the premises themselves, but that it was occupied by a Mr Gregory Allder, who was described as a "friend" on the form, and expressly not a tenant or lodger".

The sale went through on 30 August 2013 and the change of proprietor was registered at HM Land Registry on 2 October 2013. As Mr Jones' grandparents and several generations before them had been residents and local business owners within the Barnes area, the respondents felt confident that they would continue to be long-term residents of the local area themselves and full participants in that community.

22. The respondents moved into the lower maisonette and occupied it as their residence. Mr Jones took up employment at a major global and European bank. In February 2015 his employer posted him to Milan for a two year temporary assignment beginning around 1 April 2015.

23. As soon as the respondents learned of their posting to Italy they tried to contact the appellant to confirm the appellant's attitude regarding subletting the lower maisonette. The respondents found it difficult to obtain a response by numerous telephone calls. When Mr Jones eventually got through to the appellant's managing agents he was informed aggressively that he would "lose my flat" if permission to sublet was not granted and that this would only be given on the basis of a "substantial cash payment" as there was an alleged "absolute prohibition" in the lease. The F-tT recorded what happened next in paragraphs 27 and 28 of its decision in the following terms:

> "27. The respondents offered the applicant lessor a premium for a lease variation, which the applicant refused. After "several flat refusals" the respondents then made a final offer of £15,000 to vary the lease "which was refused out of hand with no justification given." Mr Jones made somewhere in the region of 67 telephone calls to the managing agents, leaving numerous messages, none of which were returned. Then, with only a few weeks to go before their departure, the managing agents told the respondents that the applicant would accept "something around double this amount for a temporary permission to sublet during the time I was overseas."
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> "28. The respondents' evidence on these verbal negotiations was contained in the written statement signed by Mr Jones in the respondents' bundle and in Mr Jones' oral evidence to the tribunal. Although Ms Dixon on behalf of the applicant sought to deny that the applicant had made a demand for £30,000 for temporary consent to sub-let, the matter was not addressed by the applicant in the Reply to the respondents' statement and the applicant's director, Mr Barry Marsh, did not attend the hearing to be asked about this, despite having filed a witness statement in support of the application. The tribunal therefore accepts Mr Jones' evidence as to these negotiations."

24. By a letter dated March 2015 the respondents wrote to the appellant formally notifying the appellant of their intention to sublet the lower maisonette after 1 April 2015. The letter stated that upon advice the respondents had established there were no clauses in the current lease which preclude subletting of the property and that the wording of paragraph 4 contains the same wording as in an earlier Tribunal case LON/00AM/LBC/20070025. The respondents also drew attention to the longstanding common law right to sublet the demised premises or part thereof.

25. The appellant's managing agents replied by email on 20 March 2015 stating:

> "The freeholder has advised that should you proceed with letting the property they would go for an order of possession and will notify your mortgage providers of the same."

The appellant's managing agents sent a further email dated 31 March 2015 noting that the lower maisonette was being marketed for rent and stating that the appellant had had the opportunity of legal advice following the respondents' correspondence. The letter stated:

> "We cannot stress enough that we feel you have been misadvised with regards to the caselaw on the clause in your lease. We would strongly advise that you consult with your solicitors before embarking on any letting of the property other than as described under the terms of your lease."

26. On 2 April 2015 the respondents replied stating they had taken legal advice; that there was no clause in the current lease specifically precluding subletting; that at common law a tenant has a right to sublet; and that there was an explicit precedent of the tribunal finding in favour of the lessee in a case where the lessee was subject to a covenant similar to paragraph 4. The respondents stated that based upon these considerations they had decided to sublet the property as was their right without any specific consent from the appellant and without any variation of the lease.

27. On 7 April 2015 the respondents granted an assured shorthold tenancy to Mr Robert Jackson for 12 months at a rent of £2,200 per month.

28. By a letter dated 8 April 2015 (which arrived on the day following the subletting) the appellant wrote further drawing attention to the decision of the Upper Tribunal in *Aaron William M Burchell v Raj Properties Limited* [2013] UKUT 0443 (LC) which came to the opposite conclusion upon the effect of paragraph 4 as compared with the decision of the F-tT upon which the respondents were relying.

29. The position accordingly had been reached where the appellant was contending that paragraph 4 prohibited the respondents from subletting the lower maisonette to a third party who would occupy it, whereas the respondents were contending that they were entitled, consistently with the terms of their lease, to grant such a subletting. The respondents had, despite the appellant's opposition, granted such a subletting. In consequence the appellant made an application to the F-tT for a determination under section 168(4) that the respondents had breached the terms of their lease.

The F-tT decision

30. Before the F-tT the respondents continued to argue that the proper construction of paragraph 4 did not prevent the granting by them of a subletting to a third party. The appellant argued the contrary and relied upon the decision of the Deputy President (Martin Rodger QC) in *Burchell v Raj Properties*. The F-tT considered this point and concluded that, consistently with the decision in *Burchell v Raj Properties*, paragraph 4 did restrict occupation of the lower maisonette to the Lessee (i.e. the respondents) together with members of their family, if any, and that therefore paragraph 4 did act as a prohibition upon a subletting of the lower maisonette to any other persons for occupation by them.

31. As regards the question of whether there had been a waiver or an estoppel in respect of paragraph 4, the F-tT considered this in paragraphs 61 and following of its decision. In paragraph 64 it summarised the respondents' argument upon this point as follows:

> "64. In short, the respondents argued that the lessor had abandoned all pretence at setting up a scheme of occupation for the building by owner occupiers of the two maisonettes, was content to rent out the upper maisonette to short-term rental tenants, had no intention of complying with its own obligations and, for all of these reasons, had waived the restrictions in Paragraph 4 of the lease of the lower maisonette."

32. The F-tT considered the decision of the Lands Tribunal (in *Swanston Grange (Luton) Management Limited v Langley-Essen* LRX/12/2007) and concluded, consistently with that decision, that it had jurisdiction upon an application under section 168 to consider whether the relevant covenant in a lease, which a landlord alleged had been breached, had been waived or whether the landlord had become estopped from relying upon such a covenant against the tenant – because if the covenant had been waived or the landlord was estopped from relying upon it then it

would be wrong to conclude that a tenant who performs acts (being acts which strictly would be breach of the suspended covenant) has breached the covenant.

33. The F-tT's analysis of the argument regarding estoppel and waiver is contained in paragraphs 70-78 of its decision:

> "70. Essentially, this is an argument that the applicant's conduct has given rise to a common understanding, or assumption, between the parties that sub-letting would be allowed; in other words that an equitable estoppel has arisen, in the nature of an estoppel by convention.
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> 71. A useful statement, of the doctrine of estoppel by convention was made by Lord Steyn in the case of *The Republic of India v India Steamship Co Ltd* [1997] UKHL 40; [1998] AC 878 at 913-914;
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> > "… It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … It is not enough that each of the two parties act on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."
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> 72. The doctrine may therefore apply where a party against whom the estoppel by convention has been raised (here, the lessor company) made no representation or promise, as such, but rather has allowed a state of affairs to arise by its conduct. In the present case, the assumption made by the respondents was that the original intention to create a scheme of owner-occupation within the Mansion has been long-abandoned and that sub-letting of either maisonette to third parties is no longer prohibited. Another way of putting it is that for so long as the lessor does not comply itself with (the equivalent of) paragraph 4, a convention has arisen that it does not (and will not) seek to enforce paragraph 4 against the respondent leaseholders of the lower maisonette.
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> 73. The lessor's conduct giving rise to this state of affairs includes: its failure to grant a long lease of the upper maisonette for a period of nearly 40 years; the prolonged letting of the upper maisonette to short-term rental tenants; and the flagrant disregard of the rights of the leaseholders of the lower maisonette to benefit from the original intention that both parties of the building would and should be occupied by owner-occupiers. In particular, the second schedule of the lease grants rights and privileges to the lessee of the lower maisonette. Paragraph 5 is "the benefit of the restrictions contained in the Lease of the remainder of the Mansion granted or to be granted" so that, for so long as the freeholder lets out the upper maisonette on short-term tenancies, it is acting in derogation of grant from the lease of the lower maisonette.
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> 74. In the tribunal's view, it would be manifestly unjust to allow the lessor to resile from course of conduct and the common assumption that either maisonette may be occupied by third parties, and the lessor ought to be precluded from doing so. The respondents have suffered detriment by relying on this assumption and sub-letting their flat, only to find

themselves affected by the current application and the threat of forfeiture; and it would be unjust for the lessor to be allowed now to insist on compliance with a restriction, paragraph 4, that it clearly had no intention of complying with itself.

75. Alternatively, it may be said that, by its conduct in not complying with paragraph 4 of its equivalent, the lessor has waived the covenant and cannot now resile from that position and insist that the respondents comply with it themselves.

76. Insofar as the lessor sought to claim in correspondence in March and April 2015 that sub-letting of the lower maisonette was prohibited, such an assertion is ineffective to over-ride the clear, contrary state of affairs that has arisen from the lessor's own course of conduct over the past nearly 40 years.

77. This is not to say that paragraph 4 has been wholly abandoned by the lessor; simply that the lessor is currently estopped from relying upon it. This state of affairs will continue until such time as the original intention of the parties is fulfilled, that is to say, a long lease of the upper maisonette is granted and there is occupation of the upper maisonette by the owner-occupier and members of his family. At that point, the lessor would be in a position to give reasonable notice to the lessee of the lower maisonette that the previous waiver of paragraph 4 is to come to an end, so that the originally-intended scheme of owner-occupation of the two maisonettes may, finally, be enforced.

78. Until that time, the lessor is estopped from relying upon paragraph 4 in respect of the lower maisonette, so that the lessor is held to have waived the covenant for the time being."

34. In the result the F-tT determined that the appellant was estopped from relying upon paragraph 4 and/or had waived paragraph 4 – see paragraph 66 of the decision.

35. The F-tT also considered an argument raised by the respondents to the effect that paragraph 4 could not be relied upon by the appellant because it was an "unfair term" within the Unfair Terms Consumer Contract Regulations 1999 (SI 1999/2083) ("UTCCR"). The F-tT considered this argument in case it was wrong upon its conclusion regarding estoppel and waiver.

36. The F-tT in paragraphs 80-82 set out certain provisions of the UTCCR which it considered relevant and I set these out below:

"80. An "unfair term" is defined by regulation 5 of the UTCCR:

"5-(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the terms.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of the contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller of supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair."

81. The assessment of unfairness is refined by regulation 6:

"6 –(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate –

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

82. Regulation 8 of the UTCCR provides for the effect of an "unfair term" as follows:

"8. – (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term."

37. The F-tT decided (paragraph 83) that even if it were to be found that there was no estoppel in relation to paragraph 4, or it had not been waived, then paragraph 4 was an "unfair term" and is consequently not binding on the respondents. The reasons for the F-tT's decision upon this point were as follows.

38. The F-tT observed that, having regard to the Court of Appeal decision in the *London Borough of Newham v Khatun and Others* [2004] EWCA Civ 55 the UTCCR can apply to contracts relating to land including tenancies and long leases.

39. The F-tT recognised that the UTCCR, being regulations made in 1999, did not and could not apply to the original 1978 Lease. The F-tT found however that the UTCCR did apply to the new lease granted in 2012, which was effected by way of a surrender of the 1978 lease and a regrant of a new extended lease on largely similar terms.

40. The F-tT concluded that, for the purposes of the UTCCR, the appellant was a supplier and the individual lessee (the original lessee being Ms Scott) was a consumer.

41. The F-tT concluded that paragraph 4 was not a provision which had been individually negotiated and that in any event it was caught by regulations 5(2) and (3) because it was drafted in advance as a pre-formulated standard contract and proferred by the lessor i.e. the appellant. The F-tT observed that there was no opportunity for the lessee to negotiate individual terms in 2012 because the statutory scheme under the 1999 Act provides (in sections 56 and 57) that the new lease to be granted to a tenant shall be on the same terms as the existing lease, save as to term and rent, with individual clauses only being excluded or modified in so far as it is necessary to do so to remedy a defect in the existing lease, or if it would be unreasonable to include a particular term without modification.

42. The F-tT noted that the respondents relied upon the "Guidance on Unfair Terms in Tenancy Agreements" published in September 2005 by the Office of Fair Trading (OFT 356), and in particular paragraphs 4.2 and 4.3 thereof and paragraphs 4.2-4.28 thereof regarding unreasonableness in excluding a tenant's right to assign or sublet, and paragraph 4.55 which proposed that such unfairness could be avoided by providing that prohibited conduct was allowed only "with the landlord's consent, which will not be unreasonably withheld or delayed."

43. The F-tT concluded that this guidance, upon the facts of the present case, did not assist because the F-tT found that a restriction on subletting in the terms of paragraph 4 was not intrinsically unfair – provided it applies equally to all flats in a building. The F-tT considered that such a provision (in effect preventing occupation save occupation as a single private dwelling house in the occupation of the lessee and his family) may be advantageous and beneficial in circumstances where all flat owners in a building are able to insist upon only lessees and members of their family being in occupation.

44. However the F-tT found it of central relevance that in the present case the circumstances were not such that all the flat owners in the building were able to insist that only lessees and members of their family were in occupation of each flat – this was because there was no such obligation in respect of the upper maisonette and the appellant had been letting the upper maisonette on shorthold tenancies to third persons.

45. In paragraph 89 of its decision the F-tT referred to *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 481 where Lord Bingham of Cornhill referred to the regulations in the following terms:

> "'17. … The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty … The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given on

terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations … It looks to good standards of commercial morality and practice…"

46. In paragraphs 93-97 of its decision the F-tT gave its conclusions upon the question of whether paragraph 4 was an unfair term as follows:

> "93. The unfairness of the term is to be assessed at the time of conclusion of the contract, that is to say, in the present case, at the time of the 2012 grant of an extended lease. At that stage, nearly 35 years had gone by since the lessor expressed its intention to grant a lease of the upper maisonette, and the lessor had taken no steps to set up the scheme of owner-occupation intended by the original parties, as evidenced by the drafting of the lease of the lower maisonette. Furthermore, the upper maisonette had been used for the short-term rental tenants during some or all of this period, including immediately before the respondents became successors in title to the lessee named in the 2012 lease extension.
>
> 94. The lease therefore contained a provision in paragraph 4, which imposed more onerous terms on the lessee (as consumer) than applied to the lessor (as supplier). In the tribunal's view, the imbalance went so far as a derogation of grant by the lessor from paragraph 5 of the Second Schedule of the lease, by which the lessee was granted "the benefit of the restrictions contained in the Lease of the remainder of the Mansion granted or to be granted." Furthermore, there was no reciprocal mechanism for the lessee of the lower maisonette to enforce paragraph 4 or its equivalent against the lessor directly, for so long as there was no long lease of the upper maisonette. The most that the lessor covenanted to do was to enforce the like restrictions against the "occupier" of the upper maisonette, which was a right devoid of any practical meaning for so long as the upper maisonette remained part of the freehold, owned by a limited company, and was let out to short-term rental tenants.
>
> 95. The conclusion is that paragraph 4 causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer (the lessee). This is contrary to the requirement of good faith, because the lessor: had failed for nearly 35 years (now nearly 40 years) to complete its side of the bargain to set up the scheme of owner-occupation in the building; had derogated from the grant of the lease of the lower maisonette; and had flagrantly disregarded its own need to comply with paragraph 4 or its equivalent, for the better use and management of the building, as a whole, and for the benefit of the lessees of the lower maisonette, in particular.
>
> 96. By refusing to comply with paragraph 4 itself, but insisting that the lessee of the lower maisonette do so, the lessor was not merely seeking "to have its cake and eat it", but was seeking to perpetuate, in bad faith, an unequal and unfair arrangement.
>
> 97. The tribunal therefore concludes that, in the circumstances of this case, paragraph 4 is an "unfair term" within the meaning of the UTCCR and, therefore, by regulation 8, it is not binding on the consumer (the lessee). As such, even had there been no estoppel or

waiver, there can be no breach of paragraph 4 by the respondents having sub-let their flat to a third party."

Appellant's submissions

47. Mr Webb drew attention to the fact that the F-tT had found that the estoppel which was present in this case was an estoppel by convention. He referred to the principles in Snell's Equity 33rd Edition at paragraphs 12-011 and following upon this topic. In paragraph 12-011 Snell refers to what the editors describe as a "useful statement of the doctrine" as made by Lord Steyn in *Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace")* [1998] AC 878 at 913-914:

> "[A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption." It is not enough that each of the two parties acts on an assumption not communicated to the other. But … a concluded agreement is not a requirement."

Mr Webb referred to paragraph 12-014 of Snell where it is stated that it is not sufficient to show only that the parties have a common understanding:

> "B must also establish that there was an agreement or convention by which the parties regulated their dealings. It must be established that the shared mistake or assumption "crossed the line." B must show that he or she communicated the mistaken assumption or understanding to A and that A either shared the mistake or acquiesced in it. The communication may be by words or conduct although it seems that it is not necessary to establish a clear and unequivocal representation of the kind which would give rise to an estoppel by representation."

48. Mr Webb also drew attention to the Court of Appeal decision in *Mitchell v Watkinson* [2014] EWCA Civ 1472 where the court cites with approval the formulation made by Briggs J (as he then was) in *Stena Line v Merchant Navy Rating Pension Fund Trustees* [2010] EWHC 1805 (Ch) where the learned Judge recorded that counsel in that case were content to accept, subject to one small adjustment, the summary of the relevant principles in paragraph 52 of the Judge's own judgment in *HM Revenue & Customs v Benchdollar* [2009] EWHC 1310 (Ch) namely as follows:

> "… the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, to be derived from *Keen v Holland*, and the cases which comment upon it, are as follows:
>
> (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of

responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual position)."

Mr Spink's suggested adjustment was to part (i) of that summary, where I suggested that the common assumption must be "expressly shared between them." Mr Spink submitted that the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred, relying on note 2 at page 180 of *Spencer Bower (op. cit) and [1985] 2 Lloyd's Rep 128* at 34-5. I accept that submission.

49. In the light of these authorities Mr Webb submitted that no estoppel by convention could have arisen in the present case.

50. Starting with the most recent transaction involving the respondents and the appellant, namely the communications between them leading to the respondents granting the assured shorthold tenancy in April 2015, it was entirely clear upon the face of the communications and correspondence between the appellant and the respondents that there did not exist some common assumption between them to the effect that paragraph 4 was no longer operable or enforceable against the respondents. On the contrary the understanding of the appellant, forcefully expressed to the respondents, was that paragraph 4 was a term of the new lease which bound the respondents and which prevented the proposed subletting and which the appellant would seek to enforce if the respondents granted the proposed subletting.

51. Accordingly the dealings between the appellant and the respondents in the Spring of 2015 did not give rise to any estoppel by convention.

52. The question therefore arises as to at what earlier point in time, if any, could the claimed estoppel by convention have arisen.

53. The next possibly relevant occasion was the occasion when the respondents chose to take an assignment of the new lease from Miss Scott. However the respondents' position in the present case has never been put upon the basis that they had purchased the lease on some clear understanding (created or encouraged by the appellant) that paragraph 4 was no longer relied upon by the appellant. Instead the position of the respondents is as recorded in paragraph 67 of the

bundle (Mr Jones' email to the appellant's agents) asserting that the respondents had been advised of certain matters and that upon the proper construction of the lease there was no relevant provision prohibiting the proposed subletting. The respondents have never asserted that they were led to believe by the appellant, upon the occasion of their purchase of the lease, that the appellant no longer insisted upon paragraph 4. Mr Webb further drew attention to the fact that the respondents had made no disclosure regarding the report upon title when they purchased the property nor of whether they paid a lesser price for the lease because it was not available to the buy-to-let market. Mr Webb also drew attention to paragraph 23 of the F-tT's decision where the F-tT records Mr Jones's evidence that he had read the whole of the original 1978 lease before purchase including paragraph 4. There was no evidence that the respondents' solicitors had raised with the appellant prior to purchasing the lease the question of paragraph 4 or that the respondents had received any assurance that paragraph 4 would not be relied upon.

54. On the basis therefore that there had occurred no transaction as between the appellant and the respondents such as to give rise to the claimed estoppel by convention, the next question was whether some estoppel by convention had arisen between the appellant and the respondents' predecessor, Miss Scott, being an estoppel on which the respondents were entitled to rely.

55. Mr Webb submitted that the way to test this question was to examine the history of the lease from the grant of the original lease in 1978 to the grant of the new lease in 2012. The following points were of relevance:

(1) The 1978 lease expressed an intention in the lessor that there would be granted in respect of the upper maisonette a long lease in similar terms to the 1978 lease relating to the lower maisonette. But there was no contractual obligation upon the lessor to grant such a lease of the upper maisonette.

(2) The absence of any such obligation was made even clearer by the 1980 deed entered into two years after the lease and apparently in circumstances where no long lease as originally contemplated had yet been granted of the upper maisonette. This deed expressly recognises that circumstances may continue whereunder there will not be the grant of a long lease (of more than 21 years) of the upper maisonette in terms similar to the 1978 lease of the lower maisonette. Instead express provisions are made which are to apply for so long as there is no such long lease granted of the upper maisonette. Mr Webb pointed out that the parties in 1980 did not think it appropriate to make provision for relieving the lessee of the obligation to comply with paragraph 4 for so long as there was no similar long lease of the upper maisonette.

(3) There is no evidence of any relevant dealings as between the lessor and the lessee between 1980 and the grant of the new lease in 2012 from which could be found the existence of some estoppel by convention regarding paragraph 4. The evidence is simply that matters continued from 1980 to 2012 with there being no grant of a long lease of the upper maisonette and with the lessor granting certain tenancies of the upper maisonette. Accordingly immediately before the grant of the new lease in 2012 the appellant as lessor was entitled to enforce paragraph 4 of the 1978 lease.

(4) The grant of the new lease in 2012 did not change the foregoing position. The new lease was granted in circumstances where the parties must have been aware of the 1980 deed (even though no express mention of it is made in the new lease). Quite apart from the foregoing, the new lease granted in 2012 is expressly made upon the terms and conditions of the 1978 lease including paragraph 4. Accordingly the 2012 lease was a repetition by the lessee of the covenant which the lessee had hitherto been subject to in paragraph 4.

56. Accordingly nothing occurred between the lessor and the lessee prior to the respondents' purchase of the new lease of the lower maisonette which could give rise to some estoppel by convention preventing reliance upon paragraph 4.

57. Mr Webb submitted that the F-tT's analysis appears to proceed on the basis that under the original documents the lessor was prohibited from letting the upper maisonette save on a long lease on similar terms to that relating to the lower maisonette; that the lessor had failed to grant any such lease; that that factor alone gives rise to a convention that paragraph 4 is no longer insisted upon; and that the respondents have relied upon this convention. Mr Webb submitted that the F-tT's analysis was mistaken. There was no justification for the F-tT's conclusion that the appellant was in some way in breach of covenant or had committed some "flagrant disregard of the rights of the leaseholders of the lower maisonette to benefit from the original intention that both parts of the building would and should be occupied by owner-occupiers." Even apart from the 1980 deed there was no breach of covenant by the lessor. The 1980 deed further confirmed that position.

58. Separately from the foregoing, Mr Webb submitted that even if his primary argument was wrong and that the appellant (and perhaps also its predecessor) had been in breach of covenant in failing to grant a long lease of the upper maisonette upon similar terms (so that the owner of the lower maisonette could enforce an owner-occupier covenant regarding the upper maisonette) such a failure by the appellant would not have the effect of releasing the lessee of the lower maisonette from complying with paragraph 4. Instead it would provide the lessee of the lower maisonette with a possible cause of action against the appellant.

59. In summary, the F-tT was wrong in concluding in paragraph 72:

> "In the present case, the assumption made by the respondents was that the original intention to create a scheme of owner-occupation within the Mansion has been long-abandoned and that the subletting of either maisonette to third parties is no longer prohibited."

There was no basis identified by the F-tT to justify such a finding. Also such a finding was contrary to rather than consistent with the evidence.

60. As regards the F-tT's alternative conclusion that there had been a waiver of paragraph 4, Mr Webb pointed out that such a waiver would in effect have to be akin, if not identical to, some form of estoppel by convention. The F-tT was not concerned with some waiver of a prior breach of covenant (such as by accepting rent with knowledge of a breach). Instead what was being

considered here is whether the appellant had so conducted itself in relation to paragraph 4 (with some relevant reliance by the respondents upon such conduct) that it would be unconscionable for the appellant to rely upon paragraph 4 without at least first giving reasonable notice to the respondents that paragraph 4 would henceforth be relied upon. Mr Webb submitted that the arguments which showed that there was no estoppel by convention also were arguments which showed that there could be no such waiver in the present case.

61. As regards the F-tT's findings regarding paragraph 4 being an unfair contract term, Mr Webb advanced the following arguments.

62. He accepted that the Unfair Terms in Consumer Contracts Regulations 1999 remained the relevant regulations to consider, despite the passing of the Consumer Rights Act 2015, having regard to the provisions of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 regulation 6.

63. In summary upon this point Mr Webb submitted:

(1) The F-tT was wrong to conclude that the UTCCR could apply to the grant of the new lease in 2012; alternatively,

(2) That the F-tT ought to have concluded that paragraph 4 was fair, since it was not imposed upon the lessee but was included in the new lease in good faith pursuant to the appellant's obligations under the 1993 Act to grant a new lease.

64. Mr Webb accepted that the UTCCR could apply to terms in leases see *London Borough of Newham v Khatun and Others* [2004] EWCA Civ 55.

65. However the UTCCR could not apply to the 2012 lease for the following reasons which arise from the fact that the 2012 lease was a lease which the appellant was compelled to grant by virtue of the provisions of the 1993 Act and was a new lease granted in substitution for the original lease which itself was granted in 1978 and therefore long before the relevant UTCCR and which therefore was a lease to which the UTCCR did not apply:

(1) In these circumstances no relevant "contract" can be found between the appellant and the respondent for the purposes of regulation 4 of the UTCCR. It is wrong to describe as a contract, for the purposes of the UTCCR, a circumstance where an obligation has arisen through the service of a notice requiring the grant of a new lease under the 1993 Act. Accordingly no relevant contract was concluded between the appellant and the respondents and therefore the UTCCR can have no application.

(2) Separately, it is wrong in the circumstances of the present case to describe the appellant as a "supplier" having regard to the compulsory nature of the transaction. Once again regulation 4 of the UTCCR is therefore not engaged.

(3) In any event the UTCCR do not apply because the contractual terms (if any such contractual terms existed) between the appellant and the respondents reflected

mandatory statutory provisions (i.e. mandatory provisions arising under the 1993 Act regarding the obligation to grant new lease). The provisions of regulation 4(2)(a) of the UTCCR therefore prevented the regulations applying. This regulation 4(2)(a) provides as follows:

"These Regulations do not apply to contractual terms which reflect –

(a) mandatory statutory or regulatory provision …".

(4) Upon this point Mr Webb referred to *Schulz v Technische Werke Schussental GmbH und Co KG* [2015] 1 CMLR 39 in the European Court of Justice where consideration was given to Directive 93/13 in the context of relationships between energy suppliers and their customers. All parties agreed that Directive 93/13 did not apply to the relationship. Mr Webb submitted that this was a useful example of a contract to which the UTCCR did not apply and that the Advocate General's opinion to the court analysed the differences between contracts freely entered into and the energy relationships being considered in that case. The court concluded that the content of the contracts at issue was determined by German legislative provisions which are mandatory such that the Directive did not apply. Mr Webb drew attention to paragraph AG 34 in which the Advocate General referred to the contracts being governed by national legislation such that they "do not fall within the sphere of freedom of contract." In the present case the appellant was statutorily required to grant the new lease. Also the statute made provisions in sections 56 and 57 as to what the terms of the new lease should be.

66. Separately from the foregoing if (contrary to his primary argument) the UTCCR do apply, Mr Webb submitted that the term in paragraph 4 was a fair term. The F-tT had correctly held that there was nothing intrinsically unfair in such a term – but the F-tT placed the limitation that this was only so where it applied to all of the flats in a building. However bearing in mind that the appellant (and indeed the original lessor) is a limited company the appellant would have never have been able to observe an owner-occupation requirement. Accordingly the continuation of paragraph 4 did not cause "a significant imbalance in the party's rights and obligations arising under the contract" – there could never have been such a balance if a limited company remained the owner of the upper maisonette. For the appellant to be bound by clause 4 would effectively mean the appellant could not occupy or use the property at all.

67. Also the F-tT failed in considering the fairness of the provision to consider the circumstances in which the new lease was granted, namely as a mandatory requirement of the provisions of the 1993 Act. Also both sides regarding the grant of the new lease were represented by solicitors; there existed a statutory mechanism enabling either party to seek to amend the terms of the old lease (consistently with the provisions of sections 56 and 57) if they wished to do so. There is nothing in the present case contrary to the requirements of good faith.

68. Separately and in any event the lessee was, as at the date of the grant of the new lease, bound by paragraph 4 (in a lease which antedated the UTCCR and to which therefore they did not apply) until the year 2098. Accordingly the inclusion in the new lease of paragraph 4 did not

"cause" any imbalance in the party's rights and obligations – if any such imbalance was present in the party's rights under the new lease this imbalance was already in place and was going to continue until 2098 in any event, such that the 2012 lease (if that constituted a relevant contract) did not cause this imbalance.

The respondent's submissions

69. There was before the Tribunal the Respondent's statement as prepared by Mr Jones for the F-tT and also the Statement of Case prepared by Mr Jones for the Upper Tribunal. Mr Jones made further oral submissions in amplification of the points there raised. He asked the Tribunal to remember that he and his partner were not legally trained and that the Tribunal was asked to bear that in mind when considering his submissions. I do so.

70. Mr Jones drew attention to his family's longstanding connection with Barnes and his intention to put down roots there. He and his partner lived in the lower maisonette until his posting to Milan in 2015. He made reference to his Treaty Rights (Article 45) as a EU citizen to seek and enjoy employment in another member state.

71. He confirmed the difficulties he had faced when trying to establish communications with the appellant when he wanted to hear the appellant's attitude towards subletting. He said that he would be substantially prejudiced if he was unable to sublet the lower maisonette. His posting to Milan was merely temporary. The respondents would return to the lower maisonette when it had finished after about two years.

72. He submitted that on the proper construction of paragraph 4 he was in any event entitled to sublet the lower maisonette.

73. He submitted that paragraph 4 was in effect a rare or unusual clause; that it was open to interpretation; that it was not really in step with modern life; and that apart from paragraph 4 there was no restriction upon subletting. He pointed out that the respondents used a firm of estate agents, namely James Anderson, to find the sub-tenant for the lower maisonette and that this was the same firm as the appellant used for the purpose of subletting the upper maisonette.

74. He submitted that there should be equitable treatment in respect of the owners of each maisonette. It was clear that the original intent was that there should be two long leases, one of each maisonette, where each lessee was bound by paragraph 4. However as regards the upper maisonette this had not occurred.

75. The appellant was itself in breach of paragraph 4 as it has failed to honour the owner-occupier scheme as regards the upper maisonette.

76. At the time the respondents purchased the lease they obtained information from the vendor (Ms Scott) who indicated on the relevant information form that she had not herself been occupying the lower maisonette but that a Mr Allder was occupying as a friend. This showed that there was another occupant other than the lessee. Also it was clear from information obtained from the appellant that the upper maisonette was occupied by a shorthold tenant.

77. The second schedule of the 1978 lease paragraph 5 indicated that the lessee of the lower maisonette was to enjoy the benefit of the restrictions contained in a lease to be granted of the upper maisonette – i.e. including a restriction as in paragraph 4. The appellant was in breach of the terms of the lease by failing to ensure that this right came into the hands of the lessee.

78. It is notable that the new lease in clause 6 contemplates that there may be a sub-demise granted out of the lease of the lower maisonette – this is inconsistent with the lessee having to occupy themselves.

79. The F-tT was correct in concluding there was an estoppel. Alternatively there was a waiver of paragraph 4 by the appellant, such waiver arising from the fact that despite the intention of having an owner-occupier scheme in the building the appellant had let the upper maisonette on shorthold tenancies and also the fact that the appellant had failed to complain regarding the occupation by Mr Allder of the lower maisonette.

80. In summary therefore there was a common assumption between lessor and lessee that the paragraph 4 restriction (requiring owner-occupation) had been disregarded and ignored by both the lessor (as regards the upper maisonette) and the lessee (as regards the lower maisonette). This conduct by the lessor communicated the clear and common assumption that sub-letting of the lower maisonette was permitted.

81. As regards the argument regarding unfair contract terms and the UTCCR, Mr Jones referred to the Office of Fair Trading document (see paragraph 42 above), which was produced after the decision in *L. B. Newham v Khatun* which established that UTCCR could apply to leases or tenancies. He submitted that the appellant is a trader in land and thus a supplier. So far as the question of where the contract is to be found, the contract is simply the new lease itself.

82. Mr Jones did not accept that there was an absence of freedom in the appellant as to whether or not to enter into the contract or as to the terms of the contract. Section 45 of the 1993 Act deals with counter notices and shows there does exist a freedom for the landlord. Separately section 57 deals with the terms of the new lease and shows there is a freedom regarding terms. In the present case it may be that the actual grant of some new lease was mandatory, but the terms were not mandatory – there was scope to change the terms of the tenancy. Accordingly the UTCCR are not excluded on the basis that the contractual terms were mandatory statutory or regulatory provisions.

83. As to whether there is a significant imbalance in the party's rights and obligations arising under the new lease, Mr Jones submitted that there was such an imbalance because the appellant

was entitled to enforce paragraph 4 against the respondents but the respondents were not able to enforce such a clause against the appellant.

Discussion

84. It is true that the respondents have not sought or obtained permission to appeal against the F-tT's decision that, upon the proper construction of paragraph 4, this prevented the respondents from subletting the lower maisonette. However the respondents are acting in person and the point in question is purely a point of law. It would therefore in my judgment be wrong for me to deny the respondents the ability to raise this point. However for the following reasons I conclude that the F-tT was correct in its conclusion that paragraph 4 upon its proper construction did preclude the respondents from subletting the lower maisonette to a subtenant who would occupy it.

85. I consider that the decision of the Deputy President in *Burchell v Raj Properties* is correct upon this point. In that case the relevant covenant was "to use the flat as a private dwelling for the lessee and his family and for no other purpose." There is no relevant distinction, favourable to the respondents, between the wording of that clause and the wording of paragraph 4 which is the relevant wording in the present case (see paragraph 3 above). Indeed if anything the wording of paragraph 4 is a clearer statement that the use permitted is use as a single private dwelling house in the occupation of the Lessee (i.e. here the respondents) and their family. It may be noted that in the 2012 new lease "The Tenant" is an expression which includes "his successors in title". In the 1978 lease the expression "The Lessee" where the context so admits includes "his executors administrators successors in title and assigns". These do not include a subtenant. In short I conclude in agreement with this Tribunal's decision in *Burchell v Raj Properties*, that the covenant in paragraph 4 upon its true construction is breached if the lessee sublets the lower maisonette to a third party such that the property is in the occupation of the third party rather than in the occupation of the lessee (here the respondents) and his family. The F-tT was correct so to decide.

86. I do not consider that the presence of paragraph 6 in the new lease, dealing with the absence of any further rights to a new lease under the 1993 Act for any person who might subsequently become a subtenant under a long lease, can be construed as abrogating the provisions of paragraph 4. This paragraph 6 was presumably included because of the provisions of section 57(7)(a) and section 59(3) of the 1993 Act.

87. The F-tT found an estoppel by convention. For such an estoppel to be established it is necessary that a party to a transaction has acted upon an assumed state of facts or law, the assumption being either shared between them both or made by one and acquiesced in by the other. I have regard to the legal principles recorded in paragraphs 47 and 48 above.

88. If an estoppel by convention arose it is necessary to consider when it arose.

89. An estoppel by convention plainly could not have arisen by reason of the dealings between the appellant and the respondents in 2015 immediately prior to the grant of the assured shorthold

subtenancy. This is because, prior to the grant of the subtenancy, there was communication between the parties and the appellant made it clear to the respondents that the appellant's understanding was that paragraph 4 was enforceable and would prevent a subletting – i.e. the appellant made clear its understanding was exactly contrary to the understanding which would be required to support an estoppel.

90. The next question is whether any such estoppel could have arisen upon the occasion of the purchase by the respondents of the lease. However the following points may be noted:

(1) The respondents in paragraphs 5.8 of their inquiries asked the appellant whether there had been any variation of the leases either formal or informal. The only answer given was a reference to a licence to carry out works. The appellant also responded that the first floor flat was freehold and was subject to a shorthold tenancy. While this was notification to the respondents that the upper maisonette was not for the time being subject to some owner occupation restriction, it did not amount to a representation that any of the terms of the lease of the lower maisonette (including paragraph 4 in particular) were no longer enforceable.

(2) The respondents raised inquiries with their vendor and were informed that the vendor did not herself live in the lower maisonette which was occupied by a friend named Mr Allder who was not a subtenant. It is not known for how long the vendor had not lived there or what was her intention regarding returning. This situation may have amounted to a breach of paragraph 4. However there is no evidence to the effect that the appellant knew of the existence of such a breach. Also even if there was such evidence this might well show a waiver of the right to seek forfeiture for that particular breach, but that is different from founding an estoppel preventing the appellant from relying upon paragraph 4 in the future.

(3) It may also be noted that the detriment identified by the F-tT which was part of the ingredients which gave rise to the estoppel was (see paragraph 74 of the F-tT's decision) that the respondents suffered detriment by relying upon the assumption that either maisonette could be occupied by third parties and subletting their flat. I have already observed that by the time they sublet their flat they were aware that the appellant relied upon paragraph 4 and contended a subletting would be a breach. The F-tT did not find (and on the evidence the F-tT could not have found) that the respondents purchased the lease of the lower maisonette upon the understanding that paragraph 4 would not be insisted upon.

(4) It may also be noted that in the correspondence between the appellant and the respondents prior to the subletting the attitude of the respondents was to the effect that they had legal advice that upon its proper construction paragraph 4 did not prevent a subletting – they were not contending that by reason of some representation or encouragement by the appellant they had purchased on the assumption that paragraph 4 could no longer be relied upon against them.

91. Accordingly I conclude that no estoppel by convention could have arisen in 2015, prior to the grant of the subletting, or in 2013 upon the occasion of the respondents' purchase of the lease.

The question arises therefore as to whether some such estoppel could have arisen earlier in favour of the lessee, being an estoppel upon which the respondents were entitled to rely.

92. It is true that the 1978 lease contemplated that there would soon be granted a long lease of the upper maisonette in similar terms (including paragraph 4) to the lease of the lower maisonette. However there was no specific covenant given by the lessor that any such long lease would be granted by any particular date. Accordingly even upon the terms of the 1978 lease alone, and ignoring the 1980 deed, I do not see that the lessor was in some way in breach of its obligations in failing to grant a long lease of the upper maisonette by any particular date.

93. The position however is made clearer still by the 1980 deed which was executed in circumstances where there had not yet been granted a long lease of the upper maisonette and which expressly contemplated that there may in the future not be the grant of any such long lease and which made provisions to operate in those circumstances. The deed made provision that in such circumstances the restrictions in the first schedule would be enforced (at the lessee's request and expense) so far as is possible against the occupier of the upper maisonette. Also the deed did not release the lessee from any of the covenants in the lease including in particular paragraph 4. The position under the lease as varied by the deed was therefore that it was recognised the lessor might not grant a long lease of the upper maisonette; that this would be no breach by the lessor of any obligation; and that the terms of the lease would continue in force so far as concerns the lessee, which included paragraph 4.

94. I now return to paragraphs 72 and 73 of the F-tT's decision. The F-tT may have been correct in finding that the original intention to create a scheme of owner-occupation within the building had been long abandoned. However, in my view the F-tT was wrong in concluding that subletting of either maisonette to third parties was no longer prohibited. The F-tT reached this latter conclusion on the basis that the lessor was acting in flagrant disregard of the rights of the lessee of the lower maisonette (see paragraph 73) and that the lessor was itself not complying with the equivalent of paragraph 4. However having regard to the terms of the lease and of the deed I conclude that the lessor was acting consistently with rather than in flagrant disregard of its obligations under the lease as amended by the deed. Separately even if that is wrong and the lessor was in some way in breach of some obligation by granting subtenancies of the upper maisonette, this could give rise to a cause of action in the lessee against the lessor but would not automatically give rise to some estoppel preventing the lessor from relying upon paragraph 4 against the lessee. It is possible that such circumstances would have provided a foundation for an application for a modification or discharge of the restriction pursuant to section 84 of the Law of Property Act 1925, but no such application was ever made.

95. I conclude therefore that prior to the grant of the new lease in 2012 no estoppel (whether by convention or otherwise) arose so as to prevent the appellant from relying upon paragraph 4 against the lessee. This conclusion is reinforced by the fact that in 2012 the appellant and the lessee entered into the new lease which repeated (by incorporation from the 1978 lease) the restriction in paragraph 4. Nor, as has been shown by the analysis set out above, did any such estoppel arise after the grant of the 2012 lease.

96. I therefore I conclude that the F-tT was wrong in finding that an estoppel by convention had arisen.

97. The F-tT separately found that the lessor had waived paragraph 4 and that the appellant could not now resile from that position and insist that the respondents comply with paragraph 4. No separate reasoning was given by the F-tT for this conclusion, which appears to be a conclusion that the self same facts upon which an estoppel by convention had been found would also give rise to a waiver. I therefore conclude that, for the same reasons as I find that no estoppel by convention has arisen, I find that no such waiver has arisen either.

98. I now turn to the question of whether paragraph 4 is an unfair contract term and therefore unenforceable under the UTCCR.

99. I accept that the UTCCR can apply to the terms of a lease, see *L B Newham v Khatun*. I also am prepared to assume in favour of the respondents that the appellant, being a property company, can properly be described as a "seller or supplier".

100. I consider that the new lease granted in 2012 constituted a "contract" and that it is therefore not necessary to consider whether any such contract arose from the service of the section 42 notice. The new lease was entered into between the appellant and the lessee. Accordingly I consider that this contract was "concluded", despite the fact that it was concluded within the context of the obligation upon a landlord to grant a new lease pursuant to the 1993 Act.

101. However regulation 4(2) provides that the regulations do not apply to contractual terms which reflect mandatory statutory provisions. The appellant was statutorily obliged to grant the new lease. The terms upon which the appellant was obliged to grant this new lease were provided for in sections 56 and 57. There was scope for some alteration in the terms of the new lease as compared with the existing lease, but the starting point was that the new lease was to be on the same terms as those in the existing lease subject to certain limited modifications. In these circumstances I conclude that regulation 4(2) is applicable and that the UTCCR do not apply to the contractual terms of the new lease.

102. Separately from the foregoing there is the following point. Regulation 5 provides that a contractual term which has not been individually negotiated shall be regarded as unfair if:

> "…. contrary to the requirement of good faith, it causes a significant imbalance in the party's rights and obligations arising under the contract, to the detriment of the consumer."

103. In the present case the lessee chose to require the grant of a new lease in circumstances where the existing lease, containing paragraph 4, was a lease which would continue to regulate the rights between the appellant and the lessee until 2098. This lease being granted in 1978 was not a lease to which the UTCCR applied. Accordingly the position immediately after the grant of the new lease was (supposing that paragraph 4 operated to bind the lessee) exactly the same position as the lessee was in prior to such grant and would have continued to be in for a further period

exceeding 80 years. In such circumstances I do not consider that the relevant contractual term (i.e. paragraph 4 as repeated in the new lease of 2012) can be said to be a clause which "causes" a significant imbalance etc. If there was a significant imbalance it already existed.

104. Further, bearing in mind the circumstances in which the new lease was granted, namely pursuant to an obligation under the 1993 Act, I do not consider that it can be said that paragraph 4 (as repeated in the new lease in 2012) was a term which was "contrary to the requirement of good faith."

105. Accordingly, even if paragraph 4 does produce a result in which there is a significant imbalance in the party's rights and obligations under the lease to the detriment of the consumer (as to which I make no finding), I conclude that paragraph 4 remains valid and is not rendered invalid by the UTCCR because in summary:

(1) The UTCCR do not apply having regard to regulation 4(2)(a);

(2) The lessee was already subject to paragraph 4 prior to the 2012 new lease and therefore the term in the new lease did not "cause" any such significant imbalance; and

(3) In any event the inclusion of paragraph 4, in the context of a renewal under the 1993 Act, was not contrary to the requirement of good faith. Upon this point I note that both appellant and lessee would have been professionally represented during the procedures for the grant of the new lease and that the lessee would have had solicitor's advice upon the terms of the new lease and upon the consequences of entering upon the renewal procedures under the 1993 Act.

Conclusions

106. I remind myself that this is an appeal by way of review. The F-tT's decision is detailed and carefully expressed. However, with respect to the F-tT, I conclude that it erred in finding any estoppel by convention or waiver and that it also erred in finding that paragraph 4 was an unfair contract term and hence unenforceable.

107. In the result therefore I allow the appellant's appeal. I find in accordance with section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of paragraph 4 of the first schedule did occur upon the occasion of the grant in April 2015 by the respondents of an assured shorthold tenancy of the lower maisonette to a subtenant who went into occupation.

108. Reference has been made to the concept of waiver during the course of the F-tT's decision and this decision. The waiver there being considered was whether the right to rely upon paragraph 4 at all had been waived for the future (i.e. for the time after the act of waiver). Any question of whether there has been a waiver of the breach caused by the granting of the subletting to a subtenant who went into occupation (i.e. a waiver of the breach such as to prevent the appellant from seeking to base a forfeiture claim upon such breach) is not a matter for the Upper Tribunal, nor of course is any question of relief from forfeiture supposing that the appellant did pursue

proceedings seeking to forfeit the lease. All that the present decision decides is that a breach of covenant in the new lease did occur by reason of the granting 0n 7 April 2015 of the subtenancy to a subtenant who went into occupation.

109. On behalf of the appellant Mr Webb did not seek any order for costs against the respondents – he recognised that it could not be said to have been unreasonable for them to seek to uphold the decision of the F-tT.

Dated: 18 July 2016

His Honour Judge Huskinson