SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/00HN/LBC/2009/0046

Decision of the Leasehold Valuation Tribunal on application made under Section 168 of the Commonhold and Leasehold Reform Act 2002 and Section 20C of the Landlord and Tenant Act 1985

Applicant and Landlord:	Bowlplex limited
Respondent and Tenant:	Ms DE Buchanan
The Premises	**Flat 8 and Garage 8, Marybourne, 4 Manor Road Bournemouth BH1 3EY**
Date of Application	**17 December 2009**
Date of Inspection	12 **March** 2010
Date of Hearing	12 March 2010
Venue	Royal Bath Hotel, Bournemouth
Appearances for Applicant	Mr A Howard, Solicitor, Coles Miller
Appearances for Respondent	Mr S Oram of Counsel
Also attending	Ms DE Buchanan, Mr S Fry, Mr J Scollard, Mr Buchanan. Mr T Standish, Mr Cullaney, Mr Sargent

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
JS McAllister FRICS	Valuer Member
Mr PD Turner-Powell FRICS	Valuer Member

Date of Tribunal's Decision: 29 March 2010

Decision

1. The Tribunal determines for the purposes of Section 168 of the Commonhold and Leasehold Reform Act 2002 (the Act) that the following breach of covenant has occurred on the part of Ms D E Buchanan (the Respondent), in respect of the Flat known as Flat 8 and

Garage 8, Marybourne, 4 Manor Road Bournemouth (the Premises), the covenants being contained in a lease (the lease) dated 4 March, 1985 and made between Wessex Investments Limited (the then landlord) and Hilary Beatrice Halpern and Helen Eleanor Goodrich(the then tenant):

a. There has been no breach of clause 2(36) of the lease by reason of promissory estoppel..

b. In breach of clause 2 (15) of the lease, (a covenant on the part of the tenant) "not to display any plate or placard advertisement or ball of any kind except the plate (bearing on its the lessees name) outside the entrance to the premises hereby demised", a letting board of the Respondent's letting agent was displayed outside 4 Manor Road Bournemouth for approximately 3 weeks in April/May 2009.

2. An Order Is made under Section 20C of the Landlord and Tenant Act 1985 that any costs incurred or to be incurred by the Applicant in connection with these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent

Reasons

Preliminary

3. This was an application by the Applicant under Section 168 of the Act for determination that the Respondent was and is in breach of covenant of the lease in respect of the premises. The lease of the premises was at all material times assigned to the Respondent.

4. The Applicant alleged the following breaches by the Respondent of covenants of the lease:

a. Clause 2 (36) "not to sublet the premises or any part thereof or permit or suffer any person to sublet the same except by way of mortgage but so that this clause shall not prohibit an underlease of the premises for the whole of the residue of the term hereby granted less a nominal reversion at a yearly rent not less than that specified in the 6th Schedule hereto and at such premium payable to the Underlessor as the Underlessor shall desire provided that the form of such underlease has first been approved by the lessor and which shall reserve not less than the minimum rents specified in the 6th Schedule hereto". The statement of breach states "It has come to the attention of the Applicant by way of complaints received from the lessees at Marybourne about the Respondent's tenants, that the Respondent is subletting in breach of the terms of the lease". [*In these reasons we refer to the subletting of the whole which is permitted by this clause, i.e. the residue of the term less a*

nominal reversion, to be a long sublet and any other subletting of the whole to be a short sublet].

b. Clause 2 (15) "Not to display any plate or placard advertisement or board of any kind except a plate (bearing on it the lessee's name) outside the entrance to the premises hereby demised". The statement of breach states that "the Respondent's agent Clifton's Estate and Lettings Agent of 27A - 229 Old Christchurch Road Bournemouth Dorset BH1 1JZ placed a lettings board on the reserved property".

5. On 19 February, 2010 the Respondent made an application under Section 20C of the Landlord and Tenant Act 1985 in the terms set out in the decision.

Inspection

6. The Tribunal inspected Marybourne 4 Manor Road Bournemouth in the presence of the Respondent, Mr Oram and Mr Sargent. The block of 8 Flats and 7 garages is laid out in landscaped grounds. The building is rendered under a concrete tiled pitched roof. It was built some years ago and subsequently converted into 8 self-contained Flats, Flat 8 being on the first floor. We also inspected Flat 8 itself, presently occupied by the Respondent's tenant and partner.

Hearing

7. Preliminary matters.

    a. The Respondent objected to the introduction of a 2nd witness statement of J Hunter dated 2 March, 2010 and that of Mr T Standish dated 3 March, 2010 referring to paragraph 4 of directions made on 23 December, 2009 which provided, in terms, that the witness statements should be sent to the other party and the 21 days prior to the hearing failing which the Tribunal may decide not to allow that witness to give oral evidence at the hearing. Having heard submissions on behalf of both parties, the Tribunal decided to admit the statements and hear oral evidence from those witnesses (although in the event Ms Hunter was unable to attend to give evidence).

    b. The Respondent made the following admissions:

        i. the letting board had been displayed for approximately 3 weeks in the period April/May 2009 in breach of the relevant covenant;

        ii. Flat 8 is let on an Assured Shorthold Tenancy which is a short sublet not within the terms of clause 2 (36) of the lease.

c. It was agreed by the parties and accepted by the Tribunal that the Tribunal has jurisdiction to determine not only whether the Respondent was in breach of the strict terms of the lease but also whether the Applicant was estopped from relying on the terms of the lease or had waived the terms of the lease. It's jurisdiction did not however extend to whether the Applicant had waived the right to forfeit the lease on the basis of a breach of covenant.

8. We considered all the documents to which we had been referred in the Trial bundle, the oral evidence given by Mr Standish and Ms Buchanan and the submissions made by Mr Howard and Mr Oram in conjunction with the skeleton arguments and authorities referred to.

9. Findings of relevant fact.

10. The Respondent had wished to purchase the lease of the premises in late 2007 for the specific purpose of short subletting to be financed by a "buy to let " mortgage over a term of 18 years, with early redemption penalties. Prior to exchange of contracts there had been some investigation by her and/or her conveyancing solicitors as to any provisions in the lease or otherwise which might restrict her ability to carry out short sublets .

11. Her solicitors obtained, from an unidentified source, some copy letters and other documents. These were: --

    a. a letter dated 8 August, 2003 to Mrs PJ Fry of Flat 1 from her solicitors which indicates they had considered terms of the lease of that Flat (which we understand are in all material terms the same as for Flat 8) and that there was no clause in the lease preventing her from letting the Flat out, but that she could not let part only of the Flat.

    b. A letter dated 6 October, 2004 from the Applicant to Mr Fry of Flat 7 which in terms states that Mr Fry could let out the whole of his Flat but that it must be to one family.

    c. A letter dated 9 October, 2007 from the Applicant to Mr Fry of Flat 7 to the same effect.

    d. A letter from the Respondent's solicitors dated 3 December, 2007 to HGW as to concerns about the price to compensate for the restriction in letting of the property and the short lease term and future repainting.

    e. A memorandum dated 8 January 2008 from Ms Hunter of the Marybourne Management Association to a Nickola Johnson, the relevant part of which states "regarding the restricted letting of the property the lease is very clear in its detail, again this not is (sic) a decision of anyone else but the fact of the lease signed

by all the owners". It appears that Nickola Johnson was a member of the firm of solicitors HGW.

f. A letter dated to January 2008 from HGW (who were then acting for Ms Buchanan's seller) to Ms Hunter concerning the cost of a lease extension.

g. A letter dated 2 October 2008 from the Applicant to the Respondent concerning her subletting the premises and referring to requirements of (inter alia) clause 2.36 of the lease as to obtaining permission from the Applicant and then providing a copy of the letting agreement.

12. The Respondent was unclear in her evidence as to when she purchased the lease but it appears from her solicitor's letter dated 28 April, 2009 that this was 18 January 2008. They go on to say that the Flat was then let on an Assured Shorthold Tenancy shortly thereafter.

13. On 17 April, 2009 the Applicant's solicitors wrote to the Respondent who evidently received it by e-mail. They referred to the terms of clause 2 (36), that a short-term tenancy is prohibited by the lease, drawing her attention to it to ensure she did not sublet on this basis in breach of the lease and asking for an assurance that she would immediately cease marketing the Flat for letting and that she would take no steps to let the property. In her e-mail reply of the same date the Respondent stated that she had purchased with the intention of letting the whole property and believed that she was within her rights to do so under what she calls "Section 11" of the lease which is presumably a reference to clause 2 (11) which is a provision preventing underletting etc of part of the premises and in any event not for holiday lets, lodgers or paying guests.

14. From all the documents that we have before us, it seems that not until the Applicant's solicitors letter dated the 17 April, 2009 had there been any understanding by either of the parties, the Respondent's solicitors and other solicitors, as to the terms of clause 2 (36) (hereafter referred to as the clause). On the contrary the Applicant had in the past indicated in respect of Flats 1 and 7 that lettings were permitted but focusing on the aspect that lettings must be to one family. We are satisfied that the Applicant's indication in that way was intended as a reference to short sublets being permissible. In view of the terms of the clause, which we find to be unambiguous, it seems that either the Respondent did not have appropriate legal advice prior to purchase or, if she did, she nevertheless proceeded preferring to rely on other evidence as referred to above and as now referred to below.

15. The Respondent says that because of the evidence she had which indicated that sublettings of the whole Flat were permitted, she spoke to Mr Standish of the Applicant, prior to proceeding with her proposed purchase.

a. She told us that she had started a new job in October 2007, working in an open plan office. For that reason and because it was not a good start to make personal calls when commencing a job, she had gone into the photocopier room to make a call to Mr Standish on her mobile phone. She produced a yellow post-it note on which she had noted Mr Standish's name and a telephone number and likewise for Mrs Hunter. There is also reference on that note to "Francis", a telephone number and a period "9.30 – 10.00 a.m." She thinks she obtained Mr Standish's information from the Internet.

b. She believes she made the phone call in November 2007. She spoke to Mr Standish and specifically asked him to confirm the basis of subletting property. "He seemed very reasonable and told me that Bowlplex were agreeable to letting including sharers however if there were any complaints as a result of sharers from anyone else in the block then they would have to resort to the strict definition of restricted letting to an individual or married couple".

c. In his evidence to us, Mr Standish denied that conversation. He said that the systems that his company had in place were that the Respondent would have been put through to one of his 2 personal assistants who only put calls through to him for current business, otherwise she would have been told to put the matter in writing. Further that such a conversation as the Respondent recounts would therefore have failed the operating policy. He said that his company has a £30 million turnover, that the company's investment in 4 Manor Road is dormant and has no commercial value. In relation to the letter from him to Mr Fry dated 9 October, 2007 he said he thought Mr Fry would have spoken to his personal assistant who would have spoken to Mr Standish and that the personal assistant would have drafted the letter for Mr Standish to sign.

d. Mr Standish also told us that he was not aware of any file concerning the property, there are no company procedures to record or note any telephone calls or any call log. He also said that if he agreed something it would be followed up in writing. He confirmed that there is someone by the name of Frances In his office. He said that the phone number shown on the Post-it note was his business mainline and in relation to the period mentioned on it said that he often got into the office after 9.30, that after 10 am would be better. Mr Standish did tell us that if the conversation had taken place, Ms Buchanan's note of the conversation did reflect the Respondent's understanding of the lease terms other than the reference to sharers.

e. In relation to this phone call, the Respondent was cross-examined to demonstrate her evident uncertainty as to the

date of her purchase. This was directed to suggesting therefore that her evidence as to the phone call could not be relied upon either.

f. We accepted her evidence as to her phone call with Mr Standish both that it did take place and that her version of the conversation was substantially accurate. In coming to that conclusion we did not find that Mr Standish was being untruthful but simply that in practice systems do not always work and that on his own evidence this particular investment was of no commercial value and that he would probably be unlikely to recall such an insignificant matter. Conversely, the matter was extremely important to the Respondent and therefore it was far more likely that she would recall the conversation. Furthermore, the evidence of the post-it note and the Respondent's evidence as to her job circumstances in which she made the call reinforced our conclusion that it had taken place. Finally that the Respondent's recollection of the conversation was entirely consistent with other letters Mr Standish had written to others, not least to Mr Fry on 9 October, 2007 i.e. not long before the telephone conversation.

16. Therefore, if it were not for the lack of any evidence before us that the actual terms of the clause had been properly addressed, we would not have been surprised that the Respondent relied on the various documents and telephone conversation referred to above, in deciding to proceed with her purchase. The Respondent submits that in the light of assurances from the Applicant she bought the property to sublet but that she would not have done so otherwise. Whether her reliance justifies her case is a matter which we consider as necessary below.

17. We should add here that we are completely satisfied that in the telephone conversation, Mr Standish, for the Applicant, was indicating that shall sublets were permitted because that had always been his understanding previously.

18. The final relevant finding of fact is that the Respondent has sublet the premises for most of the period since shortly after her purchase in January 2008 until the date of the hearing on short sublets in breach of the strict terms of the clause. However, we have to consider whether the Applicant is estopped from relying on the strict terms of the clause or has waived its right to rely on it.

19. <u>THE LAW.</u>

20. The Respondent denies breach of the clause:

a. first because the landlord is estopped by convention from asserting the interpretation of the lease it contends for; and/or

b. secondly the landlord is estopped in equity, by virtue of its knowledge and acceptance of short subletting in the block, from asserting that it is a breach of covenant, or has waived strict enforcement of the clause.

21. Estoppel by convention.

a. The Respondent principally relies on the case of The Vistafjord [1988] 2 Lloyd's Rep. 343,CA; and

b. On the question of a party's mistake in adopting a convention, that mistake is irrelevant: Amalgamated Investment and Property Co Ltd v. Texas Commerce International Bank Ltd [1982] 1 QB 84 CA. (There does not seem to be an issue between the parties on this aspect of the law).

c. Vistafjord. Our attention has been drawn by the parties to various parts of the judgement in this case and we draw especially on a summary of the nature of estoppel by convention which appears on page 12, that it is said to apply where (1) parties have established by their construction of their agreement or their apprehension of its legal effect a conventional basis; (2) on that basis they have regulated their subsequent dealings; (3) it would be unjust or unconscionable if one of the parties resiled from that convention.

22. From this we found that the basis of the convention depends on an existing agreement between the parties to it which is construed by them both, mistakenly or otherwise, in a particular way such that it would be inequitable for either of them to rely on the true terms of their agreement.

23. In the case before us we are satisfied that there was a common assumption between the Applicant and the Respondent. That common assumption was that short subletting was not prohibited under the lease. That had plainly been the Applicant's understanding for several years and we are satisfied that it was repeated to the Respondent by Mr Standish in the telephone conversation. We do not think we have to decide whether the Applicant's understanding conveyed to other people at other times is necessary to assist in the creation of a convention between the Applicant and Respondent. We are, though, sure that the understanding passed to third parties reinforced in the Respondent's mind the understanding made between her and the Applicant. However, when the understanding arose in the telephone conversation there was no contractual relationship between the parties: the Respondent had not, by then, purchased the premises and put herself in a relationship with the Applicant. For that reason we found that a convention, in law, was not

created between the Applicant and the Respondent so that the Respondent is not entitled to rely on any such understanding to protect her, through estoppel by convention, from allegation of breach of covenant.

24. The Respondent's counsel makes the point that the Respondent would not have bought the lease if she had known the true position. With respect to her, if her understanding with the Applicant was the <u>only</u> basis on which she proceeded, rather than on clear legal advice as to the full terms of the lease, she was taking a considerable risk.

25. <u>Promissory estoppel/waiver.</u>

26. By reference to Chitty on Contracts (30th Edition 2008) the Respondent submits this arises where:

    a. there is a legal relationship giving rise to rights and duties between the parties;

    b. an unequivocal promise for representation by one party that reasonably induces the other to believe that the former will not insist on his strict legal rights;

    c. an intention on the part of the first party that the other will rely on the representation;

    d. reliance on the representation by the latter.

27. By reference to the case of Patel v Peel Investments (South) Ltd [1992] 2 EGLR 116, the Respondent further submits that if a party to a contract waives a stipulation on which he is entitled to rely he will be held to have done so where he thereby unambiguously leads the other to believe that he will not insist on that stipulation; he intends the other to act on it and the other does so.

28. By reference to Handley, Estoppel by Conduct and Election (2006), the Respondent submits that where a representation is received via a third party, the representor is bound by it if he knows that it will probably be passed on to the person who eventually receives it, or to a class of persons of whom the ultimate recipient is a member.

29. Dealing with the latter point first, we have no evidence and do not think that in this case the Applicant knew or could be taken to know that the representations made to third parties would probably be passed on to someone else. It would certainly be possible but we do not think it probable. In coming to this conclusion, it appeared to us that representations to other Flat owners as referred to above as to the possibility of short subletting was a matter between the Applicant and the third-party and would not be of importance to anyone else because, from the Applicant's point of view, it only reflected what they thought the lease to provide.

30. In relation to the first point as to factors required on which to find promissory estoppel, the Respondent relies not only on the documents and phone call mentioned above but also a letter from the Applicant to the Respondent dated 2 October 2008. In that letter the Applicant refers to the clause (as well as clause 2.19), their understanding that the Respondent is subletting and then referring to a requirement that the Respondent should first obtain the Applicant's permission to sublet and then provide within one month a copy of the agreement. There is no specific reference to any alleged breach of the clause in respect of a short sublet. The Respondent further relies on previous short sublettings of Flats 7 and 8 with the knowledge of the Applicant.

31. The Respondent says as a result she reasonably believed that the landlord would not insist on its strict legal rights under the clause and was thereby induced into short subletting, so that it would be unconscionable for the Applicant to resile from that promise.

32. The Respondent also says that there has not been reasonable notice by the Applicant to the Respondent to stop short subletting, referring to the letter from the Applicant's solicitors dated 20 April, 2009. She relies on the use of the word "immediate" in a paragraph of that letter which states "would you please let us have your assurance, either directly or through your solicitors, that you will immediately cease marketing the Flat for letting and that you will take no steps to let the property". The Respondent says that that would not be reasonable notice because of the length of lease, the 18 year's mortgage term and the length of acquiescence by the Applicant since around 1983/84.

33. By reference to Chitty, paragraph 3-096, the Applicant submits that the doctrine of estoppel does not extinguish rights but only suspends them; the Swanston case says that the doctrine of promissory estoppel will generally only suspend rights and that a party may revert to those rights for the future upon giving reasonable notice of his intention to the other party. Furthermore, the judgement in that case, which related to an underletting situation, stated that in the circumstances of the case the landlord cannot be said to have waived compliance with the covenant.

34. The Applicant also refers to the exact wording of the letter of 17 April, 2009 that the reference to an immediate ceasing, related to marketing and not letting. Whether it does or does not, we do not think assists in our determination.

35. The Applicant also refers to Hill and Redman, paragraph A[3082] where it is stated that "the lessor does not waive the benefit of the covenant merely by permitting other premises held under a similar lease to be used for the prohibited purpose". We refer also to the letter from the Respondent's solicitors dated 14 May, 2009 in which they reply to the Applicant's solicitors "we will advise our client of her options. There will be no need for your client to take proceedings." The

Applicant says that despite that assurance, the Respondent has subsequently carried out a short sublet.

36. The Applicant refers us to a page A9- 50 of Hill and Redman's Law of Landlord and Tenant as to acquiescence in a breach of the term of a lease. The acquiescence depends on a long period of knowledge of a breach. We are satisfied in this case that albeit that it was because of the Applicant's misunderstanding of the terms of the lease, the applicant did not have the necessary knowledge for a long period for acquiescence to the relevant to the case.

37. Reviewing all the evidence and all the case law to which we have been referred, including that specifically referred to above, on the legal aspect of alleged promissory estoppel we found that the conditions for it to apply in the first place had arisen; that it can be brought to an end on reasonable notice; that the Applicant's solicitors letter of 17 April, 2009 was intended to bring the landlord and tenant relationship back on to the strict terms of the lease. The Respondent has continued to carry out a short sublet. However, we are not satisfied that in all the circumstances the Respondent has had reasonable notice of the ending of the estoppel. In coming to the conclusion we found:

    a. the Respondent's intention to purchase to sublet;

    b. she depended and still depends on sublet income to finance the mortgage taken out for her purchase;

    c. it is not material to the length of notice required to end the promissory estoppel that the Applicant has had a settled, if mistaken, position about the lease terms since 1983, but simply that it has been the position expressed by the Applicant to the Respondent in about November 2007;

    d. The Respondent did not know until April 2009 that the Applicant was changing its position;

    e. If the letter of 17 April 2009 can be construed as notice to terminate the promissory estoppel, it was not reasonable notice. The terms of that letter were effectively not to sublet again after 17 April 2009, but that was not reasonable notice because it took no account of the Respondent's situation at paragraph 35b above, from which she could not reasonably extricate herself without selling the Flat risking early redemption penalties on her mortgage. If that letter was not notice, the estoppel continues in any event.

38. Accordingly we found that the promissory estoppel is presently continuing so that there is no existing breach of covenant in respect of clause 2 (36) of the lease.

39. Section 20C application.

a. Mr Howard had no instructions on behalf of the Applicant concerning this application and withdrew from the hearing. Under this Section, the Tribunal may order that all or any of the costs incurred by the Applicant in connection with these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent. Further, the Tribunal may make such order as it considers just and equitable in the circumstances.

b. Our findings on the issues are that the Applicant has not proved its case in relation to what might have been the major breach of covenant, but has done so in relation to the lettings board.

c. We have considered the terms of the service charge provisions in the lease. We have not been directed to, nor have we found, any provisions in the lease under which the Applicant would be entitled to recover its costs of these Tribunal proceedings, so that an order under Section 20C may be inappropriate. However, in case we are incorrect in that respect, for the reasons set out above, we made an order under section 20 C as stated in the decision.

40. The Tribunal made its decisions accordingly.

Signed

M J Greenleaves

Chairman

29/3/10

A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/00HN/LBC/2009/0046

Re a decision of the Leasehold Valuation Tribunal made under Section 168 of the Commonhold and Leasehold Reform Act 2002 and Section 20C of the Landlord and Tenant Act 1985

Applicant and Landlord:	Bowlplex limited
Respondent and Tenant:	Ms DE Buchanan
The Premises	**Flat 8 and Garage 8, Marybourne, 4 Manor Road Bournemouth BH1 3EY**
Date of this Decision:	4 May 2010

Decision on applicant's application dated 19 April, 2010 for permission to appeal the decision dated 29 March 2010

1. The tribunal grants permission to appeal.

2. It may be helpful if we set out here our own response to the grounds set out in the application for permission.

3. The grounds for appeal may be shortly stated as follows: --

    a. the tribunal wrongly interpreted and/or wrongly applied the relevant law in relation to promissory estoppel;

    b. the tribunal failed to take account of relevant considerations and evidence.

4. Ground 1 deals with the matter of there being an unequivocal promise or representation that reasonably induces the other to believe that the former will not insist on his strict legal rights. It appeared to the tribunal that all the circumstances amounted to an unequivocal promise for representation. We made that finding on the basis of the only inferences which could be drawn from communications between the applicant and the respondent. If however "unequivocal" means that a promise must be express, then we accept the evidence may fall short of satisfying that condition.

5. We did not think it relevant that if the applicant has made an "unequivocal promise or representation", that the respondent should not be able to rely upon it if the applicant was unaware of its legal rights.

6. Ground 2 relates to the condition that there must be a legal relationship giving rise to rights and duties between the parties. We did not consider that such relationship had to exist when the unequivocal promise or representation was made, but that as the applicant did not demur from its promise or representation for some while after

a legal relationship arose between the parties, that that is sufficient to satisfy the condition: the condition does not appear to be in terms that the relationship must exist at the time of the promise for representation (such as applies in the convention situation).

7. Ground 3. We considered such an intention to be implied: we accept there was no evidence of such an intention being expressed.

8. Ground 4. We had no doubt that the respondent relied on the applicant's representation.

9. Ground 5. We considered that in the light of the surrounding circumstances, in particular the letters to other flat owners of which the respondent was aware, she was reasonably induced to believe that the applicant would not insist on its strict legal rights.

10. However, this case does raise difficult issues with significant implications and we accept that our approach to the case and decision justifies review by way of appeal.

M J Greenleaves

Chairman
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor