FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LBC/2015/0010
Property	:	Flat 14, Viewpoint, 7-9 Sandbourne Road, Bournemouth, Dorset, BH4 8JP
Applicant	:	Viewpoint Limited
Representative	:	Robert Bowker instructed by Coles Miller Solicitors
Respondent	:	Andrew Simpson and Susan Simpson
Representative	:	Daniel Bromilow instructed by Preston Redman Solicitors
Type of Application	:	Section 168(4) of the Commonhold and Leasehold Reform Act 2002
Tribunal Member	:	Judge N Jutton and Judge D Agnew
Date	:	1 December 2015 Court 3, Chichester Magistrates' Court & Tribunals Centre, 6 Market Avenue, Chichester, West Sussex, PO19 1YE
Date of Decision	:	6 January 2016.

DECISION

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1 **INTRODUCTION**

2 The Applicant Viewpoint Limited makes an application to the Tribunal pursuant to section 168(4) of the Commonhold & Leasehold Reform Act 2002 for a determination that the Respondents Andrew Simpson and Susan Simpson are in breach of a covenant or condition contained in the Lease of Flat 14, Viewpoint, Sandbourne Road, Bournemouth, Dorset (the Property) by reason of letting the Property to a sub-tenant who is not a member of their family.

3 Viewpoint comprises two blocks of residential flats believed to have been built in the 1960s as purpose built holiday flats.

4 Mr and Mrs Simpson purchased the Property in or about 27 April 2006. Prior to April 2015, they used it as a holiday flat. As such, it was occupied from time to time by Mr and Mrs Simpson and members of their family.

5 In April 2015, Mr and Mrs Simpson decided to let the Property out. They granted an Assured Shorthold Tenancy to a Mr Jorden. Mr Jorden is not a member of Mr and Mrs Simpson's family.

6 It is the Applicant's case that by granting an Assured Shorthold Tenancy to Mr Jorden, Mr and Mrs Simpson are in breach of a provision in their Lease which provides that the Property is only to be used and occupied as a private dwelling for their sole use and that of their family.

7 **Preliminary Matter**

8 At the start of the hearing, Counsel for the Applicant Mr Bowker, asked the Tribunal to make a determination as to the admissibility of three Witness Statements, those of Sarah Randall dated 24 October 2015, a second Witness Statement of Andrew Simpson dated 24 October 2015, and that of Richard Phillips of 28 October 2015. Mr Bowker also asked the Tribunal to make a determination that the Respondents, to the extent that they had raised arguments of estoppel, should not be allowed to advance such arguments into areas of estoppel beyond that of estoppel by convention.

9 Mr Bowker referred to Directions made by the Tribunal on 21 May 2015. He pointed out that the notes to the Directions provided that the Tribunal *"may decline to hear evidence which is not provided in accordance with the Directions below"*. Direction 7 of those Directions provided that the Respondents should by 26 June 2015 inter alia send to the Applicant any signed Witness Statements of fact. In accordance with those Directions a Witness Statement made by Andrew Simpson was subsequently served in June 2015. (It does not contain an exact date but it was not suggested that it was served after 26 June 2015.)

10 Further Directions were made by the Tribunal on 8 July 2015 which contained the same note referred to above.

11 Directions were again made by the Tribunal on 25 August 2015 which contained the same note and provided at Direction no.2 for the Respondents to send to the Applicant further legal submissions *"both in relation to variation of the Lease and estoppel by convention"*. Those Directions set out provisions for a response on the part of the Applicant, preparation of a Hearing Bundle and Skeleton Arguments.

12 Pursuant to the Directions of 21 May 2015, the Respondents served on the Applicant a Statement in response to the application, together with legal submissions which broke the Respondents' case down into three parts, the third of which was headed 'Convention'. However, following the Directions of 25 August 2015, the Respondents served further legal submissions which Mr Bowker said made allegations in relation to the Applicant's alleged conduct and sought to expand the arguments in relation to estoppel beyond estoppel by convention.

13 Further, the Respondents served the Witness Statements of Sarah Randall, Richard Philips and the second Witness Statement of Andrew Simpson in October 2015 without permission, all of which contained evidence, Mr Bowker said, which could have been adduced by 25 June 2015 and thus in compliance with the Direction of 21 May 2015. Upon being questioned by the Tribunal, Mr Bowker confirmed that the Witness Statements had been received by his Instructing Solicitor on 2 November 2015. Mr Bowker said he was not suggesting that he was prejudiced by the late service of the Witness Statements or by further arguments put forward by the Respondents that went beyond estoppel by convention.

14 Mr Bowker made reference to the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 and in particular to Rule 3(1) which provides that the overriding objective of the Rules was to enable the Tribunal to deal with cases fairly and justly, and to Rule 18(1)(c) which provides that the Tribunal may give Directions as to issues on which it requires evidence or submissions. That had been exactly, Mr Bowker said, what the Tribunal had done. That if the Respondents wished to depart from those Directions, they should have made an application to that effect. Mr Bowker accepted that if the Tribunal was of the view that in order to deal with the matter fairly and justly the said Witness Statements should be allowed in evidence, and that the Respondents should be allowed make submissions in relation to detrimental reliance going beyond estoppel by convention, then he would be in a position to proceed with the case without seeking an adjournment.

15 Mr Bromilow for the Respondents said that the question of prejudice went to the heart of the Tribunal's discretion in applying the overriding objective. That if the further arguments and Witness Statements produced by the Respondents added nothing to the arguments already put forward, there was no prejudice. That if they did add something, then in his submission it was just and right for the Tribunal to consider that evidence and submission so that it could reach a decision with the benefit of the full relevant facts. That justice could not be achieved if the Tribunal were to make a decision based on an incomplete set of facts. The evidence he submitted had been served in good time. That there was no prejudice to the Applicant. That had the

evidence been served at an earlier date, there would be no material difference as far as the Applicant's position and preparation for the hearing was concerned. It was not suggested on the part of the Applicant that it had insufficient time to prepare evidence in response. To not allow the Respondents to rely upon the said Witness Statements and to expand their arguments in relation to estoppel beyond estoppel by convention, would be as he put it, a triumph for procedure over fairness. Further that attempts to pigeon-hole different types of estoppel was, as he put it, an outmoded argument.

16 **The Tribunal's Decision**

17 The Tribunal noted that the Applicant, quite reasonably and fairly, did not contend that it suffered prejudice by reason of the late submission of Witness Statements or by reason of the apparent expansion of the Respondents' arguments in relation to estoppel. In the view of the Tribunal it was necessary, in order to deal with the matter fairly and justly, to allow the three further Witness Statements in evidence (although there was no attendance by Sarah Randall and as such that evidence as Mr Bromilow put it was no more than hearsay evidence) and for the Respondents to expand their arguments relating to estoppel beyond estoppel by convention so far as they purport to do so in their further written submissions and in oral submissions. Permission was therefore granted to allow the said witness statements to be adduced in evidence and for the Respondents submissions in relation to estoppel not to be strictly limited to estoppel by convention.

18 **Documents before the Tribunal**

19 The documents before the Tribunal comprised a bundle of documents of some 203 pages including Title documents, the Applicant's application, Directions, inter partes correspondence, Statements of Case, legal submissions, Witness Statements, board meetings of the Applicant company and correspondence between the Applicant's managing agents and third parties. The Tribunal also has had the benefit of Skeleton Arguments submitted on behalf of both parties and a bundle of legal authorities from each. References to page numbers in this Decision are references to page numbers in the said bundle of documents.

20 **The Statutory Provisions**

21 Section 168 of the Commonhold & Leasehold Reform Act 2002 provides:

"(1) A landlord under a long lease of a dwelling may not serve a Notice under section 146(1) of the Law of Property Act 1925 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.

(2) This sub-section is satisfied if –

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings or an arbitral tribunal in proceedings pursuant to a post dispute arbitration agreement, has finally determined that the breach has occurred.

...

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred".

22 **The Lease**

23 The Respondent's lease is dated 16 March 1979 and is made between:

"... Clyffe (London) Ltd of ... on the one part and Southern Circuits Ltd ... (hereinafter called 'the Tenant' which expression shall where the context so admits include the successors in title of the Tenant) of the other part".

The lease is for a term of 125 years from 24 June 1975.

24 By clause 3(6) of the lease, the Tenant covenants with the Lessor as follows:

"Not to assign, underlet or part with possession of part only of the demised premises".

As such, there is no prohibition against sub-letting of the whole of the demised premises.

25 By clause 3(8) of the lease, the Tenant covenants with the Lessor as follows:

"Within 21 days _____ next _____ after any transfer, assignment, underletting (whether mediate or immediate) or devolution of the demised premises or any part thereof to give notice in writing of such transfer, assignment or devolution and or the name, address and description of the transferee, assignee or persons upon which the relevant term or any part thereof may have devolved or of the lessee (as the case may be) to the Lessor and to produce to the Lessor the instrument of transfer, assignment or devolution or the Counterpart of the Lease and pay a fee of six pounds (£6.00) for the registration of such notice.

26 By clause 3(9) of the lease, the Tenant further covenants with the Lessor as follows:

"To insert in every under-lease or agreement for an underlease of the demised premises a covenant underseal by the underlessees or under lessee with the Tenant and with the Lessor and (so far as aforesaid) the tenants and occupiers of the other parts of the Buildingto observe and perform so far as the same are applicable thereto all the covenants conditions and provisions herein contained and on the part of the Tenant to be observed and performed and a condition of re-entry by the Tenant and the Lessor on breach of such covenant".

27 By clause 4(6) of the lease, the Tenant covenants with the Lessor and *"... with each Tenant of a flat in the Building ..."* as follows:

"At all times during the term to observe the regulations specified in the First Schedule hereto".

28 Clause 1 of the first schedule provides:

"That the demised premises shall be used and occupied as a private dwelling only for the sole occupation and use of the Tenant and the family of the Tenant".

29 Clause 15 of the first schedule provides:

"These regulations are intended for the common benefit of all occupiers of the Building and the Lessor reserves the right to make further regulations or to vary or amend any of the aforementioned regulations for the common benefit of all occupiers of the building PROVIDED THAT such further varied or amended regulations shall not be binding on the Tenant until the same shall have been notified to the Tenant in writing".

30 **Evidence**

31 The Tribunal heard oral evidence from Andrew Simpson and Richard Phillips (the owner of Flat 35 Viewpoint). The Tribunal also had the benefit of written Witness Statements from Mr Simpson Mr Phillips and Sarah Randall a letting agent (who was not present at the hearing) together with written Statements of Case, Skeleton Arguments and oral submissions made at the hearing on behalf of both parties.

32 Mr and Mrs Simpson purchased the Property on or about 27 April 2006. They did not purchase the Property as a buy to let property. Prior to April 2015 they had used the Property primarily as a holiday flat for themselves and their family. Historically their main place of residence had been in Hertfordshire until more recently when they had moved to Poole. Mr Simpson confirmed that at the time of their purchase they were represented by a solicitor. He did not have the solicitor's file. Mr Simpson said that he would have received advice about the Lease at the time of the purchase from his solicitor, but he could not recall exactly what that advice was. He could not recall whether or not he was advised as to what was meant by the word 'Tenant' in the Lease. He said that he remembered reading advice received from his solicitor about the covenants on the lessee's part contained in the Lease. Mr Simpson says in his first witness statement that it had always been his understanding that sub-letting to persons who were not members of the 'Tenants' family was permitted. That he had had numerous conversations with other flat owners to that effect. When pressed on this by Mr Bowker, he thought such conversations had taken place mainly at AGMs of the Applicant company which he had attended, in particular in 2007. That he had had conversations with other lessees and with occupiers of holiday flats. Save for conversations with Mr Phillips however, he struggled to identify to whom he had spoken, or

to recall when and what exactly had been said. That his understanding that sub-letting to persons who were not members of the lessees family was permitted had been held by him since he purchased the Property, or certainly from the best of his knowledge since the AGM in 2007. He referred in his first Witness Statement to a belief that in the region of 11 flats at Viewpoint were subject to sub-letting and not to members of lessees' families but was unable to identify those 11 flats. When pressed by Mr Bowker he said he could not with hand on heart say whether there were 2 flats or 11 flats. That his understanding (in his second Witness Statement) that some 60% of flats at Viewpoint were holiday flats arose from conversations that he had had at AGMs.

33 Mr Bowker referred Mr Simpson to the Minutes of the AGM of the Applicant company held on 2 October 2009 (page 186). Mr Simpson could not recall if he had seen the Minutes before but where there was reference at the start of the Minutes to 'apartments represented' the inclusion of flat 14 was a reference to him having been present at the AGM. He was referred by Mr Bowker to the penultimate paragraph on the first page of the Minutes which refers to the Applicant's solicitor taking Counsel's advice on whether or not it was possible to sub-let flats. Mr Simpson could not recall a discussion to that effect at the meeting nor could he recall whether the lessee referred to in that paragraph spoke up at the meeting. Nor had he seen any documents to the effect that the Applicant company's board had made a decision on whether non-family members would be permitted.

34 Exhibited to Mr Simpson's second Witness Statement (page 122) are what would appear to be examples of letting agents advertising flats at Viewpoint for letting as Mr Simpson put it in his second Witness Statement *"...plainly not to family members but to all and sundry which as I say has always been mine, my wife's and other numerous other lessee's at Viewpoint understanding"*. In oral evidence Mr Simpson said he was trying to get across the point that many flats at Viewpoint were sub-let. Mr Simpson said he had been to 7 or 8 AGMs over the years at none of which had it been suggested that sub-letting of flats to non-family members was illegal.

35 Mr Phillips said that prior to the purchase of his flat he had received legal advice both in writing and orally from his solicitors that the Lease, especially clause 1 of the Lease, was badly drafted and open to interpretation. He wanted certainty on the question as to whether or not he would be allowed to sub-let his flat. That was why his solicitors wrote to the Managing Agents Foxes which led to a response dated 15 November 2013 which was exhibited to his Witness Statement at page 137. The second paragraph in that letter states:

"Historically, the directors of Viewpoint had taken the view that the reference to the demised premises only being used and occupied as a private dwelling for the sole occupation and use of the tenant and family of the tenant meant that sub-letting was not permitted under the lease. However, they were challenged by one lessee whose solicitor argued the point that the tenant may also be a sub-tenant. From that point, the board has taken the view that sub-letting is permitted, and we enclose the form of regulation which they use prior to a sub-letting at the block".

Also exhibited to Mr Phillips' Statement was the form referred to which contains the date at its foot of March 2009.

36 Mr Phillips said that he had spoken to Mr Simpson in May 2015. That they had never met before. That he subsequently gave Mr Simpson a copy of the said letter from Foxes dated 15 November 2013. Mr Phillips says in his Witness Statement that he had historic correspondence and conversations with Foxes in relation to sub-letting of his flat to non-family members. He makes reference to two letters exhibited to his Witness Statement dated 5 February 2014 from a Mr S N Noden-Wilkinson of Foxes, one of which contains the statement:

"Should it be your intention to sub-let the property, I would be grateful if you would supply your contact address and telephone number. You will of course be liable for the actions of your sub-tenants and it will be your responsibility to ensure that they comply with the covenants in your lease".

He also makes reference to sending a copy of the sub-lease of his flat to Mr Noden-Wilkinson. He goes on to quote correspondence that he had with Foxes in February 2015 when Foxes suggested that if he was sub-letting to a non-family member, that he may be in breach of the terms of the Lease to which he responded referring to the Applicant company's form of regulation to sub-let (page 46) and denying that he was in breach. He says in his statement that he received no reply to that letter. Mr Phillips says at the end of his Statement at paragraph 8 (page 135) that no mention was made at the AGM of the Applicant company on 2 October 2015 about sub-letting.

37 **Submissions**

38 The submissions can conveniently on both sides, be divided into three:

1) construction/interpretation of the Lease;

2) variation (of paragraph 1 to the first schedule of the Lease pursuant to paragraph 15 of that schedule); and

3) estoppel.

39 The Tribunal has taken all submissions made by both parties both in writing and orally into account.

40 The submissions of the parties in summary are as follows:

41 **The Applicant's Submissions**

42 **Construction**

43 The Applicant says that the word 'Tenant' is not anywhere in the lease used to describe an under-lessee. That it cannot be used to describe the Respondents' tenant Mr Jorden. That the word 'Tenant' is used in the lease in four ways. It

is used to describe the original Lessee, Southern Circuits Ltd. It is used to mean Southern Circuits Ltd's successors in title. It is used to mean the Tenant for the time being of any flat and it is used to mean the Tenant for the time being for every other flat. It is not used interchangeably with a person occupying the demised premises pursuant to an under-lease. Consistent with that, Mr Bowker referred to sub-clause 3(8) where the word 'lessee' is used to describe an occupier occupying pursuant to the terms of an under-lease. That had the draftsman intended that such an occupier would fall within the definition of 'Tenant', he would have said so and not used the word 'lessee'.

44 Nor said Mr Bowker are the Respondents helped by the reference to 'Tenant' including successors in title. He places reliance upon the Upper Tribunal's Decision in **Flat 21, Courtney Gate** (2012) UKUT 125(LC) and on **Souglides v Tweedie & Another** (2013) CH 393 (CA) to the effect that the term 'successor in title' does not in its usual usage include a sub-lessee.

45 As such Mr Bowker says that 'Tenant' does not include a sub-tenant who is not a member of the Tenant's family. Thus occupation by Mr Jorden who is not a member of the Respondent's family is a breach of regulation 1 to the first schedule of the lease.

46 The Lease, the Applicant says, works. The Flat has to be occupied by the Respondents and their family. It can be occupied by a sub-tenant as long as the sub-tenant is a member of the Respondents' family.

47 The Tribunal, said Mr Bowker, is bound to follow the Decision of the Upper Tribunal in **Aaron William M Burchell v RAJ Properties Ltd** (2013) UKUT 0443 (LC), which on similar facts held that subletting could only be to a member of the lessees family.

48 The Upper Tribunal was not referred in that case to the earlier unreported decision of **Platform Funding Ltd v Miller Parris** (2012). A decision of the High Court. That is considered further below but appears contrary to the Decision in Burchell. Mr Bowker said that the Tribunal must follow the Decision of the Upper Tribunal in Burchell and it is not for the Tribunal to make a ruling as to whether the Decision in Burchell was made *per incuriam*.

49 Mr Bowker accepted that this is a difficult case, that the arguments are finely balanced. He suggested a possible reason for the restriction at Regulation 1 to Schedule 1 was to allow a sense of community at Viewpoint to be preserved. That he suggested might be a rational reason for the restriction.

50 The lease the Applicant says works perfectly well with the restriction imposed by Regulation 1 in Schedule 1 in place. That this is not a case in which the construction contended for by the Respondents is necessary to rescue the Lease from ambiguity. That this is not a case (as in **Chartbrook Ltd v Persimmon Homes Ltd** (2009) UKHL 38 where the wording of the lease is ambiguous to such a degree that the Tribunal should depart from it. That it is not irrational to have a lease which allows sub-letting of the whole but which restricts any sub-letting to members of the lessee's family.

51 **Variation**

52 The Respondent Mr Bowker said cannot rely upon Regulation 15 to the First Schedule to the effect that there had been a variation of Regulation 1 to remove the family restriction. That if the lessor wished to vary a regulation that had to be made in writing to all lessees so the variation or amendment would be mutually enforceable and operate for the common benefit. That written notice had not to that effect been given to all lessees. That the letter relied on by the Respondents dated 15 November 2013 from the Managing Agents Foxes to D Fisher & Co Solicitors (page 44) did not constitute written notice for the purpose of a variation pursuant to Regulation 15.

53 Mr Bowker invited the Tribunal to read that letter as meaning that the lessor had previously, wrongly, understood that sub-letting was not permitted at the property at all, but now agreed that sub-letting could take place albeit within the lessee's family.

54 Mr Bowker referred to the form attached to the said letter (page 46) which is headed '*Viewpoint Ltd Form of Regulation to Sub-Let at Viewpoint*'. He said that he suspected, although he had no evidence to that effect, that this was a pro forma document. That you would not normally expect provision for the name of letting agents to be included on the form if a letting was to be to a member of the lessee's family. That nonetheless, the letter and form taken together were not effective in his submission for the purpose of constituting a variation in accordance with Regulation 15.

55 Mr Bowker referred to the Respondents' Statement of Response (pages 82-84), in particular to paragraphs 6 and 7 of that Response. The reference in paragraph 7b to '*numerous others*' being allowed to sub-let to sub-lessees who were not members of the lessee's families was not borne out he said by the evidence given by Mr Simpson and by Mr Philips or by the documentary evidence. The reference in 7b to '*policy*' was no more than a reference to the lessor's decision that sub-letting, albeit to a member of the lessee's family, was permitted and which gave rise to the letter of 15 November 2013 and the form attached to it.

56 Mr Bowker referred to the Minutes of an AGM of the lessor company held on 2 October 2009 (page 186) where in the penultimate paragraph of the first page of the Minutes it is stated:

"The company's solicitors who have taken counsel's advice advise that the lease was not clear but it was probably not possible to prevent sub-letting on an assured tenancy. This conflicted with the advice given to one lessee by his solicitors when he purchased his flat".

That did not mention the word 'family'. It was no more than a reference to advice received that sub-letting was permitted. It did not go as far as saying that sub-letting was permitted to sub-lessees outside of the lessee's family.

57 In summary, it is the Applicant's case that there was no evidence that there had been an effective variation of regulation 1 so as to permit subletting to

non-family members compliant with regulation 15 to the first schedule of the lease.

58 **Estoppel**

59 For there to have been an estoppel by convention, Mr Bowker submitted, mutuality of consent was required. He referred to '*The Law Relating to Estoppel by Representation*' 4th (current) edition by Spencer Bower where at 12.8 it is stated:

"An estoppel by convention is an estoppel by representation of fact, proprietary estoppel or promissory estoppel in which the relevant proposition – that is, the proposition from which a party is to be estopped from departing – is communicated, not by representation of fact or promise but by one party to another, but by mutual assent. By reason of this consensual foundation, many estoppels by convention properly analysed, are not true estoppels but estoppels that bind by contract, the parties to the convention having expressly or impliedly agreed that their relations are to be governed in accordance with a particular proposition, and consideration for the agreement of each lying in the agreement of the other thereto: if consideration is given, then there is no need for detrimental reliance to found the estoppel".

60 There is not in this case, the Applicant says, an agreement sufficient upon which estoppel by convention can be founded. The letter of 15 November 2013 is not an agreement to sub-let to non-family members. It does not say that. It simply provides that sub-letting is permitted (as the lease already provides). That there was nothing to suggest the necessary meeting of minds to establish an estoppel by convention.

61 Further, the Applicant says that as regards the Respondents arguments as to detrimental reliance that they have a difficulty with timing. The letter of 15 November 2013 was not addressed to them. Indeed Mr Simpson's evidence was that although he could not be sure as to the first time he saw that letter, he thought it may have been in May or June 2015. Nor had he spoken to Mr Phillips (who had that letter) until May 2015. That it was in April 2015 that the Respondents sub-let their flat to Mr Jorden. Therefore in doing so the Respondents could not have relied upon that letter.

62 That there was no evidence of widespread sub-letting which would be sufficient to establish the necessary common assumptions for the purposes of establishing estoppel by whatever means.

63 It was relevant Mr Bowker said as to how the Respondents put their case in relation to detrimental reliance using what he describes as 'the colourful language' in the Respondents' submissions. The evidence he submitted did not bear that out. There was no evidence that the Respondents had been misled or misinformed. There was no evidence of wholly unconscionable conduct. That in all the circumstances, Mr Bowker submitted the Respondents' estoppel argument failed.

64 **The Respondents' Submissions**

65 **Construction**

66 There is, say the Respondents, an obvious tension between the lack of prohibition against sub-letting of whole with Regulation 1 in the First Schedule of the Lease restricting the use of the flat to the Tenant and the Tenant's family particularly if that Regulation is interpreted in the manner contended for by the Applicant. That although in theory on the Applicant's interpretation sub-letting would still be possible, it would only be possible to a member of the Tenant's Family which was something that in practice would never take place.

67 The Respondents say the usual principles of construction and interpretation apply. The lease must be read as a whole and interpreted in light of the factual matrix at the time that it was drafted.

68 The Respondents say that the Applicant's interpretation is absurd. However, the Tribunal did not need to find that the Applicant's interpretation was absurd or ridiculous, just that the Respondents' interpretation was the better of the two. That it was clear from the authorities that the Lease should be interpreted in accordance with common-sense in a way which did not result in a conclusion that offended common-sense. Mr Bromilow referred to **Rainy Sky S.A. v Kookmin Bank** (2011) UKSC 50 and in particular to the judgment of Lord Clarke at paragraphs 14 and 21.

69 The reality say the Respondents, is that the Applicant by contending that sub-letting is not permitted save to family members is saying that sub-letting is not allowed.

70 That apparently unambiguous wording can be corrected by proper construction as per Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd** (2009) 1 AC 110 at 25 *"It should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant".*

71 This is a matter, say the Respondents, where the contra proferentem rule is useful.

72 The issue is what is meant by the word 'Tenant'. That the definition at the start of the Lease is not exhaustive. It contains the word 'include'. That as such, it remains open for the term 'Tenant' to be used in a wider meaning. For example, in **Adelphi Estates v Christie** (1983) 47 P & CR 650 where the term 'landlord' was held in one particular incidence to include a superior landlord.

73 That it is relevant that the original Lessee, the original Tenant, under the terms of the Lease was a limited company. That, say the Respondents, is part of the matrix of facts against which the Lease falls to be interpreted. That suggests that the interpretation contended for by the Applicant must be

wrong. The original Tenant as a limited company could not have used the property in any way for the sole occupation of it and its family.

74 That if the term 'Tenant' is treated as including a sub-tenant, then the apparent tension referred to above is resolved.

75 As to the Burchell case, the Tribunal say the Respondents should prefer the High Court Decision in Platform Funding.

76 In Platform Funding, a case which was decided before Burchell on very similar facts, the court construed the word *'Tenant'* as including a sub-lessee. That the court took note of the fact that the definition of 'Tenant' was not exhaustive but inclusive.

77 Mr Bromilow accepted with reference to Flat 21 Courtney Gate and Souglides v Tweedie the meaning of the expression 'successors in title' contended for by the Applicant. He accepted the Applicant's contention that the word 'Tenant' had four different meanings at different parts of the Lease. Why, he suggested, should there not be a fifth meaning if that made sense.

78 That accordingly if the Tribunal accepted that the word 'Tenant' included a sub-Lessee there was no breach on the Respondents part of Regulation 1 in Schedule 1.

79 **Variation**

80 Regulation 15 of the First Schedule to the Lease allows the Lessor power to vary and amend the Regulations. The question for the Tribunal is, did that happen? It was possible, Mr Bromilow said, to put together a coherent storyline. That historically the Applicant had permitted sub-lettings and even provided a form upon which details of a sub-Lessee should be provided.

81 That the history from the documents appeared to be:

a. In December 2008 the Managing Agents Foxes were instructed to write to the owner of Flat 53 to prevent the Flat from being sub-let (Viewpoint Ltd Board Meeting 5 December 2008 (page 165)). The letter then written is assumed to be the letter at page 191 dated 24 November 2008 to Mr Spector of Flat 53 which states:

"We regret to inform you that under-letting of the flats at Viewpoint is prohibited by the Lease and we have, this morning, informed Belvoir Lettings in Wimborne".

The letter goes on to refer to and quote Regulation 1 of the First Schedule.

b. At page 192 is a letter from Foxes to Anglotown Letting Agents dated 14 January 2009, again making the point that the under-letting of flats was prohibited but endorsed upon the bottom of the letter is a handwritten note that reads:

"14/1/09 – received a call from Mr Spector F53. It is his flat and his legal advisers say he is able to sub-let under the Lease. – Copy Lease sent to Ruth today".

c. At page 193 is a further letter from Foxes to Mr Spector of Flat 53 dated 15 January 2009 which states:

"... I have been asked by the directors for you to confirm in writing your understanding of the advice provided by your solicitor. Alternatively a letter from your solicitor providing his opinion would suffice. Specifically the directors wish to know on which clauses you are relying to allow sub-letting of your flat".

d. At 194, a letter from Mr Spector to Foxes dated 25 February 2009 in which he states:

"My Solicitor has assured me that my Lease allows for me to have a Tenant in the flat if I so wish. I am advised that Schedule 1 clearly allows for me to rent my flat".

There is a handwritten note at the bottom of the letter which reads:

"27/2/09 – Phoned Mr Spector and confirmed receipt of the letter and that Viewpoint advisers confirm letting is not prohibited".

e. At 198 is a letter from Foxes to Mr Spector dated 6 March 2009 which states:

"It is understood that you may have recently moved out of the property and are due to have tenants moving in shortly. I would be grateful if you would supply correspondence address and contact telephone number for you whilst you are not in residence".

f. At page 199 is a further letter from Foxes to Mr Spector dated 30 March 2009 requesting Mr Spector to complete the enclosed *"form of regulation to sub-let at Viewpoint"* and to return it. At page 200 is the completed form dated 1 April 2009.

g. At page 186 are Minutes of Viewpoint Ltd AGM dated 2 October 2009 which has been referred to above.

h. In March 2014, Mr Phillips sub-let his flat having first been in correspondence with the Managing Agents Foxes and also having spoken to a Mr Patrick Cauldwell of the Applicant company of his intention to sub-let his flat.

82 Consistent say the Respondents with the Applicant's acceptance of the right of lessees to sub-let (to include a non-family member) are details of flats being marketed to let exhibited to Mr Simpson's second Statement of 24 October 2015 including an advertisement placed by the Applicant's own Managing Agent Foxes (pages 125-130). It is clear Mr Bromilow said that after 2009 the

Applicant took the view that it could not prevent sub-lettings and sub-lettings did take place. That the evidence taken as a whole points to a conclusion that following advice taken, the Applicant took the view that it could not and would not enforce Regulation 1 to the First Schedule.

83 **Estoppel**

84 The issue of estoppel, Mr Bromilow, said was fact-dependent. Mr Simpson's evidence was that he was aware that flats were being sub-let. He was aware that sub-letting was permitted. That it was on that basis that he granted the sub-tenancy to Mr Jorden. That estoppel was not, he suggested, a difficult concept. Mr Simpson had been at the AGM of the Applicant company on 2 October 2009 where it was minuted that on Counsel's advice, '*it was probably not possible to prevent sub-letting on an assured shorthold tenancy basis*'. That Mr Simpson had relied upon that.

85 Distinctions as to the type of estoppel are, the Respondents say, immaterial. Mr Bromilow referred to **Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd** (1981) 2 WLR 576 in particular to the judgment of Oliver LJ at 593.

86 In short, the Respondents say the Applicant has allowed sub-lettings to non-family members and in doing so has encouraged lessees such as the Respondents to believe that was permitted. That the Applicant is now seeking to reverse its position notwithstanding the fact that the lessees have acted to their detriment by granting sub-leases to non-family members. Conduct, the Respondents say, which is wholly unconscionable and inequitable.

87 **The Tribunal's Decision**

88 **Construction**

89 In **Rainy Sky S.A. v Kookmin Bank** (2011) UKSC 50, Lord Clarke at paragraph 14 made reference to the principles to be applied in the construction of a contract. He said "*... the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffman made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*".

90 Further, at paragraph 21, Lord Clarke said:

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would

reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common-sense and to reject the other".

91 That does not mean that a Court or Tribunal should look to interfere with the wording in a contract when that wording is clear and unambiguous albeit giving rise to a surprising or unreasonable result. As Lord Hoffman put it in **Persimmon Homes Ltd** (2009) UKHL 38 at paragraph 20:

"It is of course true that the fact that a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says".

92 In **Burchell v RAJ Properties Ltd** the Upper Tribunal addressed the question *"If a lessee covenants to use a flat as a private dwelling for himself and his family and for no other purpose, is he thereby precluded from sub-letting the flat to a person who is not a member of his own family?".*

93 In Burchell, the lease was of a third floor flat for a term of 99 years from 31 December 1987. It contained a covenant between the lessee and the lessor *"to use the flat as a private dwelling for the lessee and his family and for no other purpose".* There was no restriction against sub-letting.

94 At paragraph 29 the Deputy President said:

"In any issue of interpretation the starting point must be to consider the natural or ordinary meaning of the words to be construed, read together with the whole document in which they appear, and having regard to all of the relevant circumstances of the transaction which would have been known to both parties. Only in the event of real ambiguity which conventional methods of construction are incapable of resolving, is it permissible to resort to the convenient but artificial approach of construing the document against the interests of the party who is presumed to have drawn it up".

A reference to the contra proferentem rule.

95 At paragraph 33, the Deputy President said:

"The absence of an express covenant against sub-letting does not require that a strained or restricted meaning must be given to any other covenant the natural effect of which is to limit the category of persons by whom, or the circumstances in which, the premises may be occupied".

96 At paragraph 22, reference is made to **Sweet & Maxwell Ltd v Universal News Services Ltd** (1964) 2 QB at page 737 where Buckley LJ said:

"To underlet is an important incident of the normal property right which belongs to a tenant; it is one of the ways that he can turn his property to

good account and make it profitable to himself; and as a matter of construction I think a tenant should not be treated as deprived of that right except by clear words or circumstances that make it clear that the parties so intended".

97 In **Platform Funding Ltd v Miller Parris** (2012) unreported, on similar facts His Honour Judge Havelock-Allan QC sitting as a High Court Judge came to a different conclusion to that of the Deputy President in the Burchell case, albeit in the context of a summary judgment application. The Tribunal has the benefit of a copy of the approved judgment in Platform Funding.

98 In Platform Funding the lease was dated 9 September 1983 for a period of 99 years. The recital contained the words *"The Tenant shall include his executors, administrators and assigns".* At clause 3 the Tenant covenanted *"... to keep and use the demised premises as and for a private residence for the sole occupation of the tenant, his family and members of his household and for no other purposes whatsoever".* There was no provision against sub-letting. The lessee sub-let to a sub-lessee who was not a member of his family. In paragraph 53 the Judge said:

"I start from the basic principle that a lessee is entitled to sub-let unless by clear words this right is circumscribed or excluded. The lease contains no provision which expressly curtails this right. On the contrary, clause 3(xiii) presupposes that a sub-term may be created ... The only justification for interpreting clause 3(xiv) in restricting the right to sub-let is the reference to 'Tenant'. However, the definition in recital (1)(B) is not exhaustive but inclusive. In the case of any lease where a sub-letting is not expressly prohibited, a reference to the tenant will be understood as also including any sub-tenant presently having the right of occupation ... If the premise is that the Tenant has the right to sub-let, it would be strange if the user covenant had the effect of drastically cutting down that right simply by requiring the property to be used as a private residence for the sole occupation of the Tenant. I construe 'Tenant' in clause 3(xiv) as meaning the person for the time being with the right of occupation under the Lease or any sub-lease".

99 At paragraph 29, the Judge stated with reference to Woodfall at para 16.1.5.6 that:

"It is a basic principle of law that a lessee has power to sub-let, unless expressly precluded by the terms of the lease from doing so".

100 The Tribunal notes that there is in this case an express restriction on alienation at clause 3(6). That prevents under-letting of part only. If the intention had been for there to be a form of restriction on the power to sub-let whole, then one would have expected to have found such restriction to that effect in the same part of the Lease.

101 Reading the lease as a whole, the Tribunal has regard to clause 3(9) (page 14). This provides that any under-lease will contain a covenant on the part of the sub-lessee to observe and perform the covenants, conditions and provisions contained in the Lease on the part of the Tenant. In the view of the Tribunal,

that restriction is in place clearly to ensure that those occupying the Property are closely bound to the Lease by ensuring that any sub-tenant is bound by the covenants in the Lease to the same extent as the Tenant is. The Tribunal asks itself what is the mischief that the original parties to the Lease were intending to address by the inclusion of the restriction that the Property could only be occupied by members of the Tenant's family. Mr Bowker suggested that it was to allow a sense of community at Viewpoint to be preserved. That may be right. More particularly, in the view of the Tribunal, the original parties intended to ensure that the Property was only occupied from time to time by a single family. That it could not be occupied by lodgers, by students, or by members of different families. That mischief is addressed by requiring a sub-lessee to covenant, to observe and perform inter alia the restrictions in Schedule 1 to the Lease, including the restriction that the property can only be occupied by the members of one family.

102 It is relevant in the view of the Tribunal that the original lessee was a limited company; Southern Circuits Ltd. A corporate lessee has no family. In that context, a provision that the Property may be occupied only by the Tenant and the family of the Tenant makes no sense.

103 The Tribunal has regard to the fact that the definition of 'Tenant' in the recitals is inclusive not exhaustive.

104 The Tribunal notes that in Burchell, there was no restriction at all on sub-letting. Nor it appears was there provision requiring every sub-lessee to enter into a covenant in similar terms to that set out in clause 3(9) of the Lease. Further, the original Lessee, Southern Circuits Ltd, is a corporate entity whilst the lessee in Burchell was not.

105 The Tribunal must consider the entire matrix of facts. It must consider the Lease as a whole. It bears in mind the statement of Buckley LJ in Sweet & Maxwell Ltd v Universal News Services Ltd to the effect that for a tenant to be deprived of the right to sub-let clear words or circumstances must be used to make it clear that is what the parties intended.

106 In all the circumstances, in the view of the Tribunal, reading the Lease as a whole and considering the entire matrix of facts, a reasonable person with all the background knowledge which may reasonably have been available to the original parties to the Lease at the time that it was entered into, would conclude that the interpretation contended for by the Respondents is correct. That the non-exhaustive definition of 'Tenant' includes sub-lessees. That the intention of the original parties was simply to prevent the Property being occupied at any given time by more than one family and to ensure that any sub-tenant is bound to observe the same covenants as the head tenant.

107 It follows that there is no breach of the restriction at paragraph 1 of the First Schedule to the Lease because there is no evidence that the Property is occupied otherwise than by Mr Jorden and his family. For the sake of completeness, if the Tribunal is wrong in its construction of the Lease, it went on to consider the other two heads of the Respondents' case, namely that Regulation 1 had been varied or that the Applicant was estopped from

claiming that the Respondents were in breach by sub-letting to someone who is not a member of their family.

108 **Variation**

109 The Respondents contend that in the alternative, there has been a variation of Regulation 1 of Schedule 1 by reason of Regulation 15 to permit sub-letting to sub-lessees who are not members of the Tenant's family. That that is the meaning of the letter of 15 November 2013 (page 44). That is consistent with the historic events, in particular with the AGM of the Applicant company on 2 October 2009 where reference was made to legal advice having been taken to the effect that it was not possible to prevent sub-letting on an assured shorthold tenancy. It was also consistent with evidence of properties being marketed for letting.

110 Regulation 15 allows the Applicant to vary or amend the Regulations set out in Schedule 1. The question is, did it do that? In the Tribunal's view, neither the Minutes of the AGM in October 2009 nor the letter of 15 November 2013 are sufficient to effect such a variation. They do not say that it is intended that the Regulation should be amended or deleted. The AGM Minute is simply a re-statement of the Landlord's understanding of the existing Regulation, not that the Regulation was being changed in any way. The Tribunal therefore finds against the Respondents on this point.

111 **Estoppel**

112 The Respondents say that the Applicant is estopped from alleging a breach of the covenant. The reality say the Respondents is that the Applicant has permitted sub-lettings to non-family members.

113 The Applicant says that there is insufficient evidence to establish the necessary common assumptions for the purposes of an estoppel by whatever name. That there is not the necessary meeting of minds. That as at the date that the Respondents sub-let their flat to Mr Jorden there was insufficient evidence to show that they had been misled or misinformed and as such relied upon representations or conduct to the effect that sub-letting to a non-family member would be permitted.

114 The Tribunal takes a broad approach to the issue of estoppel. Has the Applicant knowingly or unknowingly allowed or encouraged the Tenants at Viewpoint including the Respondents to act to their detriment by sub-letting to non-family members? In those circumstances, would it be unconscionable for the Applicant to be permitted to deny what it has allowed or encouraged? As such, is the Applicant estopped from contending that sub-letting by the Respondents to Mr Jorden is a breach of Regulation 1 to Schedule 1?

115 As Oliver LJ said in Taylor Fashions at 593:

"... the application of ***Ramsden v Dyson*** *LR 1 HL 129, a principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement, is really immaterial –requires a very much broader*

approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some pre-conceived formula serving as a universal yard stick for every form of unconscionable behaviour".

116 The Tribunal has considered the evidence as a whole. Mr Simpson says in his first Witness Statement at paragraph 2 (page 53) that it has always been his understanding that sub-letting to non-family members was permitted. When questioned about this by Mr Bowker, he said that by *"always"* he meant since he had owned the flat and to the best of his knowledge, since the Applicant's AGM in 2009. He referred to conversations with Mr Philips. Mr Simpson was at the AGM on 2 October 2009 (page 186) when it was reported that the Applicant's solicitors had taken Counsel's advice and the advice was that *"... the lease was not clear but that it was probably not possible to prevent sub-letting on an assured shorthold tenancy".* Given that the lease does not prohibit sub-letting as a whole, it is not unreasonable in the view of the Tribunal for that statement to be taken to mean that sub-letting as a whole to non-family members was permitted.

117 Exhibited to Mr Simpson's second Statement are adverts placed by letting agents for tenancies of flats at Viewpoint dating from 2009 to 2014. There is even an advert placed by the Applicant's own managing agents.

118 The Applicant has asked lessees who wished to sub-let to complete a form headed *'Form of Regulation to Sub-Let at Viewpoint'* (page 46) which the Tribunal notes has a date at the bottom of March 2009. That form seeks details of the proposed sub-tenant including the name of the letting agents involved. If sub-letting was restricted just to family members of the 'Tenant', it is unlikely that there would be any need for the Applicant to ask for details of letting agents. That the form in the view of the Tribunal is entirely consistent with the Applicant permitting sub-letting to non-family members.

119 Mr Philips' evidence was that prior to purchasing his flat, he was concerned to ensure that he would be allowed to sub-let to non-family members. He refers to correspondence with and conversations with Mr Noden-Wilkinson of the Applicant's management company in which he discloses his wish to sub-let, discloses details of his tenants, and sends a copy of the sub-tenancy to the agents.

120 Taken together, there is in the view of the Tribunal clear historic evidence of the Applicant permitting or at least allowing sub-letting to non-family members and of 'Tenants', including the Respondents being aware or being given to understand that sub-letting to non-family members was allowed. That in reliance thereon the Respondents sub-let the property to Mr Jorden.

121 That in all the circumstances, it would be unconscionable for the Applicant to deny that it has allowed 'Tenants' including the Respondents to sub-let to non-family members. That accordingly the Applicant is estopped from contending

that sub-letting by the Respondents to Mr Jorden is in breach of Regulation 1 to Schedule 1 of the Respondent's lease.

122 General Concluding Comment

123 It is evident that the Applicant has been confused and confusing in its understanding of the provisions of the Lease, which, it is accepted, is not happily drafted. In the view of the Tribunal, the Applicant has taken different stances to sub-letting at different times. Even now, they seem to have singled out the Respondents and taken proceedings against them whilst seemingly not taking action against other lessees who have sub-let or have their properties on the market for sub-letting. The Tribunal strongly suggests that they take a clear and consistent view on unrestricted sub-letting and communicate this to the lessees.

124 Although Mr and Mrs Simpson have succeeded in fending off the application, that they have breached the Lease by sub-letting to someone other than a member of their family, it could be a Pyrrhic victory. The Tribunal has not seen the terms upon which the sub-letting to Mr Jorden was effected, nor did the Applicant seek disclosure of the same. It is not known, therefore, whether the sub-letting did contain a covenant as required by clause 3(9) of the Lease. As the Applicant did not claim that there was a breach of the Lease in that respect, it was not necessary for the Tribunal to have made any determination on the point. However, any future sub-lettings by them and other lessees of Viewpoint, would have to contain such a covenant. Prospective sub-tenants on short term, assured shorthold tenancies, may not be prepared to accept such a covenant.

125 Conclusion

126 For the reasons stated, the Tribunal determines that the Respondents are not in breach of the terms of their Lease of Flat 14, Viewpoint, Sandbourne Road, Bournemouth by sub-letting the Property to a sub-tenant who is not a member of their family.

Dated this 6th day of January 2016

Judge N Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.