Estoppel and Residential Leases

Philip Sissons, Falcon Chambers, 4th July 2017.

Introduction

1. I have been asked to take as my topic, estoppel and residential leases. That topic, I presume, has been suggested by a recent spate of decisions in the Upper Tribunal which have applied the doctrine of estoppel by convention in the context of service charge disputes.

2. In those cases, the most recent of which Jetha v Basildon Court Residents Co Ltd was decided in February, the Tribunal has examined the extent to which estoppel might be relied upon to vary or limit the scope of obligations imposed by the strict terms of the leases.

3. As these cases demonstrate, there is considerable scope for estoppel (in its various different guises) to be deployed in disputes concerning residential leases and, in particular, service charges.

4. This is not least because, in my experience, managing agents responsible for administering service charge regimes are not necessarily to be relied upon for a scrupulous application of the provisions of the lease which they are required to

administer. Quite often, it seems, costs are apportioned, demands are issued and accounts prepared without anyone having read the leases properly.

5. In most cases this is unlikely to cause much difficulty, particularly in small blocks. Long residential leases, at least modern ones, are relatively uniform in the mechanism created for recovery of service charges. Furthermore, most leaseholders, most of the time, are not particularly interested in the minutiae of the lease terms as to, say, the basis of apportionment between tenants or the precise form of a certificate issued by accountants.

6. It is only when a dispute arises (usually as a result of an entirely separate complaint, or, often, simply because a tenant cannot afford to, or just won't pay) that scrutiny falls upon whether the practice adopted in the management of a block properly accords with the mechanisms laid down in the lease. A minor discrepancy (failure to issue a demand within a strict time limit, say) can have significant consequences for a landlord by rendering service charges irrecoverable altogether, whereas compliance would have little practical benefit for the tenant.

7. In such a situation, the defence often put forward (whether by the tenants, to resist payment or by the managing agent to justify the demands raised) is the simple cry of fair play; which distilled to its essentials goes as follows 'well, we have always done it like that and no-one has ever complained about it before'.

8. It is extremely difficult to imply a variation of a lease by conduct because a long residential lease is invariably made by deed and, accordingly, any variation of its

terms must also be made by deed to be effective. The law's response to long established practice is, in an appropriate case, to find that some species of estoppel, or its close cousin waiver, has arisen.

9. In this talk I intend to first, very briefly and at the risk of some oversimplification, explain the key ingredients of the three main forms of estoppel that are encountered in practice. These are proprietary estoppel, promissory estoppel and estoppel by convention.

10. I will then examine the recent decisions concerning estoppel by convention. My broad conclusion from these cases is that the circumstances in which estoppel by convention can be relied upon to effectively vary the terms of a long lease are limited. It will be a relatively rare case where the conduct of the parties, even longstanding and consistent practice, will trump the proper construction of the lease.

An overview of estoppel

11. It is of course a familiar refrain to say that estoppel is a broad concept which encapsulates a number of distinct doctrines. It is not always easy to distinguish between the different types of estoppel and the same set of facts might be said to give rise to more than one.

12. This is perhaps because, in the widest sense, estoppel is the response of equity to perceived unfairness arising out of expectations created by the words or conduct of

one party to another coupled with the reliance by the other party on that expectation. It is therefore flexible and the courts have, over the years, made full use of that flexibility to meet the merits of the particular case.

13. In residential landlord and tenant practice, however, there are three main types of estoppel which are frequently encountered. These are closely related.

14. The first is proprietary estoppel. This involves the owner of land encouraging another (by words or conduct) to believe that he has or will in the future acquire some right or benefit over his property. If the other acts to his detriment in reliance upon that expectation the court will give effect to it by granting the right or interest in question if it would be unconscionable for the landowner to deny it.[1]

15. Each element of that test has been the subject of scrutiny in a considerable body of authority. However, proprietary estoppel is unlikely to arise in service charge disputes and only relatively infrequently in other disputes between landlord and tenants of residential property. These cases do not often involve issues of property rights, although there are exceptions. For example, a tenant might claim that a storage cupboard or loft space has been incorporated in the demised premises because the landlord has encouraged the tenant in that belief.

[1] See *Megarry & Wade,* The Law of Real Property, *8th Ed.* Para. 16-007

16. Second, is promissory estoppel (sometimes called estoppel by representation). The ingredients are broadly the same as proprietary estoppel, save that there is no proprietary interest in issue.

17. Thus, this species of estoppel requires that there has been a promise or representation by one party that he or she will not enforce strict legal rights arising under a contract or otherwise, coupled with detrimental reliance by the other party.[2]

18. The key factor which distinguishes (and limits) promissory estoppel is that it cannot be relied upon to create new rights; it does not create a cause of action but only a defence. Accordingly, to take a very simple example it could not be said that a tenant is liable to pay service charges by virtue of promissory estoppel merely because he has always paid them before and the landlord has detrimentally relied on the implied representation that the tenant is liable to continue providing services. That would be to create a new right where none otherwise exists.

19. Third is estoppel by convention. This is the doctrine which appears has been deployed in the four recent cases which I am going to consider, so I will examine the ingredients in a little more detail.

20. The central idea is a shared or common assumption as to the facts or law made between two parties, upon which both parties have acted and from which it would therefore be inequitable for either to resile. The leading authority is a decision of the

[2] *Chitty on Contracts, 30th Ed*. Para. 4-08 *et seq*

House of Lords, Republic of India v India Steam Ship Co Ltd [1998] AC 878. In that case, Lord Steyn described the doctrine as follows:

> *"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 acts on an assumption not communicated to the other. But… a concluded agreement is not a requirement."*

21. It will probably be immediately apparent from that quotation where the ambiguity in applying the concept often arises. A shared assumption without communication is not enough, but a concluded agreement is not required. That does not tell us what is required, only what is not. That problem, as we shall see, has loomed large in the four cases I will discuss and has caused, what I will respectfully suggest, is some inconsistency in the decisions.

22. The most authoritative attempt to answer this question is provided by the judgement of Briggs J in HMRC v Benchdollar Ltd [2009] EWHC 1310, in which he formulated five principles, 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 on 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."

23. Before turning to our four cases, I must mention, very briefly, two other doctrines, which are closely related either conceptually or by terminology.

24. First, there is waiver. This is the principle that a party that by words of conducts indicates to the other that he will not rely upon his strict rights can, in appropriate circumstances, be prevented from doing so. It will be familiar from forfeiture cases and is closely related to estoppel by representation, indeed often indistinguishable.

25. Second, issue estoppel or *res judicata*. This principle is rather different, since it does not rely upon representation or detrimental reliance. Rather, it is the rule that prevents a party from advancing in litigation an argument that has (or could have been) already determined in an earlier case. It is really linked to the other forms of estoppel by name only.

The four decisions of the Upper Tribunal

26. I now turn to the four recent decisions of the Upper Tribunal dealing with the question of estoppel by convention, taking them in chronological order.

i) *Clacy v Sanchez* [2015] UKUT 0387

27. The first decision is Clacy v Sanchez a decision of tribunal Judge Edward Cousins. This case concerned a small block of four flats let on long leases. The First Tier Tribunal had held that one of the tenants was under no obligation to pay any of the service charges which were in dispute. This was because the lease in question required as a condition precedent to a valid demand that the costs included had first been certified by an accountant.

28. The first issue in the appeal, therefore, was whether or not certification was a genuine pre-condition on a true construction of the lease. That can be is a tricky topic in itself, but one which is outside the scope of this talk.

29. In short, Judge Cousins held (overturning the FTT) that the lease provisions in this case did not make certification a pre-condition to a valid demand and that it was therefore open to the landlord to comply by providing a certificate at some later time.

30. However, the landlord also argued that if certification was strictly required under the lease, the tenant was nevertheless obliged to pay because there had arisen an estoppel by convention. The convention was that no certificates would be provided by the landlord and everyone had been content to proceed on the basis of that convention for around 19 years, before the tenant challenged the assumption.

31. The landlord relied upon a meeting that had taken place in 1993, shortly after it had purchased the freehold and the management company previously responsible for administering the service charge had been dissolved.

32. The landlord was able to satisfy the Upper Tribunal on the evidence that at that meeting 19 years before the service charge year in question, the then tenants had all agreed with the landlord that only demands would be sent out and if any lessee wanted to see details of the expenditure, they would ask for it. Based on the agreement reached at that meeting, the landlord had continued to send out demands, without engaging an accountant, for a period of 19 years and this practice was never challenged.

33. The landlord argued that this gave rise to an estoppel by convention which was binding upon the current tenant. The judge accepted this submission. After referring to the decision in The Republic of India v India Steamship Co Ltd, from which I have already quoted, the judge said, simply and without further analysis, that he was satisfied:

> *"…that there has been a course of conduct which constitutes an equitable estoppel by precluding the Respondents from seeking to assert that there should now be a certification process in accordance with the terms of the* [Lease]*."*

ii) Admiralty Park Management Co Ltd v Ojo [2016] UKUT 421

34. The second case, Admiralty Park v Ojo, related to the method of apportionment of the service charge by the landlord. The difficulties caused by a somewhat gung-ho approach by the managing agent will probably be familiar.

35. This case concerned a purpose-built block of 16 flats located on an estate of 12 similar, self-contained blocks, nine of which were owned and managed by Admiralty, the Appellant landlord.

36. Mr Ojo's lease required him to pay a specified percentage of the costs of maintaining his particular block and a different, much lower, percentage of the estate costs relating to communal areas, use of which was common to all blocks.

37. The managing agents instead adopted the straightforward, but plain wrong, method of simply dividing the total costs incurred on the estate between all of the flats within their blocks.

38. It was impossible, said the judge in the Upper Tribunal (Deputy President Martin Rodger QC), to tell whether the result was that Mr Ojo was asked to pay a greater or lesser sum than what was actually due. This would depend on re-apportioning all of the costs as between the estate and block and the result of that difficult exercise were uncertain.

39. The case had a somewhat unfortunate procedural history (which will, no doubt, also be familiar). Mr Ojo had not identified any problem with apportionment prior to the FTT hearing. However, the FTT spotted the issue and raised it at the start of the hearing. The landlord, not unsurprisingly, asked for an adjournment to enable it to adduce evidence of long established practice to deal with the point, but the FTT, having thrown the point at the landlord, refused to agree an adjournment and went on to hold that the tenant's liability was accordingly nil because no valid demands had been issued.

40. The landlord, probably somewhat taken aback by that outcome, appealed the decision, alleging serious procedural irregularity and seeking to rely upon estoppel by convention to justify the demands that had been served.

41. On the question of procedure, the Upper Tribunal accepted that the FTT (as an expert tribunal) was entitled to raise points which were not advanced by the parties. However, if it did so, it was obliged as a matter of natural justice to permit the parties time to adduce new evidence to deal with any such points. The FTT decision was therefore set aside. Ojo is therefore a useful authority to pull out when the FTT (as it not unfrequently does) raises new arguments but resists an adjournment.

42. Turning to the estoppel point, in this case, in contrast to Clacy v Sanchez, there was no evidence of an express agreement, at a meeting or similar, where the parties had all agreed to proceed on a different basis to the mechanisms laid down by the lease.

43. Instead, all that the landlord could point to was a course of conduct dating back to at least 2009 but possibly going back to when the leases were granted in 1993, coupled with the absence of any complaints by the lessees.

44. Nevertheless, the Upper Tribunal was prepared to hold that Mr Ojo's acquiescence in this method of calculating his liability was sufficient to establish an estoppel by convention. Given the prolonged acquiescence of Mr Ojo and the unfairness involved in permitting him to now resile from it, the judge concluded that *"a conventional mode of dealing"* existed between the parties which permitted the landlord to divide the total costs between all of the flats.

45. The judge appears to have been particularly influenced by two factors.

46. First, there had been previous proceedings between the parties in January 2011 where a dispute as to service charges had reached what was then the LVT. Mr Ojo had not, on that occasion, taken any issue with the method by which the service charges were calculated.

47. The second factor was the extreme difficulty which would face the landlord if it was no obliged to re-calculate the liability of Mr Ojo going back many years. This would, of course, have a potential knock-on effect on other tenants and it was entirely unclear whether the difference in Mr Ojo's ultimate liability would make the exercise worth the candle.

iii) *Bucklitsch and others v Merchant Exchange Management Co Ltd* [2016] UKUT 527

48. The third case is Bucklitsch v Merchant Exchange which, like Clacy v Sanchez, concerned a requirement for certification of service charge accounts, which had not been complied with by the landlord.

49. In this case both parties were unrepresented and, again, it was the FTT which spotted the point. On this occasion, however, the FTT invited the parties to make further written submissions about estoppel, having drawn attention to the decision in Clacy.

50. Having received those submissions, the FTT then decided that there was an estoppel by convention or waiver on the part of the Respondent tenants, which meant that certification by an accountant was not a pre-requisite to a valid service charge demand.

51. Although there had been no meeting or express agreement that no certification was required, the FTT considered that the failure of the Respondent tenant to raise any objection during the 11 years of his ownership was enough to enable to landlord to assert estoppel.

52. Notwithstanding the decision in Ojo (which does not appear to have been cited) on this occasion, the tenant's appeal was successful. HHJ Huskinson was not prepared to accept that a mere failure to object was enough to give rise to estoppel by convention/waiver, the judge said:

> *"…the appellants have been tenants for 11 years; they have never until the present case complained about the way the accounts have been put together; they are shareholders in the* [landlord]*; the first appellant was at the* [landlord's*] AGM where he raised issues including the question of water rates; the final accounts for the year in question were adopted unanimously; and that when the appellants did seek to question the serive charges in 2014, no issue about the accounts was raised….*

With respect to the FTT I do not consider that these facts, without more, can give rise to an estoppel (whether by convention or otherwise) and/or waiver such as to disentitle the appellants from relying upon the condition precedent point."

iv) *Jetha v Baslidon Court Residents Ltd* [2017] UKUT 58

53. I come to the final case in this mini-series of decisions, Jetha v Basildon Court Residents Ltd. In this case, the Upper Tribunal (perhaps conscious of the apparently difficult task of providing a principled reconciliation of these three decisions) carried out a rather more comprehensive review.

54. The facts were as follows. The claim concerned service charges in respect of a block of 11 flats in Fitzrovia, London, described in the report as 'prestigious'. The tenants entered into deeds of covenant with a management company, which provided for the tenants to pay a service charge. The deeds did not, however, make any provision for the collection of an interim service charge on account.

55. The management company sought to recover arrears of service charge and was met with a defence which, amongst other points, relied upon the absence of a right to demand an on account payment. The deeds of covenant in fact only allowed recovery of payment in advance if this was agreed by a majority of the leaseholders at the company's AGM.

56. The management company pleaded that it had been demanding an advance service charge since 1996, following an AGM which had taken place in that year. The tenants had paid all demands without objection until 2012. The FTT held that an estoppel by convention was established on these facts to the effect that there was no need for a resolution at the AGM every year in order for the company to recover on account payments.

57. His Honour Judge Behrens first considered the evidence as to whether or not there had been any positive resolution at the AGM for the year in question. The judge held that there was not and, furthermore, decided that there was insufficient evidence to establish that some form of continuing resolution had been passed (if that were possible in law) at the AGM in 1996. Accordingly, it was necessary for the judge to consider the case based on estoppel by convention.

58. In addressing that issue, the judge first set out some fundamental principles applying to estoppel by convention, by reference to the Republic of India and Benchdollar cases to which I have already referred.

59. The judge then referred to the three recent decisions of the Upper Tribunal which I have just described before concluding that there was no estoppel by convention on the facts of the case before him. There were three reasons for this.

60. First, it was not possible to be sure that there was any common assumption at all. The management company may have assumed that no resolutions were necessary whilst the tenants assumed that a resolution had in fact been made. Accordingly, if the parties made different assumptions there was no 'convention' and so no estoppel.

61. Second, the judge was not satisfied that the tenants could be said to assume some element of responsibility for any common assumption because of communications which had 'crossed the line' between the parties. The point of distinction with Clacy was, said the judge, that ib Clacy there had been an express agreement that no accountants certificate was required.

62. The judge also distinguished Ojo, (to my mind rather less convincingly) on the basis that in Ojo the accounts sent out each year made it clear that the liability had been calculated on the wrong basis.

63. Thirdly, the judge considered that the management company was unable to establish the requisite element of detriment. If the on-account demands were invalid then there would be nothing to stop the management company from proposing and passing appropriate resolutions to demand the service charge in arrears.

Points to be taken from the decisions

64. What general points can we take from these cases? I offer three thoughts.

65. First, it seems to me that the cases are not wholly consistent. In the final analysis, there seems very little to distinguish Ojo (where there was an estoppel) from Jetha (where there was not). I think that there are two reasons for this. First, estoppel is flexible and based on fairness. In Ojo the absence of any clear evidence as to what the effect of recalculating the apportionment must be coupled with the difficulty of that task meant that the element of unconscionability or unfairness, central to all forms of estoppel, was missing. Second, the tenant's failure to raise the argument in earlier proceedings, suggests that this case might be better regarded as a case of issue estoppel, rather than estoppel by convention.

66. Second, surprisingly little consideration is given in these cases to the effect of a change in the identity of the tenants. Whilst it is relatively easy to see why a tenant who has acquiesced in a particular departure from the leases terms should be precluded from insisting on strict compliance, it is less easy to see why his assignee should be equally affected. In Clacy the meeting at which the agreement not to issue an accountants certificate was made took place

before at least some of the respondent tenants acquired their leases. No point appears to have been taken about this, but it is hard to see any sound basis for holding that a new, incoming tenant is bound by what effectively amounts to a variation of the terms of the lease in which they did not participate and of which they have had no notice.

67. I would expect this question to come up in future cases. It seems to me that on a principled basis, there must be something to tie the incoming tenant to the convention that has been established before it will bind them.

68. Finally, estoppel by convention is a very useful tool for a landlord where the administration of the service charge has not matched the strict requirements of the lease. However, long standing-practice will not, by itself, be enough (or at least ought not to be). The Tribunal will look for some communication suggesting that there was an agreement, or something coming close to it, that there was a positive agreement or understanding. In Clacy this was the agreement expressly reached at a meeting. In Bucklitsch and Jetha the absence of any such communications appears to have been a decisive factor against the landlord.

69. I would suggest that it will be a relatively rare case where a landlord is able to rely upon a meeting or similarly clear indication of a mutual understanding that the terms of the lease need not be strictly followed. The key ingredient to make good a plea of estoppel by convention appears to be some communication, or conduct which 'crosses the line' between the parties, which shows a mutual understanding. It is unlikely in most cases that a long-standing practice of issuing demands in a particular way would be enough.