Neutral Citation Number: [2023] EWCA Civ 641

Case No: CA-2022-001894

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUST & PROBATE LIST (ChD)
MR JUSTICE LEECH
[2022] EWHC 2738 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE CARR
and
LORD JUSTICE NUGEE

- -

Between :

AVONDALE PARK LIMITED	**Appellant**
- and -	
MISS DELANEY'S NURSERY SCHOOLS LIMITED	**Respondent**

- -
- -

David Holland KC (instructed by **Keystone Law LLP**) for the **Appellant**
William Moffett (instructed by **Hunters Law LLP**) for the **Respondent**

Hearing dates : 24/05/2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 07/06/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. Mellcraft Ltd held a headlease of Avondale Park Lodge from the Royal Borough of Kensington and Chelsea. The term of the lease was contractually due to expire on 13 September 2022. Although the parties attempted to contract out of Part II of the Landlord and Tenant Act 1954, that attempt was unsuccessful. On 9 September 2014 Mellcraft granted a sub-lease of the whole property to Miss Delaney's Nursery Schools Ltd ("MDNS") for a term expiring on 29 August 2022. That sub-lease was successfully contracted out of Part II of the 1954 Act. Mellcraft subsequently assigned its lease to Avondale Park Ltd. Both Mellcraft and Avondale are companies controlled by Mr Moaven. Except where it matters, I will refer to Avondale throughout.

2. On 26 August 2022 Avondale purported to forfeit the sub-lease by peaceable re-entry alleging non-payment of rent. On 2 September 2022 MDNS applied for an injunction preventing Avondale from interfering with its possession of the property and from excluding MDNS from occupation. That injunction was initially granted by Meade J on a without notice application on 5 September 2022 and continued at an inter partes hearing before Leech J on 8 September. Avondale now appeals with the permission of Newey LJ.

The underlying facts in more detail

3. Clause 3 (11) of the headlease prohibited subletting except by way of an assured shorthold tenancy. Clause 3 (13) prohibited use otherwise than for the permitted use (defined as "Residential"); and also prohibited offering any service for reward. Clause 6 (1) contained a forfeiture clause. These covenants had to be altered if MDNS was to be allowed to occupy and trade from the property as a nursery. The terms of the sublease reflect this in two material respects.

4. First, clause 8 of the sublease provides that MDNS would make an application for "Planning Consent" in a form approved by the landlord. By clause 8.4, MDNS had an option to determine the sublease if "Planning Consent" was not granted. It provided:

> "If Planning Consent is not granted the Tenant may give one month's written notice to the Landlord terminating this Lease. Termination will be without prejudice to the obligations of the Tenant and the rights of each party in respect of any earlier breach of this Lease Provided that the Tenant shall not be entitled to determine this Lease if any of the following are in place: -
>
> (a) a decision is awaited in respect of a Planning Application submitted to the Local Planning Authority;
>
> (b) the Review Period following the date of grant of a Planning Consent shall not have expired;

> (c) Proceedings have been instituted; or
>
> (d) the Local Planning Authority has passed a resolution to grant but a Planning Permission has not been granted
>
> and in such case the date after which Tenant can determine this Lease pursuant to Clause 8.4 shall be postponed to the date 10 Working Days after the later of
>
> (e) the date on which any Proceedings are Finally Determined without leaving in place a Planning Consent;
>
> (f) the Unchallenged Date;"

5. Second, clause 9 of the sublease appears to render the sublease conditional on Mellcraft procuring a Deed of Variation in respect of the Head Lease which permitted the property to be used as a nursery. It provided:

> "**9. DEED OF VARIATION**
>
> This lease will be terminated immediately if by 14th December 2014 the Landlord does not produce to the Tenant a certified copy of a completed Deed of Variation, of the Superior Lease which :-
>
> (a) either deletes Clause 11 of the Superior Lease or permits the sub-letting of the Property to the Tenant on the terms of this Lease; and
>
> (b) varies the Permitted Use under the Superior Lease from residential to the Permitted Use under this Lease."

6. There are a number of other potentially relevant provisions of the sublease. Clause 5 contains provisions for rent review on 26 July in each of the years 2016, 2018, 2020 and 2022. Clause 10 obliged the tenant "without delay" to apply to register the sublease at HM Land Registry. Clause 13 required the tenant to apply for closure of that title at HM Land Registry within one month of the end of the term. Clause 14 of the sublease provided that the tenant would not use the property for any purpose other than the permitted use (defined as "a nursery" within Class D1 of the Use Classes Order). At the date of the sublease the property was occupied under an assured shorthold tenancy expiring on 13 December 2014. MDNS acknowledged in clause 18 that it could not take possession until vacant possession was given. The rent would be payable as from 14 December 2014 or (if later) the date when vacant possession was given. Clause 23 of the sublease required MDNS to pay a security deposit "as protection for the Landlord for any breach of this agreement by the Tenant including non payment of rent."

7. Conditional planning permission allowing a change of use from Class C3 dwellinghouse to Class D1 non-residential nursery school was granted by the local planning authority on 11 December 2014.

8. No deed of variation as required by clause 9 of the sublease was produced to MDNS by 14 December 2014. Nonetheless, MDNS went into possession of the property on 18 December 2014 and subsequently began works for fitting it out as a nursery. It occupied the property as such until August 2022. The security deposit was duly paid. A deed of variation, apparently dated June 2019, was eventually supplied to MDNS in August 2022, although it was not executed by RBKC. Throughout this time MDNS paid rent at the rate required by the sublease.

9. The current dispute arose in 2022. Both the headlease and the sublease were due to expire at the end of summer 2022. Under its terms, the headlease would expire on 13 September 2022. Under the terms of the sublease, it would expire on 29 August 2022.

10. There were some discussions between Mr Moaven and Ms Delaney about a new lease, but nothing was agreed. There was uncertainty about whether Avondale would itself be able to obtain a new lease from RBKC; and for her part Ms Delaney thought that MDNS might be able to take a lease directly from RBKC. In the spring of 2022 MDNS withheld rent amounting to £50,998-odd on the basis that it had concerns as to whether it would receive its security deposit of £59,000 originally paid to Mellcraft. Avondale issued a commercial rent arrears recovery notice (a CRAR notice) on 11 July 2022. On 19 August Avondale's solicitors wrote to MDNS demanding vacant possession on 30 August 2022. On 26 August 2022 Avondale purported to forfeit by peaceable re-entry.

11. On the same day, MDNS's solicitors replied to the letter dated 19 August 2022. They contended that the forfeiture was unlawful on the basis that Avondale had waived its right to do so by the CRAR notice. MDNS also contended that as no Deed of Variation had been received on or before 14 December (or indeed at all), the consequence of that failure was that the sublease terminated automatically on 14 December 2014, and that MDNS's occupation of the property, coupled with the payment and acceptance of rent, had created a periodic tenancy. That periodic tenancy was protected by Part II of the 1954 Act.

The proceedings

12. That contention was the foundation for its claim to an injunction. By a claim form dated 2 September 2022, MDNS sought a declaration as to the status of MDNS's tenure and an injunction preventing Avondale from interfering with MDNS's possession of the property. On the same day, it made a without notice application for an urgent interim injunction preventing Avondale from excluding MDNS from occupation of the property. The application was initially heard (and granted) at a hearing on 5 September 2022, and maintained at the return date hearing on 8 September 2022 before Leech J. It was common ground before the judge that he should decide the application on the basis of the principles in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

13. In an extempore judgment the judge held:

    i) Clause 9 of the sublease was clear and operated automatically on the failure to produce the deed of variation by the stipulated time. The sublease therefore terminated on 14 December 2014. Once the sublease had terminated there was nothing left for MDNS to waive.

ii) Both parties clearly believed that MDNS was a tenant and obliged to pay rent on a quarterly basis. There was, therefore, a triable issue as to whether MDNS was a periodic tenant.

iii) There was also a triable issue as to whether Avondale had waived its right to forfeit for the arrears of rent by the issue of the CRAR notice.

iv) Avondale's reliance on estoppel by convention might well provide a complete answer to the claim. But it was not possible to decide that on an application for an interlocutory injunction. Whether MDNS was estopped from denying that the sublease was at an end was another triable issue.

v) The upshot was that there was a serious issue to be tried; namely whether MDNS had a legal right to occupy the property beyond 26 August 2022; and if it was successful in establishing that right and that Avondale had waived its right to forfeit for the arrears of rent, then MDNS could establish the existence of a tenancy protected by Part II of the 1954 Act.

14. The judge went on to say that damages would not be an adequate remedy for MDNS; but that Avondale's claim for damages could be adequately calculated and compensated. The balance of convenience clearly favoured MDNS, as did maintenance of the status quo ante. Although the judge had doubts about MDNS's ability to meet an award of damages, he was not satisfied that Avondale had demonstrated that it would suffer substantial losses if not permitted to go into occupation of the property. Finally, the judge held that it was clearly just and convenient to grant the injunction to permit MDNS to remain in occupation.

15. Avondale appeals on three grounds:

i) Clause 9 of the sublease did not result in automatic termination of the sublease. It required an election to terminate by MDNS and no such election was made.

ii) There was no serious issue to be tried on the question of estoppel.

iii) Since the grant or refusal of the injunction would effectively decide the case, the judge ought to have considered not merely whether there was a serious issue to be tried, but the likelihood of MDNS succeeding at trial.

16. There is no challenge to the judge's assessment of the balance of convenience, nor to his observations about preserving the status quo ante.

Clause 9

17. Mr Holland KC submitted that the words of clause 9 were clear. It provided that the lease would "be terminated" on 14 December if no deed of variation were produced. The use of the phrase "will be terminated" as opposed to "will terminate" meant that one or other party would have to do something in order to invoke that clause. It was not clear whether he was submitting that the initiative lay with MDNS alone or whether either party could invoke the clause. At times his argument varied from one to the other. Nor was it clear when the clause could be invoked, since there is no time limit for taking any action. At one stage he suggested that MDNS had to invoke the

clause, if at all, on 14 December. But he also submitted that MDNS could invoke the clause either on 14 December 2014 or, if later, on or before the date on which it actually took possession.

18. Alternatively, Mr Holland submitted that if clause 9 was ambiguous it should be interpreted in conformity with a long line of cases in which the courts have held that a clause which apparently makes a contract void on the happening of a particular event is interpreted as not automatically coming into effect, but as giving one party the option to terminate. So far as necessary for that purpose a term should be implied to the effect that Avondale was required to use reasonable endeavours to obtain the required deed of variation. On that basis, if Avondale had failed to comply with the implied obligation, then only MDNS could invoke the clause.

19. On either basis the judge's interpretation, which had the consequence that the sublease came to an end on 14 December whether the parties wanted it to or not, was uncommercial and could not have been intended.

20. The earliest of the cases to which he referred was *Doe d Bryan v Bancks* (1821) 4 B & Ald 401. That case involved the grant of a lease of a mine, reserving a royalty rent. The lease provided that the works should begin within one year of the lease; and that if the lessee should stop working for two years "this lease shall be deemed void to all intents and purposes." It was held that on its proper interpretation that clause gave the lessor the option to terminate the lease if the lessee stopped working for two years. Bayley J said:

> "I am of opinion, that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist, that thereby the lease has become void to all intents and purposes."

21. Holroyd J said that the tenant "cannot insist that his own act amounted to a forfeiture." Best J said:

> "In construing this clause of the lease, we must look to the object which the parties had in view. The rent was to depend upon the number of tons of coals raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel his tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him in case of a cesser to work, to take possession of the mines, and either work them himself, or let them to some other tenant. That therefore being the object of the parties in introducing this clause, I think it will be fully answered, by holding the lease to be void at the option of the landlord. Besides, I take it to be an universal principal of law and justice, that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle, to

> permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period."

22. That case was followed in *Roberts v Davey* (1833) 4 B & Ad 664. That was another case about a mine, where the licence provided that if the grantee should neglect to work the mine for a certain time or fail to perform his covenants the licence "should cease, determine and be utterly void and of no effect." All three judges regarded the case as being governed by *Doe d Bryan v Bancks*.

23. In *Davenport v R* (1877) 3 App Cas 115 the Privy Council applied these cases to a statutory provision of a similar nature. Sir Montague Smith explained the rationale at 129:

> "The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would of course be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to repossess the land, as indeed in the present case it was thought to be."

24. *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222 was a similar case. A mining lease provided that if the lessee should cease to work the mine for two years "then this demise shall become absolutely forfeited and these presents and the term hereby granted … shall… cease and be void as if these presents had not been made." Giving the advice of the Privy Council, Lord Buckmaster held that the true meaning of the covenant was that the lease became void at the option of the lessor (i.e. that it was voidable). He said at 227:

> "Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease."

25. There are two particular points to be made about this line of cases. First, whether a clause provides for a contract to be void or voidable on the happening of a particular event is a question of interpretation of the contract. Second, one of the principles of interpretation is that, in the absence of a clear contrary contractual intention, a clause will not be interpreted so as to permit a party to take advantage of his own wrong.

This is an ancient principle of interpretation which can be traced back to Lord Coke's day (Co Litt 206b).

26. In determining the question, the ordinary principles underlying the interpretation of contracts apply: *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 at [34].

27. In *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1 a shipbuilding contract made in 1913 provided that if France became engaged in a European war within 18 months from the agreed date for completion of the ship "this contract shall become void." Lord Finlay LC said at 8:

> "Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co Litt 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about. In the present case the builder was in no way responsible for the non-completion within eighteen months, and there is no reason why clause 12 should not be interpreted according to the natural meaning of the words so as to render the contract void."

28. Lord Atkinson said at 9:

> "It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. … But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

29. Lord Wrenbury said at 15:

> "The rule is that in a contract "void" is to be read "voidable," if the result of reading it as "void" would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is "void

> as against him," or that if one party is in default it is "voidable at the option of the other party." The two amount to the same thing."

30. The result of the case was that, since the ship builder was not at fault, it was entitled to say that the contract became void. It does not appear that the builder was required to take any step to bring about that result.

31. There are many cases where, on particular facts, the principle has been held not to apply: e.g. *Gyllenhammar & Partners International Ltd v Sour Brodograde Industrija* [1989] 2 Lloyd's Rep 403.

32. This is plainly a case in which clause 9 was not introduced for the benefit of one party alone, as Mr Holland accepted. To that extent it differs from forfeiture clauses found in leases. From the perspective of Avondale, if MDNS carried on the business of a nursery and otherwise than on the terms of an assured shorthold tenancy without the deed of variation, the headlease was liable to be forfeited by RBKC for breach of covenant. From the perspective of MDNS the use clause in the headlease was a restrictive covenant, which RBKC could have enforced against it, leaving it in a position in which it was contractually bound to pay a substantial rent for property which it could not use. Moreover, it was not within MDNS' power to obtain the deed of variation which was a matter between Avondale and its own landlord. In so far as there was fault in not agreeing and providing the deed of variation by the agreed date, the fault was therefore that of Avondale and not that of MDNS. But even looking at the matter from the perspective of Avondale, it was not within Avondale's power to bring about the entry into a deed of variation either. That depended on the agreement of RBKC over which Avondale had no control. RBKC could simply have refused to vary the headlease or, as it seemed to do at one time, to have required the payment of a substantially increased rent as the price of its consent. The principle of interpretation on which Mr Holland relied has no application on the facts of this case.

33. Since the sublease was contracted out of Part II of the 1954 Act its termination is governed by the common law. There is no conceptual difficulty at common law in the grant of a term of years which determines on the happening of a particular event. The existence of such a lease is expressly recognised by the definition of "terms of years absolute" in section 205 of the Law of Property Act 1925 and is exemplified by old cases such as *Brudnel's Case* (1591) 5 Co Rep 9a and *Doe d Lockwood v Clarke* (1807) 8 East 185.

34. Clause 9 sets out a condition and its consequence. The condition is that Avondale does not produce to MDNS a certified copy of a completed deed of variation by 14 December 2014. The consequence is that the sublease "will be terminated immediately". As a matter of ordinary English, I agree with the judge that the consequence is the automatic result of satisfaction of the condition. First, the clause provides that the lease "will" be terminated: not that it "may be" terminated. I consider that (a) the word "will" is imperative and (b) is readily explicable by the fact that at the date of the sublease the terminating event lay in the future. Second, the word "immediately" leaves no room for some indeterminate intermediate period during which one or other party decides whether to terminate the sublease. Third, from the perspective of both parties an immediate termination makes commercial sense. From the perspective of Avondale, it removes the threat of forfeiture of its own

lease; and from the perspective of MDNS it relieves it from a liability to pay rent for property that it cannot use on the terms of the sublease. Fourth, in order to make the clause work in the way that Mr Holland contended it worked, a considerable amount of redrafting and implication must be done, all of which depends on an *a priori* conception of how the clause was supposed to work. I therefore agree with the judge's interpretation of clause 9.

Periodic tenancy

35. The judge went on to hold that once the sublease had automatically terminated, MDNS's continued possession and payment of rent gave rise to a triable issue whether it was entitled to a periodic tenancy at common law. This is the conventional result at common law where the tenant enters under a void lease, but pays rent calculated by reference to a year. The terms of such a periodic tenancy are the same as those of the void lease, except where they are inconsistent with a periodic tenancy. As Lord Templeman put it in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, 392:

> "When the agreement in the present case was made, it failed to grant an estate in the land. The tenant however entered into possession and paid the yearly rent of £30 reserved by the agreement. The tenant entering under a void lease became by virtue of possession and the payment of a yearly rent, a yearly tenant holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy."

36. Since MDNS occupied the property for the purposes of a business, a periodic tenancy would have attracted the protection of Part II of the 1954 Act.

37. Mr Holland does not challenge the judge's view that there was at least a serious issue to be tried as to whether a periodic tenancy had arisen, except to say that MDNS is estopped from asserting that the sublease had come to an end. The estoppel relied on is an estoppel by convention. Mr Holland argued that Avondale's case on estoppel is overwhelming; and there is no issue that is fit to go to trial.

Estoppel by convention

38. The applicable law is authoritatively summarised by Lord Burrows in *Tinkler v HMRC* [2021] UKSC 39, [2022] AC 886 at [45], approving with minor modifications Briggs J's summary of principle in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174. I have made the modification in the italicised part of the quotation that follows:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. *There must be words or conduct which crosses the line between the parties from which the necessary sharing may be inferred.* (ii) The expression of the common

> assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

39. It is therefore not enough if both parties share the same assumption but arrive at their conclusions independently of the other. Lord Burrows went on to say:

> "[51] It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.
>
> [52] It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance."

40. Before I come to the evidence, there is a point of principle that arises.

41. Given that (a) there is no challenge to the judge's conclusion that there was a triable issue whether an implied periodic tenancy came into existence once MDNS took possession and paid rent; (b) it is common ground that MDNS occupied the property for the purposes of a business; (c) a periodic tenancy attracts the protection of Part II of the 1954 Act; (d) section 38 (1) of the 1954 Act contains a general prohibition on contracting out of security of tenure and (e) the statutory procedure for contracting out does not apply to a periodic tenancy, can estoppel by convention deprive the tenant of security of tenure to which it would otherwise be entitled?

42. A similar question arose in *Keen v Holland* [1984] 1 WLR 251. In that case the parties entered into a tenancy of a farm. What was contemplated was a tenancy from 1 September 1978 to 31 October 1979. A tenancy of more than one year but less than two did not qualify for protection under the Agricultural Holdings Act 1948. The

problem was that the agreement was not finalised until 19 October 1979 when the agreed term of the tenancy had only a few days left. A tenancy for a term of less than one year did attract the protection of the 1948 Act. The landlord argued that the tenant was estopped from contending that the term of the tenancy exceeded one year but was less than two and therefore was not protected by the 1948 Act.

43. Oliver LJ said at 261C:

> "Once there is in fact an actual tenancy to which the Act applies, the protection of the Act follows and we do not see how … the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as inapplicable. If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel."

44. Commenting on that case in *Tinkler*, Lord Burrows said at [33] that *Keen v Holland* was:

> "of primary importance in laying down that estoppel by convention … cannot apply, in certain circumstances, because it would undermine a statute."

45. Applying the approach in *Keen v Holland*, the court must first consider whether there is "in fact an actual tenancy" before it comes to any question of estoppel. If there is in fact an actual tenancy, to which Part II of the 1954 Act applies, then the statute overrides any estoppel. If, therefore, MDNS succeeds at trial in showing that an implied periodic tenancy arose from the taking of possession and subsequent payment and acceptance of rent, there is, in my judgment, a strong argument to the effect that estoppel by convention cannot override statutory security of tenure. Lord Radcliffe discussed the principle in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993. At 1015 he referred to:

> "… a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute."

46. Having discussed a number of authorities, he went on to say at 1016:

> "In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury … override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies…."

47. Likewise, there seems to me to be a strong argument that the prohibition on contracting out of security of tenure under Part II of the 1954 Act will override any estoppel by convention. There is a more general discussion of the point in Spencer Bower: Reliance-Based Estoppel (5th ed) at paras 7.5 to 7.12 and Michael Barnes QC: The Law of Estoppel paras 5.33 to 5.36.

48. Mr Holland submitted that the estoppel alleged did not fall foul of this principle because what was alleged was that the parties were estopped only from contending that clause 9 had the effect of terminating the sublease. Since the sublease was validly contracted out of Part II of the 1954 Act, that Act was not outflanked. There is some force in that argument, but I do not consider that it is so clear that it gives rise to no serious issue to be tried.

49. In *Keen v Holland* Oliver LJ added at 261F:

> "The dealing alleged to give rise to the estoppel is the entry into the agreement itself in the belief that it would produce a particular legal result. In fact, for reasons which had nothing to do with the defendant, the plaintiffs got it wrong: and what Miss Williamson appears to us to be contending for is a much wider conventional estoppel than has yet been established by any authority, namely, that where parties are shown to have had a common view about the legal effect of a contract into which they have entered and it is established that one of them would not to the other's knowledge have entered into it if he had appreciated its true legal effect, they are, without more, estopped from asserting that the effect is otherwise than they originally supposed."

50. This, too, seems to be a case in which it can be said that the parties made a mistake about the legal effect of the transaction into which they entered. But even assuming that Avondale can overcome that problem, there would need to be an examination of whether, on the facts, Mr Moaven's mistaken assumption was in some way induced or affected by anything MDNS said or did.

51. The starting point seems to me to be what Mr Moaven said in evidence. Mr Moaven says in his witness statement that after MDNS took possession of the property the deed of variation was not discussed. But, he says:

> "Thereafter we proceeded as per the terms of the Underlease."

52. In support of that contention, he refers to certain repairs to a pipe that Avondale carried out at the request of MDNS. But the carrying out of repairs is equally consistent with the terms of an implied periodic tenancy on the same terms, so far as applicable, of the sublease. In 2017 there was an attempt to implement the rent review, but that did not result in any agreement. What Mr Moaven did not say was that he believed that the Underlease itself continued in existence. Any periodic tenancy would itself have been "as per the terms of the Underlease" so in that respect his statement is equivocal. It may well be that he thought that the sublease continued in existence; but if so, it is surprising that he did not actually say so. It is also worthy of note that Mr Moaven does not give any clue about why it took some five years for

the deed of variation to be produced (and, as I have said, what was produced was not executed by RBKC).

53. Assuming that that was Mr Moaven's belief, he does not give any evidence about how that belief came to be formed or that he was encouraged or strengthened in that belief by anything that MDNS said or did. It may be that he was but, again, if that were the case, it is surprising that he did not say so.

54. Mr Moaven also says in his witness statement:

> "I would never have allowed the Claimant to take possession on 18 December 2014 if they had told me that the Underlease had ended on 14 December 2014. Further, if they had alleged this in the last few years, either Mellcraft or the Defendant would have taken steps to take possession of the Property unless they accepted that the Underlease had not been terminated."

55. I will return to that evidence later.

56. Mr Holland also relied on other features. In particular:

i) The Security Deposit payable under the Sublease was paid over and not demanded back. Payment of the Security Deposit was an obligation that arose when the sublease was granted. Although repayment was to be made within one month after the end of the term, it is a real question whether retention of the Security Deposit would have been one of the terms of an implied periodic tenancy (compare *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, [2013] 1 WLR 3848).

ii) The Sublease was registered under title No. BGL108806. That, too, was an obligation that arose on the grant of the sublease.

iii) In an email dated 22 February 2016, the Director of MDNS, Ms Delaney, referred to "the demise under my lease".

iv) In 2017, Mr Moaven sought (unsuccessfully) to implement the rent review provisions in the Sublease. At no stage did MDNS assert that there were no such provisions. But provisions for periodic rent review are not necessarily repugnant to a periodic tenancy. In the case of an annual tenancy of an agricultural holding for example, there is statutory provision for periodic rent reviews. Equally, a covenant to paint at the end of the seventh year has been held not to be incompatible with an implied periodic tenancy.

v) In an email dated 21 July 2020, Mr Moaven refers to MDNS's "full insuring and repairing lease". Again, obligations to repair and insure are not incompatible with a periodic tenancy,

vi) In an email dated 29 March 2021 Ms Delaney refers to "the legal assignment of the terms of my lease". This was a reference to the assignment of the headlease from Mellcraft to Avondale. But if MDNS had a periodic tenancy on the terms of the sublease, that would have been an understandable statement.

vii) On 9 June 2021 solicitors for both Mellcraft and Avondale gave MDNS notice of the assignment. The letter was headed "The Underlease of the Property dated 9 September 2014…" I accept that that does evidence an assumption that the sublease was still on foot.

viii) In paragraph 29(f) of her first statement Ms Delaney states that she instructed solicitors in or around February 2022 with a view to renewal of the Sublease *"*which at that time I mistakenly believed was the relevant tenancy.*"* That, however, was Ms Delaney's private belief.

ix) In a text message exchange with Mr Moaven in early 2022, Ms Delaney refers to "the repayment of my security deposit under the terms of my existing lease".

x) In emails dated 31 March 2022 and 25 May 2022, solicitors instructed by MDNS refer to "my client's lease dated 9 September 2014 [which] expires on 28 August 2022". In an email dated 8 July 2022, the same solicitors stated "my client wants to renew its lease".

57. Many of these statements are equally consistent with the existence of a periodic tenancy; and Ms Delaney's own belief does not appear to have been anything that she communicated to Mr Moaven. It was not until the end of March 2022 that there was any unequivocal statement emanating from her "side of the line" that the lease would expire on 28 August 2022.

58. Mr Holland argued that between December 2014 and August 2022 both the landlord and the tenant proceeded on the basis that the tenant was occupying under a fixed term lease excluded from the protection of the 1954 Act which terminated some two weeks before the term in the headlease. Avondale was therefore entitled to expect a period of two weeks to re-occupy the property and secure its own position under the 1954 Act vis-à-vis its landlord RBKC. Had MDNS asserted earlier that in fact it was occupying under a periodic tenancy protected by the 1954 Act, then either Mellcraft or Avondale could have taken steps to terminate that tenancy under the 1954 Act and oppose any renewal under section 30(1)(g).

59. In the first place, that is, I think, more easily said than done. The landlord may terminate a tenancy to which Part II of the 1954 Act applies by serving notice under section 25 of that Act. The notice must be at least six months before the specified termination date. But the "landlord" is defined by section 44 as meaning either the freeholder or a reversioner holding a tenancy which will not come to an end within fourteen months by effluxion of time. The person is commonly referred to as the "competent landlord". Once notice has been served, the tenant is entitled to apply to the court for the grant of a new tenancy. The application may be made at any time before the termination date specified in the section 25 notice: section 29A. The application is made against the competent landlord. The tenancy is continued in the meantime until three months after the final disposal of the tenant's application: section 64. If the competent landlord changes during the pendency of the claim (as it would if Avondale's lease expired or had less than 14 months to run), then the successor competent landlord (in this case RBKC) would step into its shoes: *AD Wimbush & Son Ltd v Franmills Properties Ltd* [1961] Ch 419. By the end of March

2022, it was too late for Avondale to give notice under section 25; and any application to the court would have been made against RBKC: not Avondale.

60. The evidence that Avondale would have taken earlier steps and the assertion that it wished itself to run a nursery school is, to say the least, thin. It consists of a single sentence in Mr Moaven's witness statement for which there is no contemporaneous evidence. There are undoubtedly a number of unanswered questions which would, no doubt, be explored in cross-examination. But taking his evidence about Avondale's future intention at its highest, he said in his witness statement of 6 September 2022 that the plan was for an electrician, plumber and builder to go in on 12 September to decorate; that Avondale was applying for an OFSTED registration which he was advised would take 12 weeks; and that it was Avondale's "aim to open the new nursery by the end of the year." 12 September was the day before the headlease was due to expire. But since the headlease was due to expire on 13 September 2022, there would be no OFSTED registration in place by that date; and opening a nursery school by the end of the year would not have been in time.

61. In addition, as I have said, Mr Moaven's own evidence about what he believed, and whether the belief that he had was induced, strengthened or reinforced by anything that MDNS said or did, is also very thin. Hence Mr Holland's attempt to infer the requisite elements of an estoppel from the correspondence. Following a trial that inference may well turn out to be correct; but in the absence of any direct evidence from Mr Moaven that it not something that can be decided now.

62. Thus, in my judgment, it is not possible to say at this stage that MDNS's position on estoppel is "nigh on unarguable" as Mr Holland submitted. In my judgment the judge was correct to conclude that there was a serious issue to be tried.

63. The final point is the argument that the judge ought not to have applied the test in *American Cyanamid*; but ought to have applied some higher test. Mr Holland's submission was that since there were no facts that were seriously in dispute, the court could take a view of MDNS's likely success at trial. Since it was common ground before the judge (as he recorded) that he should apply those principles, this is an unattractive argument. It is true that *American Cyanamid* was not a case in which the grant or refusal of the injunction would finally dispose of the dispute between the parties, as Lord Diplock subsequently pointed out in *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306. In such a case the court must "give full weight to all the practical realities of the situation to which the injunction will apply."

64. But the practical realities of the situation were that Avondale had never itself occupied the property and had only a few days left to run before its own headlease expired. Unless, therefore, it would be able to show that before the contractual expiry date of the headlease it was occupying the property for the purposes of a business carried on by it, the headlease would simply expire.

65. The first step in Mr Holland's argument is that if Avondale had managed to send in the electrician, plumber and builder on the day before the headlease was due to expire, that would have amounted to occupation for the purposes of a business sufficient to attract the protection of Part II of the 1954 Act. For that proposition he relies on *Pointon York Group plc v Poulton* [2006] EWCA Civ 1001, [2007] 1 P & CR 6. In that case Pointon York had operated a financial services business in various

parts of a building in Leicester. It held one suite of offices on a lease for a term expiring on 23 June 2005. It sublet the offices comprised in that lease (but not any other parts of the building which it occupied) on a sublease expiring on 20 June 2005, three days before the expiry of its own lease. Pointon York decided to reoccupy the offices after the subtenant had vacated. The sub-tenant had engaged contractors to carry out such works as were necessary to fulfil its own obligations under the sublease; and those works were completed on 21 June 2005. During the remaining three days of the lease Mr Pointon visited the property to observe progress of the works and to assess its suitability for Pointon York's business. The trial judge found that during that time Mr Pointon was invigilating progress towards readiness to commence work and planning what it would be necessary to install. All that needed to be done to get the business up and running in that part of the building was to install computers and telephone equipment. Mr Pointon's activities during the last three days of the term could properly be described as incidental and necessary to the running of the business by Pointon York in that suite of offices. Pointon York was therefore in occupation of the property for the purposes of a business. Upholding the trial judge, Arden LJ said:

> "[39] On the findings of the judge in the present case, the activities of Mr Pointon were clearly incidental to his business. He was checking that the premises were properly equipped and suitable for the business he wished to carry on there.
>
> [40] The distinction drawn by the appellant [landlord] is of a technical nature. The appellant accepts that the presence of a desk and making of business calls would be sufficient to constitute occupation. In conformity with the approach in the *Bacchiocchi* case, I do not consider that the application of s 23 should depend on drawing such fine lines. Moreover I agree with the judge that there is no reason why, if physical presence is not required at the end of a lease, the same common sense approach should not apply at the start of a lease."

66. The facts of that case were, in my judgment, extreme. In the present case, of course, Avondale did not in fact carry out the planned works because the judge granted the injunction on 8 September 2022. Nor did it have an operating business running a nursery school. So factually, this case is not on all fours with *Pointon York*. In order to bridge this gap, Mr Holland sought to rely on cases in which a tenant who had been occupying property for the purposes of a business had been deprived of occupation for reasons beyond its control (such as a fire) but continued to assert its right to occupy. In such cases it has been held that the thread of continuity of business occupation has not been broken: *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 1 WLR 533.

67. Section 23 of the 1954 Act applies:

> "…to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

68. It would, I think, be stretching the language of section 23 of the 1954 Act to say that a company which had never occupied the property for the purposes of a business "carried on" by it was in occupation merely because, but for the grant of the injunction, it would have begun preparatory work (which it did not in fact do) for a business that it proposed to carry on but had never in fact carried on. Moreover, I consider that if we are to take any view of the merits of the factual basis of this argument, we are entitled to take Mr Moaven's evidence with a fair degree of scepticism. Neither he (nor Avondale) professes any experience in running a nursery school. He did not communicate any intention to run a nursery school to Ms Delaney. He gives no evidence about when he formed any intention to carry on a nursery school. In the nine days between 26 August 2022 (when Avondale excluded MDNS and changed the locks) and 2 September when MDNS regained possession, there is no evidence that Avondale carried out any work at all. The exiguous emails on which Mr Moaven relies are all dated after these proceedings were begun. There is ample reason to believe, as Mr Moffett submitted, that this was a last minute expedient concocted for tactical reasons after the dispute had arisen.

69. As Lord Burrows said in *Tinkler*, one of the questions that arises is whether the detriment (if any) suffered by the person alleging the estoppel, or benefit conferred upon the person alleged to be estopped, is *sufficient* to make it unjust or unconscionable for the latter to assert the true legal (or factual) position. There is, in my judgment, a serious issue whether Avondale has suffered any detriment other than purely theoretical detriment.

70. The judge considered that the balance of convenience "clearly" favoured MDNS. As I have said, there is no challenge to that evaluation.

71. As Mummery LJ said in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, [2007] FSR 3 at [18]:

> "In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

72. In my judgment this is one of those cases.

Result

73. I would dismiss the appeal.

Lady Justice Carr:

74. I agree.

Lord Justice Nugee:

75. I also agree.