UPPER TRIBUNAL (LANDS CHAMBER)

LC-2021-333

Royal Courts of Justice,
London WC2A

2 September 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – RENT REPAYMENT ORDER – order requiring freeholder to repay rent paid to a company controlled by her husband and appointed by her as her agent – tenancy granted by company in its own name – FTT rejecting evidence that freeholder received no benefit from letting – whether freeholder a person managing or having control of the HMO – whether freeholder the landlord of the applicant – sections 40-43, Housing and Planning Act 2016, section 263, Housing Act 2004 – appeal dismissed

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

BETWEEN:

MARGARET FLORENCE CABO

Appellant

-and-

KAREN TAMIE DEZOTTI

Respondent

Re: 6 Bellamy Close,
London W14 9UT

Martin Rodger QC, Deputy Chamber President

Determination by written representations

The following cases are referred to in this decision:

Bruton v London & Quadrant [2000] 1 AC 406

Epps v Rothnie [1945] KB 562

London Corporation v Cusack-Smith [1955] AC 337

Rakusen v Jepsen and others [2020] UKUT 298 (LC)

Rakusen v Jepsen and others [2021] EWCA Civ 1150

Street v Mountford [1985] AC 809

Siu Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) (the FTT) made on 18 March 2021 by which it ordered the appellant, Margaret Cabo, to repay rent of £9,600 to the respondent, Karen Dezotti. The appeal is brought with the permission of the FTT which considered, rightly, that it raises some difficult and important issues.

2. The appeal was originally due to be heard in person in April 2022 but had to be postponed when Ms Cabo's representative became unwell. It proved impossible to find a date convenient for both parties as Ms Dezotti lives abroad and had travelled to London specifically for the postponed hearing. I therefore directed that the appeal would be determined on the basis of written representations and gave both parties the opportunity to put any further submissions in writing to supplement the skeleton arguments which had already been filed.

3. The issues in the appeal stem from the fact that although Ms Cabo owns the freehold of the HMO which was occupied by Ms Dezotti, it was not Ms Cabo's name which was on the so-called holiday letting agreement under which she occupied the property. The name on the agreement was that of a company, Top Holdings Ltd, which was run by Ms Cabo's husband, Mr Francesco Grasso.

4. The FTT made its decision before the Court of Appeal had reversed this Tribunal's decision in *Rakusen v Jepsen and others* [2020] UKUT 298 (LC) which had suggested that a rent repayment order could be made against a superior landlord. The Court of Appeal took the opposite view ([2021] EWCA Civ 1150) and determined that a rent repayment order may only be made against the tenant's immediate landlord to whom rent was paid by the tenant. The parties had prepared their evidence and made their submissions to the FTT on the understanding that a rent repayment order could be made against a superior landlord.

5. The Supreme Court has recently given permission to appeal in the *Rakusen* case but neither party has suggested that I should delay making a decision in this appeal. The issues n this case are different and I am satisfied that my conclusions are unlikely to be affected by the answers the Supreme Court gives to the issues in *Rakusen*.

The facts

6. The appeal concerns a six bedroomed terraced house at 6 Bellamy Close in West Kensington (the Property) which was purchased by Ms Cabo in 2005. The Property is on two floors with a converted attic; the former kitchen and living room have been re-purposed as bedrooms to maximise the number of occupants.

7. Ms Cabo is married to Mr Francesco Grasso. In 2014 Ms Cabo and Mr Grasso were investigated by the local housing authority, the London Borough of Hammersmith and Fulham, on suspicion of managing the Property as an unlicensed HMO. In the course of

that investigation the occupants of the Property moved out and the authority was unable to establish that any offence had been committed.

8. Mr Grasso is the sole director of a company named Top Holdings Ltd which was incorporated in February 2015. Information filed at Companies House describes the nature of its business activities as the management of real estate on a fee or contract basis. Mr Grasso later informed the FTT that the company specialises in the short-term letting of properties.

9. On 16 January 2016 Ms Cabo appointed Top Holdings Ltd her agent for the purpose of managing the Property. She and a representative of the company (not Mr Grasso) signed a Management Agreement in which she was referred to as "the First Party" and the company as "the Second Party". The Management Agreement began with a recital that the First Party was the registered proprietor and that the Second Party was "proposing to manage the Property on behalf of the First Party on the terms and conditions set forth in this Agreement." Despite what was said about the company's activities at Companies House and by Mr Grasso, the Agreement also purported to record that the company did not manage properties in the usual course of its business but was performing management duties on Ms Cabo's behalf "on a strict private arrangement basis".

10. The Agreement was to be for a term of five years during which Top Holdings was to manage the Property "exclusively for the First Party". The Agreement was expressly stated not to be intended to create any relationship of landlord and tenant between the parties nor any tenancy, licence, lease or joint venture. In return for the management services to be provided Ms Cabo agreed to pay the company an annual renumeration of one peppercorn. She also agreed to insure the property and to pay all council tax billed by the local authority. For its part, Top Holdings agreed to maintain the Property and its contents in the same condition as it found them and to pay for all other outgoings. The Agreement was terminable by either party after 12 months on giving six weeks' notice.

11. The Agreement expressly permitted Top Holdings to let the Property during the term, but it also provided that "any letting shall only be through licence agreements permitting holiday lettings only, as specifically defined under the Housing Act 1988". Clause 8 of the Agreement stated that "Any income derived by the Second Party from the Property shall be retained by the Second Party with no recourse or accountability to the First Party". The company was to be responsible for complying with all relevant statutory provisions and agreed that "it must not at any time permit the premises to become licensable as an HMO".

12. In September 2016 the respondent, Ms Dezotti, was looking for accommodation in London. She saw an advertisement on a property website for a room in the Property and contacted Mr Grasso whose name was given in the advertisement. After meeting him and viewing the room she signed an agreement allowing her to occupy it.

13. The agreement which Ms Dezotti and other occupants of the Property were required to sign is headed with the name and address of Top Holdings Ltd, defined as "the Licensor", and with the statement that the document is a "Licence to occupy a room as

holiday let". The document is dated 16 September 2016 and was signed by Ms Dezotti, described as "the Licensee", and by Mr Grasso on behalf of Top Holdings.

14. Ms Dezotti agreed to pay a licence fee of £200 per week by monthly payment of £867 including bills. The arrangement was to be for a minimum stay of six months until 20 January 2017 but was to continue thereafter from month to month until Ms Dezotti gave one month's notice.

15. The agreement stated at clause 8 that it was made on the basis that the Property was to be occupied by the "guest/licensee for holiday" and "definitively not as a main residence". The licensee was required to acknowledge that she was obtaining no security of tenure and did not have the protection of the Protection From Eviction Act 1977; the company and its agents were to be entitled "to do whatever is required to enforce the eviction of any guest/licensee and removal of any guest/licensee's property without any recourse to the Courts".

16. The agreement also recorded that Ms Dezotti would "specifically refrain to make any application for rent repayment" and agreed to waive her rights under sections 73 and 74 of the Housing Act 2004 (concerning rent repayment orders). She was to pay a deposit of £600 but was required to acknowledge that it would not be regulated by sections 212 to 215 of the Housing Act 2004; the deposit was to be forfeited if she decided to vacate the Property during "void periods" from November to January, for two weeks around Easter, or from June to August.

17. Ms Dezotti initially paid her rent in cash to Mr Grasso. In June 2018 when she had lived at the Property for almost two years Ms Dezotti asked to pay by bank transfer and was provided with the bank account details of Ms Cabo's brother, Mr Daniel Cabo, into whose account she then proceeded to pay her rent until June 2019.

18. Mr Cabo was not an employee of Top Holdings Ltd. Mr Grasso told the FTT that he and a Miss Van Orden (described as a "mentee" of Ms Cabo) were "agents" for the company and that they deducted a commission from the payments of rent they received before passing the balance on to Top Holdings. In October 2015 Mr Cabo had signed a document entitled "Agency Mandate Agreement" which recorded that Top Holdings had a portfolio of residential properties available for letting, some of which were to be allocated to Mr Cabo who was to use his best efforts to let each of them. His commission for providing this service and for "the management of the property where required" was to be an amount agreed with the company which was not stated in the agreement. Despite the terms of the agency agreement Ms Dezotti never met Mr Cabo, nor did he have anything to do with the Property as far as she could ascertain. Her only personal contact was with Mr Grasso, and internet advertisements for rooms at the Property seen by the local authority in 2019 and 2020 always named the landlord's representative as either "Francesco" or "Frank".

19. Ms Dezotti eventually became dissatisfied with the condition of the property and with Mr Grasso's style of management. In March 2019 she sought the advice of the local housing authority and in May 2019 she gave one month's notice before moving out on 4 June.

20. In September 2019 the local housing authority obtained a warrant to enter the property to investigate whether it was an unlicensed HMO. When it visited it discovered that there were six people living there.

21. On 28 October statutory requests for information were served by the authority on Top Holdings and on Ms Cabo personally. A response was given on behalf of the company by an Emily Wilson who claimed to be a director; Mr Grasso is the only director listed at Companies House and he later confirmed to the FTT that Ms Wilson was neither a director nor an employee of the company. Nevertheless, the response she completed at Mr Grasso's request stated that Ms Cabo was the owner of the freehold of the Property and that Top Holdings was the lessee. The response named only four of the six people the local authority had found living at the Property. Asked to state the name and address of the person ultimately receiving or entitled to receive rent (or licence fee) for the Property Ms Wilson responded that that person was Top Holdings Ltd, before adding "nil rent to landlord, peppercorn rent". (In fact, of course, under the Management Agreement the peppercorn was a notional payment by Ms Cabo to Top Holdings for its management services).

22. Ms Cabo also responded to the statutory request for information served on her. Her response on 28 October 2019 confirmed that she was the owner of the freehold and that Top Holdings was the lessee and occupier of the property, although she added "(no written agreement) (peppercorn rent)." She stated that she did not know who collected the rent and that no rent was received by her from Top Holdings. She added that "all rent from occupiers (if any) received by Top Holdings Ltd".

The application

23. On 1 May 2020 Ms Dezotti applied to the FTT for a rent repayment order seeking the repayment of the full amount of the rent she had paid in the last year of her occupancy. She named Ms Cabo as the sole respondent although she explained that she had paid her rent to Mr Grasso as a representative of Top Holdings Ltd and later to Mr Cabo. She explained in a witness statement that she was making the application against Ms Cabo as the registered owner of the Property because she considered that she was the ultimate beneficiary of the rent. She confirmed that she had shared the Property at all times with five unrelated people. The application was also supported by a lengthy witness statement from Mr Armel Collard, an officer of the local housing authority, who gave details of his inspections of the property and an account of the information on the authority's file concerning the inconclusive licensing investigation in 2014.

24. In witness statements filed with the FTT both Ms Cabo and Mr Grasso asserted that although they are married their finances are entirely independent of each other. A curious feature of the case is the differing impressions given to the FTT of the couple's relationship. They married in 1998 but Ms Cabo stated in her written evidence that they had been living apart since at least 2006. Yet the FTT had evidence of social media posts by Ms Cabo announcing that the couple had recently celebrated their 22nd wedding anniversary "in style at home". The couple's pre-covid anniversary seems to have been even more delightful: "21 years ago today I walked down the aisle & there he was

waiting for me [heart] [heart] & here we are today still blah blah ing around. #truelove #marriage #partnership". Mr Grasso's recent birthday celebration were marked by more public declarations of affection: "My Francesco another day another birthday [heart] [kiss][kiss] #love #husband #lovedoeslast". In their evidence the couple implied that they were estranged, but the FTT found that difficult to believe.

25. Mr Grasso maintained that his own and Top Holding's finances, and control over the company, were totally unconnected to Ms Cabo. He suggested that the Management Agreement had been entered into on a "arms-length basis" and was not more favourable or prejudicial to either party than was usual. He later explained that he managed about 30 properties and that at least two others were dealt with on the same basis i.e. that he was entitled to retain all rent monies received.

26. He emphasised that the Agreement did not give Top Holdings exclusive possession of the Property and "unequivocally confirmed" that no lease, licence or tenancy agreement existed between Ms Cabo and the company, and that she received "no rent or other payments" from the company, its agents, or Mr Grasso himself "either directly or indirectly". He described his wife as "merely the client of Top Holdings Ltd, for whom we manage her property". He declined to comment on whether the company itself had committed any offence by managing an unlicensed HMO, but he insisted that Ms Cabo was not a landlord of the property or in receipt of rent, nor was she in control of, or managing an HMO.

27. Ms Cabo also gave evidence and confirmed that she and Mr Grasso lived apart and that their finances had always been kept separate. She explained that she had complied with the local authority's statutory request for information under the advice of her representative, Mr Walker, and that as Top Holdings had been managing the Property, she had left them to deal with them (Mr Collard had explained that the forms completed by Ms Cabo and by the company had been returned to him in the same envelope). She paid the council tax of £115 a month, insurance, and mortgage repayments of £1,761 a month. Asked why she did not use a letting agency to let the Property she said that she would have to pay a fee and that she wanted short-term lets for her to be able to move in if she wished.

The FTT's decision

28. In a detailed decision issued on 18 March 2021 the FTT ordered Ms Cabo to repay rent of £9,600 to Ms Dezotti.

29. The FTT began by explaining that it was Ms Dezotti's case that Ms Cabo was in control of the Property, that Top Holdings' involvement was "artificial", and that Ms Cabo had committed the relevant offence under section 72, Housing Act 2004 of being the person in control of or managing an unlicensed HMO.

30. After recording the written and oral evidence which it had heard, including oral evidence from Ms Dezotti, Mr Collard, Mr Cabo and Mr Grasso, the FTT first considered whether it had been proved beyond reasonable doubt that an offence under section 72(1) of the

2004 Act had been committed. It was satisfied that the Property was an HMO within the scope of mandatory licensing as at all times from 2016 until 2019. On the question whether the lettings were intended to be short term it said the agreements between the company and the tenants were "something of a sham". It referred to Mr Grasso's evidence and to a letter he had written to Ms Dezotti at the start of her occupation in which he referred to the Property as "her home", which it found to be inconsistent with the suggestion that only a short-term holiday let was intended.

31. The FTT next considered who had control of the property or was managing it within the meaning of section 263 of the Housing Act 2004. It noted that Ms Cabo was the freeholder, and that Top Holdings had no property interest and that its rights were terminable on six weeks' notice. It then made the following key findings in paragraphs 70 to 71:

> "Ms Cabo's evidence was that she is separated from Mr Grasso, but that does not appear to be borne out by the on-line information Miss Dezotti collected. Further we find it unrealistic to accept that Ms Cabo would pay the mortgage, the council tax and the insurance, at a total of around £2,000 per month and allow her allegedly estranged husband to receive and retain the totality of the rent, which could be in the region of £60,000 per annum without her having some benefit."
>
> The person in receipt of the rack rent is alleged to be Top Holdings Ltd albeit some rents are paid into the bank account of Mr Cabo and Miss Van Orden. This appears to mean that Miss Cabo does not fall under the definition of "person having control" in s.263(1). However, following the Upper Tribunal decision in *Rakusen v Jepsen and others* [2020] UKUT 298 (LC) it would seem that there can be more than one party entitled to receive a rack rent. Such a person is, in our finding, Ms Cabo and accordingly she is a person in control."

Putting its negative assessment of the couple's evidence beyond doubt, the FTT added:

> "We do not find this arrangement between Ms Cabo and Mr Grasso to be credible and we are further concerned that Mr Grasso claims to be managing other properties under similar arrangements, …".

32. Having found that Ms Cabo was a person having control of the HMO because she was entitled to receive a rack rent, the FTT then made an alternative finding in paragraph 73 of its decision, namely that Ms Cabo was also within the definition of "a person managing" the property under section 263(3)(b). Referring to the couple's account of their arrangement, which it had found not to be credible, it explained that "even if this arrangement is true" Ms Cabo was an owner of the property and would receive the rents or other payments from those occupying the property "but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or a lessee of the premises by virtue of which that other person received the rents or other payments." Although the FTT did not spell it out in paragraph 73 of its decision it clearly had in its mind that Ms Cabo, the owner of the premises, had

entered into an arrangement with Top Holdings, which was not an owner or a lessee of the premises, by virtue of which the company received rents which would otherwise have been received by Ms Cabo herself. On that alternative basis also, therefore, the FTT was satisfied that Ms Cabo was a person capable of committing the offence under section 72(1), 2004 Act.

33. The FTT then directed itself that it must consider whether Ms Cabo was the landlord in relation to the property for the purpose of the 2016 Act. It found that Top Holdings had a contract for the management but had no legal interest in the Property. It concluded that "the company cannot therefore be a landlord". Nevertheless, the company was acting on behalf of Ms Cabo which led the FTT to conclude that "she must be the landlord of the property".

34. The FTT next considered whether Ms Cabo had a reasonable excuse for the offence (although it pointed out that that was not a matter which she herself had raised). It referred to the local authority's investigation in 2014 when Ms Cabo had been warned of the need to obtain a licence and to the fact that, by 2016, the Property was being let for "alleged short-term purposes … with the intention of seeking to avoid the responsibilities under the 2004 Act and 2016 Act." Although Ms Cabo had said that she "did not want to know about property law" the FTT did not consider that that was a reasonable excuse for committing the offence.

35. Finally, the FTT considered the quantum of rent to be repaid. In paragraph 79 it observed that nothing in the 2016 Act required that the landlord "has to receive the rent". In paragraph 80, referring to *Rakusen*, it said that there was no additional requirement for the landlord to be the immediate landlord of the tenant in whose name the order was sought. It was satisfied to the criminal standard of proof that "the landlord in question" (by which it meant Ms Cabo) had committed the relevant offence. It determined that a rent repayment order should be made in Ms Dezotti's favour and awarded the full amount she had requested, £9,600.

The grounds of appeal

36. Ms Cabo submitted extensive grounds of appeal to the FTT challenging its findings of fact and emphasising her case that she had derived no financial benefit from the occupancy of the property. The FTT pointed out that although many of the submissions made in the application had already been dealt with in the body of its decision, but it granted permission to appeal on three specific points which appeared to it to be arguable. The issues for which it gave permission to appeal were:

    (1) Could the owner of a property be a person in control when someone else was collecting the rack rent and it is said not passing it on to Ms Cabo?

    (2) Did the FTT correctly interpret and apply section 263(3)(b), Housing Act 2004 in making its alternative finding that Ms Cabo was a person managing the property?

    (3) Could a company with no proprietary interest in the property be a landlord?

37. The FTT listed these issues in a different order, but I have reorganised them in what seems to me to be a more logical sequence. To be capable of committing the offence of having control of or managing an unlicensed HMO contrary to section 72(1), Housing Act 2004 a person must come within the meaning of "person having control" or "person managing" in section 263 of the Act. The first issue is directed at the question whether Ms Cabo was a person in control, and the second with whether she was a person managing. The third issue is concerned with the requirement that only a landlord may be the subject of a rent repayment order under the Housing and Planning Act 2016.

38. The FTT did not grant permission to appeal on any other ground, and no application has been made to this Tribunal for permission to raise additional points on appeal. Ms Cabo addressed a number of other matters in her skeleton argument and subsequent submissions, including challenging the FTT's central rejection of her and Mr Grasso's evidence that she derived no financial benefit from the company's management of the Property. She does not have permission to appeal on those matters and I will limit the rest of this decision to the issues on which the FTT did grant permission.

Issue 1: Could the owner of a property be a person in control when someone else was collecting the rack rent and, it is said, not passing it on to Ms Cabo?

39. The definition of a person in control is provided by section 263(1), Housing Act 2004, as follows:

> "In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent."

40. To put this definition in context it is helpful to refer to the definition of "person managing" in section 263(3), so far as it applies to HMOs:

> "In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from—
>
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
>
> (ii) …; or
>
> (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

41. The concepts of having control of, or managing an HMO are both related to the receipt of rent. In the case of a person having control the rent must be a rack-rent, which section 263(2) explains means at least two-thirds of its full net annual value (where the premises are not let at a rack-rent, an entitlement to receive a rack-rent if they were is sufficient). In contrast, a person managing need not receive a rack-rent; receipt of any amount of rent "or other payments" will be sufficient. There is no doubt that in this case the Property was let at a rack-rent and that the rents were received.

42. Nothing in section 263(1) requires that the person having control should have any interest in the property itself. This is in contrast to a person managing, who must be an owner or lessee of the premises.

43. When section 263(1) refers to someone who "receives" rent, it is referring to actual receipt. Money must come into the hands of the person who has control. That is clear from the words which qualify "receives" in subsection (1) – "whether on his own account or as agent or trustee of another person" – which are absent from the definition of "person managing" in sub-section (3). A person managing also receives rent, but in their case it does not matter how they receive it; they may do so "whether directly or through an agent or trustee". The absence of a similar qualification in the definition of "person having control" indicates that to be a person having control one must actually receive rent into one's own hands; indirect receipt through an agent or trustee will not do.

44. To be a person having control, the person receiving the rent need not be entitled to keep it for their own benefit: an agent or trustee who receives rent will be a person having control. In short, the person having control is the rent collector, whether they are collecting on their own account or on behalf of someone else.

45. The answer to the FTT's question is therefore that an owner of property who does not collect the rent is not a person in control in the sense described in section 263(a). Whether or not the rent was being passed on does not matter for this purpose. What is important is that it was not being paid to Ms Cabo, and for that reason she was not a person having control of the Property.

46. The relevant passage of the FTT's decision is paragraph 71 where it said that the rack-rent was paid to Top Holdings, Mr Cabo and Miss Van Orden, which "appears to mean that Miss Cabo does not fall under the definition of "person having control" in s.263(1)." It went on to say that it seemed from this Tribunal's decision in *Rakusen v Jepsen* that more than one party could be entitled to receive a rack rent. It found that Ms Cabo was such a person "and accordingly she is a person in control."

47. These findings cannot stand, for two reasons.

48. The FTT was entitled to reject Ms Cabo's and Mr Grasso's evidence that she received nothing from the renting of the Property. It concluded that it was "unrealistic to accept" that Ms Cabo would incur expenses of around £2,000 a month while allowing Mr Grasso "to receive and retain the totality of the rent, which could be in the region of £60,000 per annum, without her having some benefit." What it did not do, however, was to make any

finding about how much Ms Cabo received; in particular it did not find that she received a rack-rent. The Property was let at a rack rent, so for Ms Cabo to be the person in control it had to be established that she was in receipt of that rack-rent. But there was no evidence about how much money was going to Ms Cabo from the arrangements with Top Holdings and Mr Grasso, and therefore no basis on which the FTT could find that she received two-thirds of the full net annual value of the Property (which would presumably have been at least £40,000). Without such a finding Ms Cabo could not be found to be a person having control.

49. Secondly, the FTT was correct that more than one party can be entitled to receive a rack rent. The authority for that proposition is the decision of the House of Lords in *London Corporation v Cusack-Smith* [1955] AC 337, 357-358, which was followed by the Tribunal in *Rakusen*, in part of its decision not doubted by the Court of Appeal. But in *London Corporation* Lord Reid was considering a property let on a chain of leases and subleases at different times. It was in that context that he explained how more than one person could be in receipt of a rack rent at one time:

> "A, the freeholder, may let to B for a rent of £100 which is a rack-rent at the date of B's lease, and later B may sublet to C for a rent of £200 which is a rack-rent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rack-rent of the land. … I am therefore of opinion that there can be more than one "owner" under the first limb of the definition, and that if the freeholder lets at a rack-rent he is and remains an "owner" no matter what his tenant may do.

50. *London Corporation* was about the meaning of rack-rent, and whether the amount necessary to qualify as a rack-rent changed over the duration of a long lease. It was not about what qualified as the receipt of that rent and nothing in it (or in *Rakusen*) dealt with a situation where property was managed on behalf of an owner by an agent which collected the rack-rent and then distributed it. The FTT did not find that Top Holdings, or Mr Grasso, were tenants of Ms Cabo paying rent to her. They were managing the Property on her behalf, and sums which they collected from Ms Dezotti and other occupiers of the Property before passing it on to Ms Cabo, however much they were, could not cause her to be a person having control of the Property. Indirect receipt is not enough for the purpose of section 263(1).

51. It follows that the FTT was not entitled to find that Ms Cabo was a person having control of the Property. If that had been the only relevant finding it made, the appeal would have to be allowed.

Issue 2: Did the FTT correctly interpret and apply section 263(3)(b), Housing Act 2004 in making its alternative finding that Ms Cabo was a person managing the property?

52. I have already quoted the definition of "person managing" above. The alternative limb (section 263(3)(b)) applies where an owner or lessee of an HMO does not receive rents or other payments from those in occupation of parts of the premises, because they have entered into "an arrangement (whether in pursuance of a court order or otherwise) with

another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments". In such a case the owner or lessee who entered into the arrangement is a person managing the property notwithstanding they do receive any rent.

53. The FTT relied on the second limb of the definition of "person managing" as an alternative route to fixing Ms Cabo with responsibility for licensing the HMO. Having rejected her evidence about the financial arrangements with Mr Grasso and his company it found that "even if this arrangement is true" Ms Cabo was still a person managing the Property. It nevertheless granted permission to appeal on the question whether it had correctly interpreted and applied sub-section (3)(b). It may have been encouraged to do so because of the absence of relevant authority on the application of this provision.

54. Taking the Management Agreement between Ms Cabo and Top Holdings at face value, as Ms Cabo would have me do, the question is whether it was an arrangement of the sort described in section 263(3)(b).

55. The first requirement is that Ms Cabo must not have been receiving rent or other payments from those in occupation of the Property. That was her case, and the FTT cannot be criticised for considering the consequences of that case on the assumption that it might be true.

56. The second requirement is that Ms Cabo would have received the rents from the occupiers of the Property "but for having entered into" the Management Agreement. The effect of the Agreement was that Ms Cabo was not in a position to receive rent or other payments from those in occupation. She had placed the management of the Property in the hands of the company and had stipulated that the company was to be entitled to retain the income from lettings "with no recourse or accountability" to her. That seems to me to be sufficient to demonstrate the required causal connection between the arrangement and the non-receipt of rent.

57. The third requirement is that the arrangement was made with another person who was not an owner or lessee of the Property, and again that is clearly satisfied on Ms Cabo's own case. The Management Agreement stated explicitly that it was not to create any relationship of landlord and tenant between the parties "nor any tenancy, licence, lease or joint venture".

58. The final question is whether Top Holdings received the rents "by virtue of" the Management Agreement. It was certainly entitled to receive the rents by virtue of the Management Agreement, and I can see no reason why that should be insufficient. The lettings themselves were arranged by the company and it might be said that until it had done so it received nothing. But that does not seem to me to be a relevant consideration. The provision is intended to cover a wide range of arrangements "whether in pursuance of a court order or otherwise" and so would apply where a receiver or manager had been appointed by a court. It is hard to see why it should matter that the property may not have been let before the arrangement and only became let after it was entered into. To

the extent that the provision is about anti-avoidance, that interpretation would make it easy to evade.

59. In my judgment the FTT's finding that section 263(3)(b) applied was correct and its alternative finding that Ms Cabo was a person managing the Property was also correct. As a result, it does not matter that the FTT's conclusion that she was a person having control of the Property was not open to it on the evidence and should be set aside.

60. It follows, by virtue of her status of being a person managing the Property, that the obligation to obtain an HMO licence under Part 2 of the Housing Act 2004 fell on Ms Cabo and that she committed the offence under section 72(1), 2004 Act when she failed to comply with that obligation.

61. The final question is whether Ms Cabo was someone against whom a rent repayment order could be made.

Issue 3: Can a company with no proprietary interest be a landlord?

62. The identity of Ms Dezotti's landlord is important because in England rent repayment orders are provided for by Chapter 4 of Part 2 to the Housing and Planning Act 2016, which begins with the statement in section 40(1) that:

> "This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies."

In *Rakusen*, the Court of Appeal decided that a rent repayment order can only be made against an immediate landlord of an applicant tenant, and not against a superior landlord. It is therefore necessary to determine whether Ms Cabo was Ms Dezotti's immediate landlord.

63. In her application for permission to appeal addressed to the FTT in April 2021 (before the Court of Appeal's decision in *Rakusen*) Ms Cabo argued that the FTT had been wrong to treat her as the landlord and ought to have found that Top Holdings was Ms Dezotti's landlord. She acknowledged that the company did not have a tenancy of its own but she relied on the decision of the House of Lord's in *Bruton v London & Quadrant* [2000] 1 AC 406 which established that a relationship of landlord and tenant could exist when a person who did not have a proprietary interest in a property nevertheless purported to grant a tenancy of it. On that basis Ms Cabo argued that it was clear that the company was Ms Dezotti's landlord and that she was not.

64. *Bruton v London & Quadrant* had not been cited to the FTT and it seems likely Ms Cabo's reference to it was one of the points which the FTT referred to as new when it granted permission to appeal. It may have had this issue in mind when it gave permission on the question whether "a company with no proprietary interest can be a landlord".

65. The answer to the FTT's question is that a company (or other person) with no proprietary interest in land can grant a tenancy of that land and can be a landlord. The authority for that proposition is *Bruton v London & Quadrant,* which concerned a licence agreement by which a housing trust had the use of a block of flats to provide temporary housing accommodation. The local authority which owned the block of flats would have been acting *ultra vires* if it had granted the trust a tenancy. The licence agreement also prohibited the trust from granting tenancies. The trust allowed Mr Bruton to occupy a flat in the block under an agreement which was called a weekly licence. The question was whether that agreement created a tenancy. The Court of Appeal dismissed an appeal from the decision of the County Court that Mr Bruton was only a licensee. Millett LJ considered that an agreement could not be a lease or tenancy unless it created a legal estate in land, and that a grantor which did not itself have an estate in land could not create one and so could not grant a tenancy.

66. Mr Bruton appealed to the House of Lords, where his appeal was allowed, and the leading speech was given by Lord Hoffmann. He explained that the decision of the House of Lords in *Street v Mountford* [1985] AC 809 was authority for the proposition that a "lease" or "tenancy" is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive possession of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. The fact that the trust was a responsible landlord performing socially valuable functions which had agreed with the local authority that it would not grant tenancies and which had explained to Mr Bruton that it did not intend to grant him a tenancy, did not make the agreement to grant exclusive possession to Mr Bruton something other than a tenancy. It was also irrelevant, Lord Hoffmann explained, that the trust did not have a legal estate:

> "First, the term "lease" or "tenancy" describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties. A lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a "term of years absolute." This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*. But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest."

67. The answer to the FTT's question is therefore clear. Top Holdings could grant a tenancy to Ms Dezotti. Moreover, that is what it did, although it tried to disguise the effect of the agreement by increasingly elaborate denials that a tenancy was being created.

68. It is not immediately obvious what the FTT's thinking was when it gave permission to appeal on this issue. It had said specifically (at paragraph 75) that Top Holdings had only a contract for the management of the Property and no legal interest in it, so it "cannot *therefore* be a landlord" (emphasis added). It may have taken the view that, if it was not a landlord, the company could not be the subject of a rent repayment order. But the application was not made against the company, so whether it could be a landlord or

not made no difference. It was also the case that, based on this Tribunal's decision in *Rakusen*, current at the time of the FTT's decision, it was not necessary that the order be made against the immediate landlord. For both of those reasons the question whether Top Holdings could grant a tenancy was irrelevant to the FTT's jurisdiction to make a rent repayment order in Ms Dezotti's favour.

69. Ms Cabo relied on *Bruton v London & Quadrant* in her original grounds of appeal to support her argument that Top Holdings was Ms Dezotti's landlord. She was right about that, but it does not necessarily get her very far. The question is whether the FTT was entitled to make a rent repayment order against Ms Cabo, not whether it should have made one against Top Holdings.

70. Following the Court of Appeal's decision in *Rakusen*, the FTT could only make an order against Ms Cabo if it was satisfied that she was Ms Dezotti's immediate landlord, but that is what the FTT found, concluding that "she must be the landlord of the property". That conclusion was based on its finding that the company had a contract for the management of the Property but had no legal interest in it and so could not be a landlord at all. Having found that the written agreement was "something of a sham" (and implicitly that it created a tenancy, although the FTT did not say so in so many words) and having excluded the possibility that the company could be Ms Dezotti's landlord, the FTT was left with only one other potential landlord, namely, Ms Cabo.

71. The real issue raised by this part of the appeal is therefore whether the FTT was right to find that Ms Cabo was Ms Dezotti's landlord.

72. The relationship between Top Holdings and Ms Cabo was that of agent and principal. An agent is a person engaged to do any act for another or to represent another in dealings with third parties. The person for whom such acts are done is known as the principal. The essence of the relationship is that the agent is given power, within prescribed limits, to affect the principal's legal relations with third parties. The relationship of agent and principal is usually created by a written contract and the responsibilities of the agent are defined by the contract. But the relationship may be defined partly in writing and partly by oral agreement or by conduct.

73. In this case, the Management Agreement specifically ruled out the existence of a relationship of landlord and tenant between Ms Cabo and Top Holdings (clause 2). Instead it required the company to manage the property "exclusively for the benefit of the First Party [Ms Cabo]" (clause 3). The company was specifically permitted to let the Property (clause 7). Although the Management Agreement also stated that the income from letting the Property was to be retained by the company "with no recourse or accountability" to Ms Cabo, the FTT rejected her case about the financial arrangements between them as "not credible" and found that she was the person entitled to receive the rent of the Property. It did not describe the Management Agreement as a sham and its findings would not rule out the possibility that the parties agreed to change the arrangement at some point after they entered into it, but the effect of the FTT's finding was that the true financial relationship between Ms Cabo and the company was not reflected in the Management Agreement. The company had express authority to manage

the Property exclusively for Ms Cabo's benefit, and to let it, and it dealt with the income from the lettings as it and Ms Cabo agreed or as she directed; whichever was the case, the result was that Ms Cabo had the benefit of at least part of the rent and was, as the FTT put it, "entitled to receive a rack rent".

74. Ms Cabo was what is known as an "undisclosed principal". Usually, when someone is acting as an agent that fact is made clear to the person with whom they are dealing, in which case the principal is said to be "disclosed"; examples can be seen in the documents in this case when Mr Grasso signed the so-called holiday letting agreements on behalf of Top Holdings. In such cases it is obvious that the agreement is being made between the principal (Top Holdings) and the third party (the occupant). Sometimes, however, the existence of the principal is not disclosed to the third party. The agent contracts with the third party as they would if they were contracting on their own behalf, without informing the third party that they are in fact doing so on behalf of someone else.

75. In this case Top Holdings let the Property using agreements which identified it as the "Licensor" and which did not mention Ms Cabo at all; her existence, and the fact that Top Holdings was acting on her behalf, were undisclosed. Ms Dezotti only found out about Ms Cabo by carrying out a Land Registry search which disclosed that she was the owner of the freehold and had granted no registerable lease.

76. The legal consequences of an agent entering into a contract with a third party in its own name, without disclosing that it is acting on behalf of someone else (the undisclosed principal), were explained by Lord Lloyd of Berwick, delivering the judgment of the Privy Council, in *Siu Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

77. The FTT's rejection of the evidence of Ms Cabo and Mr Grosso about the financial arrangements between them is important in this regard. If they had genuinely agreed that the income from letting the Property was to be retained by the company "with no recourse or accountability" to Ms Cabo, then it might have been said that Top Holdings was acting on its own behalf, and not as agent for Ms Cabo when it entered into the permitted lettings. In that case the second and fifth of Lord Lloyd's propositions (that the agent must intend to act on the principal's behalf, and that the circumstances may show that the agent is the true and only principal) might have been engaged. But, having heard their evidence, the FTT was satisfied that Ms Cabo and Mr Grasso had not given a true account of what happened to the income from the Property and that Ms Cabo was the

person "entitled to receive a rack rent". The only conclusions which can be drawn from that finding are either that the "no accountability" clause was a sham, which was never intended to be acted upon and which did not reflect the true bargain, or that it was subsequently agreed to deal with the letting income differently, and for Ms Cabo's benefit. In either case, leaving the "no accountability" clause out of the picture, nothing remains to contradict the express statement in the Management Agreement that Top Holdings was to "manage the Property on behalf of the First Party".

78. The general rule is therefore that an undisclosed principal may sue or be sued on any contract made on her behalf by her agent acting within the scope of its authority. Where an agent enters into a contract in its own name, evidence is admissible to show who is the real principal in order to enforce the contract against her (Bowstead & Reynolds on Agency, 22nd Ed, Article 76, 8-068).

79. The same rules apply where the contract creates the relationship of landlord and tenant. An agent with sufficient authority may bind its principal by granting a lease in the principal's name (Woodfall: Law of Landlord and Tenant, 2.190). Where an agent executes a lease or agreement in the name of its principal the principal will be liable on the terms of the lease. If an agent executes a lease or agreement in its own name only, the agent will be personally liable. If in such a case the agent does not disclose on the face of the agreement that it is acting as agent, evidence will nevertheless be admissible to demonstrate that the relationship of agent and principal existed between it and the real owner of the property. Proof of that relationship will then enable the principal to sue or be sued on the agreement (Woodfall, 2-194).

80. The modern authority cited by Woodfall in support of the right of a tenant to sue an undisclosed principal as landlord on a tenancy agreement entered into by an agent purporting to act on its own behalf is *Epps v Rothnie* [1945] KB 562. The question in that case was whether the claimant could recover possession of a house so that he could live in it himself. That depended on whether he was the landlord and could take advantage of provisions of the Rent Acts which allowed a landlord to recover possession for his own occupation. Scott LJ explained that in the original tenancy agreement the landlord was stated to be the plaintiff's brother, and not the plaintiff himself. The tenant argued that because the brother was named as landlord in the tenancy agreement, the plaintiff was not his landlord and could not recover possession for his own occupation. Scott LJ gave two answers to that argument. The first was that the original fixed term tenancy had expired and been replaced by a periodic tenancy between the plaintiff and the tenant. He went on:

> "The second answer to the contention is that the agreement was an ordinary agreement in writing and even if the plaintiff was compelled to rely on it, evidence would have been admissible on ordinary principles applicable to any contract in writing, to prove that the person signing it as a contracting party, was acting for an undisclosed principal."

Scott LJ therefore considered that the plaintiff could establish that he was the landlord by proving that his brother had let the property as his agent, even though the tenancy

agreement had been made between the tenant and the brother and had named the brother as landlord.

81. The position in this case is the same. The evidence shows that although the company let the Property in its own name, it did so on behalf of Ms Cabo as her agent; it thereby created the relationship of landlord and tenant between Ms Cabo and Ms Dezotti. Unlike Top Holdings, which had no proprietary interest, Ms Cabo was the owner of the freehold legal estate and a tenancy granted by an agent acting on her behalf would be good against the world.

82. When the true relationship between the company and Ms Cabo was revealed, Ms Dezotti was therefore entitled to make her claim for a rent repayment order against Ms Cabo, as her landlord. I think it likely that she could additionally have made a claim against the company itself, because the contractual relationship of landlord and tenant also existed between them, but in this case she chose not to do so and it is not necessary to decide that point.

83. For these reasons I consider that the FTT was entitled to find that Ms Cabo was Ms Dezotti's landlord and could be the subject of a rent repayment order.

Disposal

84. None of the grounds of appeal identified by the FTT provide any basis for a successful challenge to the rent repayment order it made against Ms Cabo. There is no appeal against the quantum of the order.

85. For these reasons the appeal is dismissed.

Martin Rodger QC,

Deputy Chamber President

2 September 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with perMsion. An application for perMsion to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which

case an application for perMsion to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for perMsion to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses perMsion to appeal a further application may then be made to the Court of Appeal for perMsion.