UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Breach of covenant – permitting or suffering use of premises for immoral acts – whether sufficient evidence of prohibited use adduced to discharge burden of proof – adequacy of FTT's reasons and findings of fact – importance of clear determination of nature and extent of breach – appeal allowed

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

BETWEEN:

MS FIORELLA MARCHITELLI

Appellant

and

15 WESTGATE TERRACE LTD

Respondent

Re: Flat 1, 15 Westgate Terrace,
London SW10 9BT

Martin Rodger QC, Deputy Chamber President

2 June 2020

Hearing conducted using remote digital platform

Alexander Hickey QC, acting *pro bono*, for the appellant
Robert Bowker, instructed by Keystone Law, for the respondent

The following cases are referred to in this decision:

Akici v L R Butlin Ltd [2006] 1 WLR 201

Berton v Alliance Economic Investment Co [1922] 1 KB 742

Fox v Jolly [1916] 1 AC 1

Introduction

1. Before a landlord can exercise a right of re-entry or forfeiture of a lease for a breach of covenant it must first serve a notice under section 146, Law of Property Act 1925 "specifying the particular breach complained of" (section 146(1)(a)). Where the lease is a long lease of a dwelling, the landlord may not serve such a notice unless the tenant has admitted the breach or it has been finally determined by the appropriate tribunal (or a court) on an application under section 168(4), Commonhold and Leasehold Reform Act 2002 that the breach has occurred. In England the appropriate tribunal is the First-tier Tribunal (FTT).

2. This appeal is against a decision of the FTT under section 168(4). It raises issues about the sufficiency of the FTT's determination that a breach of covenant had occurred in this case. It also raises a more general question regarding the detail which is required in a determination of breach under the section.

3. The FTT's decision concerned a flat at 15 Westgate Terrace, London SW10, one of 5 flats in a building belonging to the respondent, 15 Westgate Terrace Ltd. Flat 1 is the subject of a lease now vested in the appellant, Ms Fiorella Marchitelli.

4. At the hearing of the appeal the appellant was represented by Alexander Hickey QC, acting *pro bono*. The respondent was represented by Robert Bowker. I am grateful to them both for their assistance.

The appellant's covenants and the allegations of breach

5. A lease of Flat 1 was first granted to the appellant's predecessor in May 1975 and was extended by a new grant for a term of 999 years on 16 April 2008. The appellant subsequently acquired the extended lease. In the late summer of 2017, when the events with which this appeal is concerned began, she was not living in the flat but was sub-letting it to a cousin.

6. The extended lease incorporated covenants by reference to the original 1975 lease. These included a covenant by the tenant, at clause 4(6), to observe and perform regulations in the Fourth Schedule. Those regulations included requirements not to use or permit the flat to be used except as a private residential flat in the occupation of one family, their guests and staff only (paragraph 1), and not to use or permit the use of the flat for business purposes (paragraph 2). They also included the following restriction, at paragraph 3:

> "Not to do or permit or suffer in or upon the Demised Premises or any part thereof any illegal or immoral act or any act or thing which may be or may become a nuisance or annoyance or cause damage to the Lessors or the tenants of the Lessor or the occupiers of any part of the Building."

7. On 20 February 2019 the respondents' solicitors applied to the FTT under section 168(4) seeking a determination that the appellant had breached paragraphs 1, 2 and 3 of the Fourth

Schedule, as well as other covenants which are no longer in issue in this appeal. The grounds of the application (in which Ms Marchitelli was referred to as the respondent) were summarised in the form by which the proceedings were commenced as follows:

> "In the period from October 2017 until October/November 2018 Flat 1 was let to a tenant who used it for the purposes of a brothel. The letting was arranged by Mr Flavio Torino, a private contact of the respondent. This use of the flat is a breach of the covenants at clauses 3(7)(a) and regulations 1, 2 and 3 of the fourth schedule to the lease. The applicant refers to the witness statements of Julius Hugelshofer, Rupert Foley and James Reed attached to this application. The respondent was advised regularly about the activities being carried on at Flat 1 but persistently refused to acknowledge them or take any action to prevent them continuing".

8. As is apparent from this extract, the application did not suggest that the appellant herself was using the flat as a brothel, but that her tenant was doing so; the complaint against the appellant was that she had refused to acknowledge what was going on in her flat or to take steps to prevent it.

9. The appellant's primary ground of appeal is that the evidence relied on before the FTT by the respondent was incapable of discharging the evidential burden of proving such a serious allegation. It is convenient at this stage to describe that evidence and the appellant's response to it in a little detail.

The evidence in support of the respondent's allegations

10. The witness statements referred to in the application were those of the owners of flats 3 and 4 in the building, Mr Foley and Mr Hugelshofer, and of Mr Reed, the managing agent. All three gave evidence before the FTT.

11. Mr Foley is the owner of Flat 4 on the ground floor of the building. He does not live there, but lets the flat to tenants; at the relevant time his tenants were two young women. Mr Foley's evidence concerned complaints he had received from his tenants about disturbances caused late at night by visitors wishing to be admitted to the appellant's flat on the top floor; these visitors would ring the door-bell of Flat 4 in the mistaken belief that it was the address they sought. On at least one occasion the tenants were said to have been propositioned for sex by a late-night caller.

12. Mr Foley is also the sole director of the respondent company, which owns the freehold of the building and is the appellant's landlord. In that capacity he had communicated with the appellant and her agent, Mr Torino, and had attempted to gather evidence of the activities which were believed to be going on in the appellant's flat. E-mail communications between Mr Foley and the appellant were exhibited to his witness statement.

13. Mr Hugelshofer is the owner of flat 3 on the first floor of the building where he lived between April 2017 and August 2018, when he began to work abroad. His evidence concerned complaints he had made to the appellant about the noise of people going up and

down the staircase between midnight and 7.00am, beginning in October 2017 but becoming worse during November and December. Eventually he came to believe that Flat 1 was occupied by a person calling themselves Natalie Ferraz. Post addressed to a person of that name, at Flat 1, was delivered to the building. Mr Hugelshofer recorded that, in the early hours of 16 December 2017, he had confronted the occupier of Flat 1, whom he took to be Natalie Ferraz, and who appeared to him to be a transvestite. He formed the view on that occasion that the flat was being used as a brothel.

14. Mr Hugelshofer recorded in his witness statement that he had spoken to the tenants of Flat 4, and that they had found material on the internet advertising Natalie Ferraz's services as a transsexual escort. Mr Hugelshofer inferred that those services were being offered at the appellant's flat, although the salacious screenshots which he exhibited to his witness statement did not mention any specific address. According to Mr Hugelshofer Natalie Ferraz left the flat on 27 January 2018.

15. A few months later, in April, the flat was said to have become occupied by what Mr Hugelshofer described as "a number of different individuals, usually transvestites or woman dressed like prostitutes". He informed the appellant on 29 April 2018 and in May and June he complained to her agent, Mr Torino, about the misbehaviour of her tenants: "the prostitutes, the brothel, the noise, the dirt, the parties, the rubbish." When his complaints appeared not to be taken seriously by Mr Torino Mr Hugelshofer again contacted the appellant, who was in hospital, informing her of a regular traffic of "older men in suits with young girls walking upstairs to your flat every day". He asked the appellant to put pressure on her agent to change the tenants.

16. Mr Hugelshofer also said in his statement that the tenant of Flat 1, Mr Di Bari, had threatened him on 17 July 2018 and that he had reported the matter to the police. He had begun to work abroad in August 2018 and generally returned to his flat only at weekends but, he said, the tenants of the ground floor flat had confirmed to him that problems with noise from visitors to Flat 1 had continued. A friend of Mr Hugelshofer, staying at his flat during the week of 23 September 2018, had reported to him that she had heard people going up and down the stairs to Flat 1 every night. Screenshots of Mr Hugelshofer's text messages to the appellant and Mr Torino were exhibited to his witness statement.

17. On 29 September water began to leak (as the FTT found) from Flat 1 into the common parts of the building. Mr Torino attended and he was observed, according to Mr Hugelshofer, coming out of the appellant's flat in conversation with "a tall blonde transvestite dressed like a prostitute". In October Mr Hugelshofer instructed his solicitor to correspond with the appellant.

18. The third witness who gave evidence supporting the application was Mr Reid. He had little to add to the allegations of prostitution although he said he had been notified by Mr Hugelshofer that Flat 1 was being used as a brothel. A camera which he had installed in the common parts to record comings and goings had not been able to take any footage (other evidence explained that the camera had not been working properly). This was not the first camera to have been installed in the common parts; one of Mr Foley's original

complaints had been that the tenant of Flat 1 had installed a camera of his own, focussed on the door of the flat.

The appellant's evidence in reply

19. On 27 March 2019, shortly after the application had been listed to be heard on 9 May, the appellant's consultant oncologist wrote to the FTT expressing his concern that the appellant had been asked to attend a hearing concerning events that occurred while she was undergoing intensive chemotherapy for a very serious cancer. Brief details of that treatment were given, and her consultant requested that "every support" should be given to the appellant "at this difficult time". The letter appears to have been incorrectly addressed and it is not clear whether it ever reached the FTT's offices. The panel which conducted the hearing on 9 May had not seen it until it was shown to them on the day by Mr Hickey.

20. On 18 March the appellant had been directed by the FTT to file a statement setting out her response to the application in full. The witness statement she duly filed was prepared by her solicitors and signed by her. In it she explained that she was "currently extremely vulnerable and stressed with my current health condition". She denied that she had breached the terms of her lease and referred to a dispute over service charges, implying that the allegations made against her were in consequence of that dispute.

21. The appellant explained that she had been introduced to Mr Torino by a friend and that he had "appeared to be a reputable agent". Mr Torino had identified Mr Di Bari as a new tenant but, contrary to the impression gained by Mr Hugelhofer, the appellant said she was not related to either Mr Torino or Mr Di Bari (it appears the cousin who had occupied the flat had moved out, leaving a friend in residence, but it is not clear whether that friend was Mr Di Bari). Through Mr Torino's agency Mr Di Bari had been granted an assured shorthold tenancy for a term of 12 months. The appellant did not have a signed copy of this document and exhibited only an unsigned copy to her witness statement; no explanation was offered why this document was dated 8 July 2018 and was for a term of 12 months from that date when Mr Di Bari was said to have taken occupation in September 2017.

22. The appellant explained that she had become aware of complaints relating to her flat in October 2017. At that time Mr Torino "was still managing the premises for and on my behalf". She had entrusted dealing with the situation to him because she had been diagnosed with an extremely serious illness in August 2017 and had then been undergoing treatment. The remainder of the appellant's statement asserted that she has seen no "compelling evidence" that prostitution had taken place at her flat; she denied that the premises were used as a brothel or that she had consented to, or permitted, such use. On the contrary, she maintained, she had "instructed [Mr Torino] to take legal steps to recover possession of the premises and the AST was ended. Subsequently, [Mr Di Bari] and anyone he allowed to enter the premises, ceased to occupy the premises in or around late September/early October 2018." She said she had been in hospital at that time but a friend had confirmed personally to her that Mr Di Bari had gone.

The FTT's decision

23. The hearing of the application by the FTT took the best part of 2 days, the first in May and the second in October 2019 (the parties had estimated that the hearing would take only half a day). The respondent's three witnesses were cross-examined by Mr Hickey QC on the first day and the matter was then adjourned. The appellant was cross-examined on the second day and the parties made closing submissions.

24. The FTT recorded that the first allegation against the appellant was that in breach of regulations 1 to 3 of the Fourth Schedule to the lease she had allowed her flat to be used other than as a private residential flat, had permitted it to be used for business purposes and had "suffered the property to be used for an illegal or immoral act which had become a nuisance or annoyance to the landlord and other occupiers of the building." The FTT referred to the respondent's assertion that "between October 2017 and October/November 2018 the property had been let to a tenant who used it for the purposes of a brothel". The FTT understood that no allegation was made that the appellant herself was using the property as a brothel but that her tenant was said to have done so while she had "suffered" that use to continue.

25. The FTT dealt in paragraphs 11, 12 and 13 with Mr Hugelshofer's evidence. Its treatment was largely a verbatim recitation of parts of his witness statement. No reference was made to answers given in cross-examination which Mr Hickey QC told me included an acceptance by Mr Hugelshofer that he had not personally witnessed any immoral activity nor could he exclude the possibility that the young women he took to be prostitutes were simply "students on a night out". The FTT referred to Mr Hugelshofer's evidence concerning his encounter with Natalie Ferraz, and his departure in January 2018, Mr Hugelshofer's belief that prostitutes had returned in April and his complaints in May and June. It also referred to Mr Foley's witness statement recording the complaints which he had received from his tenants.

26. The FTT devoted four paragraphs of its decision to the appellant's evidence. She had informed the FTT that for a large part of the period under consideration she had been seriously ill and unable to deal with her affairs. She had left the management of her flat to Mr Torino but she had maintained in cross-examination that she had visited the flat on several occasions and had seen no evidence of prostitution (these visits were not mentioned in her witness statement). The FTT described her recollection of the dates of these inspections and her description of the interior of the flat as "unclear". It concluded on the basis of a contemporaneous note of a conversation with Mr Foley that she had been aware of the situation since 23 October 2017.

27. As for the allegation of permitting or suffering the use of her flat in breach of covenant, the FTT said only that, while she maintained that she had done all she could to resolve the situation, "apart from contacting Mr Torino it appears that she had taken few active steps to resolve the situation or to rid the property of its difficult sub-tenant".

28. The FTT made its determination of breach in the following three paragraphs, which I quote in full:

> "19. Although there is no direct evidence before the Tribunal of any act of *flagrante delicto*, the circumstantial evidence that the property was being used as a brothel or for business purposes or an immoral purpose is considerable and comprises:
>
> - Evidence of numerous male visitors during the night;
> - Complaints of noise and nuisance by other occupiers;
> - The identification of the occupier as Natalie Ferraz;
> - A parcel being addressed to Natalie Ferraz at Flat 1;
> - Internet advertisements for Natalie Ferraz, a transvestite, offering services of a sexual nature to men.
>
> 20. From the above the Tribunal considers that it is entitled to conclude that immoral activities in breach of clause 2(7)(b) and regulations 1-3 of the fourth schedule of the lease were being carried on in Flat 1. The fact that no criminal proceedings have been instituted is irrelevant.
>
> 21. It is common ground that the previous occupier of Flat 1 has now vacated and that the property is now being managed and let by experienced agents. That is, the problem complained of has now ceased. However, that does not prevent the Tribunal from finding that the breach of covenant has occurred and making a determination to that effect."

29. The FTT concluded its decision with a paragraph to which particular exception was taken by Mr Hickey QC in his grounds of appeal, and which he said showed an insensitivity to the appellant's medical condition, a misunderstanding of the evidence, and a reversal of the burden of proof. I therefore quote it in full:

> "24. The tribunal understands that the respondent is a lawyer but was no longer on the roll as an English solicitor. It therefore considers that she would understand the seriousness of the assertions being made by the appellant and the need to give accurate substantiated evidence. Even giving considerable leeway for the fact that during part of the period under discussion the respondent had been undergoing medical treatment (of which no evidence was supplied) the Tribunal found her evidence to be vague, unsubstantiated and unconvincing."

The grounds of appeal

30. The appellant was granted permission to appeal the FTT's determination that she had breached paragraphs 1 to 3 of the Fourth Schedule and the appeal was pursued on two main grounds. The first was that the evidence presented to the FTT by the respondent did not provide sufficient material to support a finding of fact that the appellant's flat was being used for immoral acts or otherwise in breach of covenant. The second main ground of appeal was that, even if the FTT was entitled to conclude on the evidence that the appellant's flat was being used as a brothel, the FTT had not made any finding that the appellant herself had permitted that use, or suffered it to continue and in those

circumstances she could not be found to have committed a breach of covenant. These main grounds of appeal were supplemented by additional points concerning the FTT's approach to the burden of proof, its failure to give fair treatment to the appellant's case or properly to explain its conclusions, and its failure to take account of the medical evidence which was provided to it.

Issue 1: Was the evidence sufficient to establish that the appellant's flat was being used as a brothel?

31. Mr Hickey QC first drew attention to the surprising statement in paragraph 7 of the FTT's decision that the appellant "did not dispute … in essence, the factual situation on which the applicant relies". This suggested, he submitted, that the FTT had approached its task of assessing the evidence with a mistaken appreciation of the extent of the dispute. The appellant had made it clear in her own witness statement that she did not accept the factual basis of her landlord's case either as to the use of her flat or her suggested acquiescence in it. The significance of the suggested misapprehension was intensified by the passage I have quoted above in which the FTT criticised the appellant's evidence and suggested that as a former solicitor, she ought to have understood both the seriousness of the allegations made against her "and the need to give accurate substantiated evidence."

32. On behalf of the respondent, Mr Bowker acknowledged that the statement in paragraph 7 of the decision concerning the extent of the dispute was inaccurate. He declined to speculate what the FTT might have meant.

33. There may be something in Mr Hickey's suggestion that the lapse of almost 5 months between his cross examination of the respondent's witnesses and the FTT's decision may have contributed to the FTT's suggested failure to appreciate the extent to which the facts were in dispute. On the other hand, and at the risk of speculating, the FTT may simply have meant that the appellant did not call any evidence of her own to rebut the respondent's evidence of the complaints made by Mr Hugelshofer and reported by Mr Foley (a theme to which it returned in paragraph 24). In either case it is clear from paragraph 19, and from the decision read a whole, that the FTT considered for itself whether the evidence established that the appellant's flat was being used for immoral purposes. It would not have been necessary for it to do so if it had mistakenly believed that the appellant did not dispute the facts on which the respondent relied. I therefore do not think that paragraph 7 of the decision adds significantly to the weight of the appellant's main ground of appeal (which concerns the sufficiency of the respondent's evidence to sustain a finding of breach).

34. Nor do I consider that the FTT's criticism of the appellant's own evidence in paragraph 24 amounted to an illegitimate reversal of the burden of proof. There was no burden on the appellant to disprove the allegations made by the respondent, but she had given evidence and been cross-examined and it was perfectly proper for the FTT to say what it made of her answers.

35. The more significant criticism of paragraph 24 of the FTT's decision was the FTT's apparent omission to take seriously the evidence before it about the appellant's medical

treatment, both by the appellant in her witness statement and by her consultant oncologist at the Royal Marsden Hospital whose letter of 27 March 2019 had been the subject of submissions by Mr Hickey on the first day of the hearing. The information may not have been presented in a formal way, but the general picture was not in dispute. The FTT knew both from the appellant's own evidence and from the letter that the appellant had been undergoing intensive chemotherapy at the time of the events about which she was giving evidence and that her treatment also included radiation and surgery followed by further chemotherapy. Mr Hickey complained that when he took the FTT to the letter of 27 March 2019 they were dismissive of it. Mr Bowker did not demur and the appellant's complaint is consistent with the suggestion in paragraph 24 of the decision that the FTT was supplied with no evidence of the appellant's medical treatment.

36. Once again, however, I do not consider that the FTT's approach to this aspect of the appellant's evidence is critical to the first ground of appeal which depends on an assessment of the evidence provided by the respondent. The question is whether that evidence was capable of supporting a finding that the flat was being used for immoral purposes; in effect, the appellant's submission is that there was no case to answer and, even accepting all of the respondent's evidence, the FTT ought to have dismissed the application and found that no breach had been proven. That submission does not depend on the FTT's treatment of the appellant's evidence.

37. Mr Hickey submitted that the FTT's conclusion that there was "no direct evidence of any *flagrante delicto*" ought to have led it to dismiss the allegation that the flat was being used as a brothel. I do not agree. In my judgment the FTT was entitled to make a finding that the flat was being used for prostitution on what it called "circumstantial evidence". I agree with the FTT's assessment that that evidence was "considerable" and I have no doubt it was capable of supporting the inference that sexual services were being provided to visitors at the flat in return for payment.

38. It was the totality of that evidence, and not its individual components viewed in isolation which justified the inference. Mr Hugelshofer observed men whom he described as transvestites at the flat. The material obtained from the internet by the tenants of the ground floor flat established a connection between Flat 1 and a transsexual prostitute active in Kensington and Chelsea. Post intended for Natalie Ferraz, the person named in the online profile, was addressed to the flat. That the profile was created 18 months before the events complained of or that the screen shot was taken in October 2018 when the evidence was being prepared does not detract from the fact that post addressed to a transsexual prostitute was being delivered to the flat. In April Mr Hugelshofer complained again of the presence of transvestites and "women dressed as prostitutes". Mr Hugelshofer may or may not be able to tell the difference between a prostitute and a student on a party night, but his evidence was not about the conduct or appearance of individuals on an occasional basis, but was that "a succession of young women were present at the flat and that they were visited throughout the night by a succession of older men in suits" whom he saw coming and going.

39. Mr Hickey made much of the fact that Mr Hugelshofer's initial complaints had been about the noise of people coming and going from the flat. Again, I do not consider that diminishes the effect of the evidence as a whole. The fact that residents in the building

were disturbed by a succession of men ringing the door bell and tramping up the stairs in the early hours of the morning is clearly part of the material from which the inference could be drawn that the flat was being used as a brothel or for other immoral purposes. The inference that the visitors were there to pay for sexual services is supported by the evidence that Natalie Ferraz offered sexual services for payment and was connected to the flat, and by the fact that the young female tenants of the ground floor flat were propositioned for sex by men entering the building. The fact that no witness was called to testify that they had actually seen sexual activity taking place in return for money did not preclude the FTT from finding that the flat was being used for prostitution. Nor did the failure of the CCTV camera to record the comings and goings of which Mr Hugelshofer gave evidence require the FTT to dismiss his evidence as unreliable; it was entitled to consider the absence of such a record alongside Mr Reed's explanation that the CCTV camera had not been working properly.

40. The appellant can legitimately complain that the FTT made no reference in its decision to concessions made in cross-examination by Mr Hugelshofer and Mr Foley about the extent of their observations and the accuracy of the timing of certain events recorded in their witness statements (for example, the tenants whom Mr Hugelshofer said had confirmed in August that prostitution was still going on had left by then). But the general effect of the evidence is not diminished by such flaws. Importantly, the evidence of what was heard and observed by those living in the building was supported by contemporaneous complaints recorded in text messages and emails exchanged between them and the appellant and her agent Mr Torino.

41. The FTT should also have addressed Mr Hickey's submissions that the extent of the problem was being exaggerated by Mr Foley because of a dispute with the appellant over unpaid service charges, and that Mr Foley had encouraged Mr Hugelshofer to make or exaggerate allegations against the appellant and to complain to the police because of his animosity towards her. No tribunal is required to deal with every point put to it but it is obliged to address the substantial elements of each party's case. Where a case depends on findings of fact, and where it is suggested that one party's version of events has been exaggerated out of malice towards the other party, the parties are entitled to know what the Tribunal made of that suggestion.

42. But the appellant's complaint in her first ground of appeal is not that the FTT failed to give adequate reasons for its decision; it is that the evidence could not substantiate the conclusion it reached. If that complaint had been made out, it would have been determinative of the whole application and would have led to its dismissal, whatever the inadequacies of the FTT's decision. As it is, however, each of the matters identified in paragraph 19 of the FTT's decision was the subject of evidence. Taken together they provided material from which the inference could be drawn that the flat was being used for prostitution. I therefore dismiss the first ground of appeal.

Issue 2: Did the appellant permit or suffer the use of the flat for prostitution?

43. The appellant's second ground of appeal is that the FTT failed to make a determination that she had permitted or suffered the use of her flat for prostitution or as a brothel and that,

without such a finding, it was not possible for it to conclude that she was in breach of paragraphs 1, 2 or 3 of the Fourth Schedule to the lease.

44. There was no dispute over the meaning of a covenant not to "permit or suffer" premises to be used in a particular way. I was referred to Woodfall's *Law of Landlord and Tenant*, paragraph 11.199, for the proposition that in a covenant not to permit a certain use, the word "permit" means either to give leave for something which without that leave could not legally be done, or to abstain from taking reasonable steps to prevent the act which it is within a person's power to prevent. That statement of principle is taken from the judgment of Atkin LJ in *Berton v Alliance Economic Investment Co* [1922] 1KB 742, 759. Whether any wider meaning should be given to the word "suffer" is unclear, and in *Berton* the Court of Appeal treated the two words as synonyms.

45. *Berton* concerned the use of premises by individuals let into occupation by the sub-tenant of the covenantor. Atkin LJ explained what had to be shown to establish a breach by the covenantor:

> "It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent."

46. In the same case at 756 Bankes LJ said:

> "Whether that is a breach of the covenants is the same question as whether the appellants have omitted to take some step which it was reasonable for them to take in view of the facts and circumstances."

47. These short passages from *Berton* support two propositions which may be critical to the issues in this case. The first is that it that a tenant may be guilty of a breach of covenant consisting of permitting or suffering a prohibited use if the use has been permitted or suffered by the tenant's agent (assuming, of course, that the functions of the agent included the management of the premises). The second is that, in determining whether a tenant has omitted to take steps which it was reasonable to take, all of the facts and circumstances must be taken into account. The question is whether a reasonable person in the position of the tenant would have taken steps to prevent the prohibited use which the tenant failed to take.

48. Mr Bowker acknowledged that the FTT had not made any express finding that the appellant had permitted or suffered the use of her flat for prostitution. But he submitted that a finding to that effect could be inferred from paragraphs 18, 19 and 20. The FTT had correctly identified that the allegation was one of permitting or suffering the use of the flat and in paragraph 18 it had found that "apart from contacting Mr Torino it appears however

that she had taken few active steps to resolve the situation or to rid the property of its difficult sub-tenant." That statement should be understood, Mr Bowker suggested, as a finding by the FTT that the appellant had failed to commence proceedings to evict the tenant and that by doing so she had committed the breach of covenant which was alleged against her.

49. The difficulty with Mr Bowker's submission is that it is not sufficient for a determination that a serious breach of covenant has taken place to be left to be inferred from generalised statements. The purpose of proceedings under section 168(4), 2002 Act, is to establish the facts on which steps to forfeit an extremely valuable lease will then be founded. Before forfeiture proceedings may be commenced the landlord is required by section 146(1), 1925 Act, to serve a notice "specifying the particular breach complained of" and if that breach is remedied and compensation is paid no forfeiture will occur. Before a section 146 notice may be served the FTT must determine that "the breach" has occurred (section 186(2)(a), 2002 Act). It follows, therefore, that the determination required of the FTT must be sufficiently specific to provide the basis of a section 146 notice.

50. In *Akici v L R Butlin Ltd* [2006] 1 WLR 201 Neuberger LJ considered what is required of a valid section 146 notice. At [57] he referred to the decision of the House of Lords in *Fox v Jolly* [1916] 1 AC 1, 23 and to the last sentence of the speech of Lord Parmoor which, he said, appeared to him "to encapsulate the proper approach to section 146 notices", as follows:

> "I think that the notice should be construed as a whole in a common-sense way, and that no lessee could have any reasonable doubt as to the particular breaches which are specified."

The same degree of transparency is required of a determination of breach by the FTT. Without it the landlord will not be able to serve a sufficiently specific section 146 notice. I do not accept Mr Bowker's suggestion that a landlord may rely on an ambiguous determination by the FTT by including in its section 146 notice particulars of the least serious breach consistent with the FTT's findings.

51. There is a second important consideration. Unless the FTT makes specific findings of fact concerning the breach and the tenant's part in it, the County Court will face an impossible task when it is required to determine whether to forfeit the lease or to grant relief against forfeiture. It is essential that the County Court is in a position, from the FTT's decision, to assess the seriousness of the breach, the culpability of the appellant, and the appropriate response to an application for relief against forfeiture. If that degree of certainty is not achieved it may be necessary for the County Court to rehear the evidence which has already been presented to the FTT. That is not what section 168 contemplates and would render it pointless.

52. In this case the FTT made no findings of fact about what the appellant did or what were the effects of the steps she took. In paragraph 19 of its decision it appeared to concentrate on the evidence concerning Natalie Ferraz, but his use of the flat ended at the end of January 2018, three months after the FTT found the appellant first became aware of the prohibited

use. The sequence of events after the appellant first received complaints is unclear. In her witness statement she said that she had instructed Mr Torino to investigate the complaints and that he had found nothing untoward, but Mr Foley's evidence was that Mr Torino had told him in January 2018 that he had "got a grip on the situation." On 27 January 2018 the appellant informed Mr Foley that she had been told by Mr Torino the previous week "there is no prostitute in the flat and he has cleared any issue with his tenant and the other tenants below and he has served notice to quit".

53. The FTT did not find that the appellant had done nothing when she became aware of the use of her flat, but it did not say what the "few active steps" which it was satisfied the appellant had comprised consisted of. On the evidence it is possible that those steps included appointing a manager in November 2017 at a time when she was unwell, who then "got a grip" and served a notice to quit which resulted in the departure of Natalie Ferraz at the end of January.

54. The FTT made no specific findings about when, or if, prostitutes returned to the flat or what steps were then taken. It did refer in paragraph 19 to "evidence of numerous male visitors during the night" but it made no separate finding about dates or that prostitution was continuing between April and October 2018. It made no finding about steps taken by the appellant during that period, nor about any steps taken by Mr Torino, or the effect if any they may have had on the use of the flat. The contemporaneous evidence of complaints is not continuous throughout the year. That may suggest that the problem was episodic, which might be consistent with the appellant's own evidence that when she visited the flat she saw nothing untoward. It may equally be that Mr Hugelshofer stopped complaining to Mr Torino in June because he realised he was wasting his breath.

55. A version of events less favourable to the appellant, and which the evidence was also capable of supporting, is that the appellant handed over the management of her flat to Mr Torino and that, whatever her state of knowledge, he knew perfectly well what it was being used for. Mr Hugelshofer's encounter with Mr Torino and a person he took to be a transvestite prostitute emerging from the flat in September 2018 might support that inference. It may be that Mr Torino chose to take no steps to control what was going on or did so only in response to intense complaints before allowing the previous use of the flat to resume once those complaints had died down. The findings of the FTT are silent on what Mr Torino knew or did.

56. On the appellant's evidence Mr Torino was her agent. She may therefore be fixed with his knowledge and the evidence may justify the conclusion that by her agent permitting or suffering a prohibited use the appellant herself was in breach. A breach of that nature would be very different from one arising out of a failure by the appellant to take steps which it was reasonable to expect her to take, and might have different consequences for the terms on which relief against forfeiture might be granted. But the FTT made no findings as to the extent of Mt Tornio's knowledge or his responsibility either for facilitating what was going on in the flat or preventing it. Nor did the FTT give itself any relevant direction concerning his role. Those were significant omissions although, in the FTT's defence, neither party appears to have considered the significance of Mr Torino's status as the appellant's agent.

57. Although there was evidence from which the FTT could have made relevant findings of fact, it failed to do so. The evidence was capable of being interpreted in different ways and it is not possible for this Tribunal to substitute findings of its own. The appeal must therefore be allowed on the second ground.

Disposal

58. It was suggested by Mr Hickey that if the appeal was allowed on the second ground the Tribunal should dismiss the application under section 168(4) altogether. I do not think that course of action would be fair. The respondent presented sufficient evidence to the FTT to support a finding of breach. Depending on how much of the evidence the FTT accepted the finding could have been of a relatively modest breach which was remedied within three months or something much more serious; the evidence is also capable of acquitting the appellant altogether. Although any breach is now in the past the respondent is entitled to take action to forfeit the lease or to recover some of the substantial costs which have been incurred in these proceedings, should it choose to do so. In those circumstances it is necessary that the matter be remitted to the FTT for further consideration.

59. Were it not for the evidence about the appellant's health and the treatment she began in August 2017, which I was told was continuing at the time of the appeal, I would have remitted this matter back to the FTT for it to make findings of fact based on the evidence it had already heard concerning the role of the appellant and Mr Torino. The FTT failed to consider the critical question of whether a person in the appellant's condition could reasonably have been expected to do more than she did by handing the matter over to an agent. Without an assessment of the appellant's state of health at the relevant time and its impact on her ability to act a proper determination cannot be made of the nature and extent of any breach of covenant in this case.

60. In my judgment, it would not be fair to the appellant for the necessary findings now to be made by the original tribunal based on the evidence it has already heard. She could fairly complain that the FTT did not take seriously the evidence concerning her medical condition when it was first presented to it. It would be asking much of the panel for them to consider it again with an open mind and the appellant might reasonable fear that they might be unable to do so.

61. In the circumstances the FTT's decision cannot stand because it failed to make the necessary determinations of fact to support its finding of breach of covenant, and the matter must be remitted to the FTT for consideration by a differently constituted panel.

62. There is no reason to disturb the FTT's general finding that the appellant's flat was used for prostitution, but unless the parties can now reach agreement it will be necessary for the new panel to consider when the prohibited use took place and whether the appellant or her agent permitted or suffered it to occur. In principle, subject to directions from the FTT, the parties should be permitted to adduce further evidence on those issues if they wish to do so.

Martin Rodger QC

Deputy Chamber President

18 June 2020