UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT – shared ownership lease – unlawful sub-letting – application for determination of breach of covenant – defence of waiver by acceptance of rent with knowledge of breach – tenant applying to strike out proceedings – whether FTT wrong to refuse to strike out – s.168, Commonhold and Leasehold Reform Act 2002 – appeal dismissed

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

BETWEEN:

MR CHARLES CHRISTIAN BEDFORD

Appellant

-and-

PARAGON ASRA HOUSING LIMITED

Respondent

Re: 5 St Stephens Cottages,
70 Vincent Road,
Kingston upon Thames,

Martin Rodger QC, Deputy Chamber President

12 October 2021

Royal Courts of Justice

Rebecca Cattermole, instructed directly, for the appellant
Terence Gallivan, instructed by Devonshires LLP, for the respondent

The following cases are referred to in this decision:

Attorney General v Barker [2000] 1 FLR 759

Barrett v Robinson [2014] UKUT 322 (LC); [2015] L & TR 1

Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015

Crestfort v Tesco [2005] L & TR 20, [2005] EWHC 805 (Ch)

Faiz v Burnley Borough Council [2021] EWCA Civ 55; [2021] Ch 303

Hunter v Chief Constable of West Midlands Police [1982] AC 529

Stemp v Ladbroke Gardens Management Ltd [2018] UKUT 375 (LC)

Summers v Fairclough Homes Limited [2012] UKSC 26; [2012] 1 WLR 2004

Swanston Grange (Luton) Management Ltd v Langley-Essen [2008] L & TR 20, [2007] EWLands LRX_12_2007

Triplerose Ltd v Patel [2018] UKUT 374 (LC)

Introduction

1. The jurisdiction to determine issues relevant to the forfeiture of the lease of a dwelling is divided between the First-tier Tribunal and the County Court. By section 168(1), Commonhold and Leasehold Reform Act 2002, a landlord under a long lease of a dwelling may not serve a notice under section 146 of the Law Property Act 1925 in respect of a breach of covenant by the tenant unless the tenant has admitted the breach or it has been finally determined that it occurred. In England a landlord wishing to obtain such a determination as a prelude to forfeiture of the lease must apply to the First-tier Tribunal. If the application is successful the landlord may then give notice under section 146 and, if the breach is not remedied, may bring proceedings for forfeiture in the County Court. The tenant may then raise any grounds of defence to the forfeiture.

2. In this appeal from a decision of the First-tier Tribunal (Property Chamber) (the FTT) given on 23 December 2020 the appellant, Mr Bedford, contends that on an application brought against him by his landlord, Paragon Asra Housing Ltd (Paragon), for a determination under section 168 that he had committed breaches of covenant, the FTT ought not to have made a determination but should instead have struck out the application as an abuse of process. The proceedings were an abuse of process, he maintains, because any right to forfeit for the breach of covenant alleged against him had been waived.

3. Paragon is a registered provider of social housing and Mr Bedford's lease is a shared ownership lease.

4. The application to strike out the proceedings was refused by the FTT which went on to determine that Mr Bedford had sublet the house let to him by Paragon in breach of an absolute prohibition on subletting and that the alleged breach of covenant was made out.

5. The FTT gave permission to appeal its refusal to strike out the application. At the hearing of the appeal Mr Bedford was represented by Miss Rebecca Cattermole, and the Housing Association was by Mr Terence Gallivan. I am grateful to them both for their submissions.

The facts

6. No.5 St Stephens Cottages is a two-bedroom terraced house in Kingston upon Thames. In 1983 the Richmond-upon-Thames Leasehold Housing Association granted a lease of the property to Dorothy Banbridge for a term of 99 years on a shared ownership basis. Ms Banbridge paid a premium representing 25% of the market value of the property and agreed to pay a rent representing 75% of its rental value calculated on the same basis as a fair rent under the Rent Act 1977.

7. The lease includes an absolute covenant by the tenant not to underlet the property. Guidance issued by central government required housing associations to include such a prohibition in shared ownership leases to protect public funds and to ensure that properties let on a shared ownership basis were not exploited for commercial gain.

8. Mr Bedford acquired the lease of the property in November 2009 and, initially at least, he appears to have lived there. Paragon acquired the freehold interest in 2017 as a result of an amalgamation of the estates of a number of housing associations.

9. Within a year of acquiring the lease Mr Bedford decided that he would like to move temporarily to the United States of America to pursue his ambition to be selected to represent that country in the 2011 Rugby World Cup. In October 2010 he sought Paragon's permission to sublet the property for a year while he did so. He gave a specific assurance that he would resume occupation of the property at the end of 2011 and permission was granted to him by Paragon on that understanding.

10. Mr Bedford did not return to live at the property at the end of 2011 and it now appears that he has sublet the property continuously since 2010. He is likely to have made a substantial profit; in 2018 he was subletting the property at a rent of £1,215 per month at a time when the rent he paid to Paragon was only £463.50 per month. I was informed that he has continued to sublet the property despite the commencement of proceedings by Paragon.

11. Paragon first became aware that Mr Bedford was subletting the property on 9 August 2018 when it was informed of the outcome of investigations by his mortgage lender. Mr Bedford had fallen behind in payments of rent as well as with his mortgage, and on 30 November 2018 Paragon served a notice of seeking possession under section 83, Housing Act 1985 in respect of arrears of rent of £1,125.

12. In January 2020 Paragon's solicitors obtained a report from an inquiry agent listing the names of two individuals who were currently registered on the electoral register as residing at the property, and the names of four others who had had some form of connection with the property since 2009. In March 2020 the same agents visited the property and were informed by the person residing there (who refused to give her name) that she rented the property from Mr Bedford and had done so for four years; she said that she signed a new agreement every two years but was unwilling to provide a copy of it and could not say when it was due to expire.

13. It later emerged in the course of the proceedings that Mr Bedford had granted a new tenancy to his current sub-tenant on 29 August 2018 for a term of one year commencing on 1 September 2018. It has not yet been established whether any further subletting has taken place after the expiry of that tenancy.

14. Despite being aware of the breach of covenant by subletting Paragon appear not to have taken a decision to forfeit Mr Bedford's until May 2020 and it continued to collect rent by monthly direct debit between December 2018 and May 2020.

The proceedings in the FTT

15. On 28 July 2020 Paragon issued an application under section 168(4), 2002 Act for a determination that Mr Bedford had repeatedly breached the terms of the lease by subletting the property. In supporting evidence provided by one of its employees, Paragon explained that it had been unaware that Mr Bedford was subletting the property from the time the

original one year permission expired at the end of 2011 until they were alerted to the breach in August 2018.

16. The FTT gave directions for the determination of Paragon's application and listed the matter for hearing on 19 October 2020. Mr Bedford then issued an application of his own under rule 9(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules) inviting the FTT to strike out the whole of the proceedings on the grounds that they were "frivolous, vexatious or otherwise an abuse of the process of the tribunal". Mr Bedford's application was also listed to be considered at the hearing on 19 October.

17. The basis of the application to strike out the proceedings was said to be that they served no purpose because the right to forfeit the lease had been waived by Paragon's acceptance of rent with full knowledge that Mr Bedford was subletting the property. The sole purpose of an application under section 168, 2002 Act was to secure a determination that a breach had occurred as a prelude to the service of notice under section 146, 1925 Act and the commencement of forfeiture proceedings. In circumstances where Mr Bedford had a defence that the breach of covenant had been waived, the pursuit of the application by Paragon was, he contended, an abuse of process.

18. A copy of the tenancy agreement granted by Mr Bedford on 29 August 2018 was helpfully provided with his application to strike out. That was the first occasion on which Paragon became aware of the date on which any specific breach of covenant had been committed.

Abuse of process

19. By rule 9(3)(d) of the 2013 Rules the FTT is given power to strike out the whole or part of proceedings before it if it considers them to be "frivolous or vexatious or otherwise an abuse of the process of the Tribunal".

20. Abuse of process can take a variety of different forms but it generally involves some element either of serious unfairness to another party or of bringing the administration of justice into disrepute. In *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, Lord Diplock explained, at 536C:

> "It concerns the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, it would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people."

21. In *Attorney General v Barker* [2000] 1 F.L.R. 759 Lord Bingham, then Lord Chief Justice, provided a working definition of abuse of process, as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

22. Striking a case out as an abuse of process is not to be done lightly, as Lord Hope explained in *Summers v Fairclough Homes Limited* [2012] UKSC 26:

> "48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly."

23. In *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015 at [63] Coulson LJ discussed the correct approach to an application to strike out for abuse of process and said that it involved a two-stage test:

> "First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (…). It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant."

Waiver

24. The basic principles of the law relating to waiver of forfeiture have recently been considered by the Court of Appeal in *Faiz v Burnley Borough Council* [2021] EWCA Civ 55. They are, as Lewison LJ explained at [14]-[15], "of ancient origin":

> "15. The basic principle is not in doubt. Where a tenant commits a breach of covenant which gives rise to the right to forfeit the lease, the landlord is put to his election. Either he may forfeit the lease; or he may affirm its continuation. In order for the landlord to be put in that position he must have knowledge of at least the basic facts which constitute the relevant breach. Subject to statutory restrictions, he may forfeit the lease either by the issue and service of a claim form claiming possession; or by peaceable re-entry. He may affirm the continuation of the lease either expressly or by means of an act or statement (communicated to the tenant) which is consistent only with the continuation of the lease. The affirmation of the lease is normally referred to as a waiver of forfeiture. Once the landlord has made his election, he cannot retract it."

25. Certain acts on the part of a landlord are taken to be acts of waiver. Most notably, the acceptance of rent which accrued due after the date on which the landlord had knowledge of the breach automatically amounts to a waiver. As Lewison LJ put it in *Faiz*, at [16]: "Where the alleged act of waiver is the acceptance of rent, and possibly where it is no more than a demand for rent, that is all that counts."

26. It is necessary to bear in mind an important distinction when considering the issue of waiver in the context of a breach of covenant. The distinction is explained in *Woodfall: Landlord and Tenant*, at 17.092, as follows:

> "Waiver of the right to forfeit is not the same as waiver of a breach of covenant. The former depends on the principle of election and only bars one remedy,

> leaving the landlord's right to damages intact. The latter depends on the inference of consent, and bars all the landlord's remedies in respect of the breach in question. Neither of these kinds of waiver will prevent the landlord from relying on the covenant in respect of subsequent breaches."

27. There is a statutory reason why neither a waiver of the right to forfeit nor the waiver of a breach of covenant prevents a landlord from relying on the covenant in respect of any subsequent breach. By section 148(1), Law of Property Act 1925 any waiver by a lessor of the benefit of any covenant extends only to the breach to which the waiver specifically relates and does not operate as a general waiver of the benefit of the covenant.

The FTT's jurisdiction under section 168

28. The FTT's jurisdiction under section 168, 2002 Act, is to determine whether a breach of covenant has occurred. Before the right to forfeit for a breach of covenant can be waived, it is necessary that a breach of covenant must first have been committed. It is the determination of that prior question which has been allocated by statute to the FTT.

29. In *Swanston Grange (Luton) Management Ltd v Langley-Essen* [2008] L & TR 20 the Lands Tribunal (HHJ Huskinson) explained that, in order to determine whether a breach of covenant has occurred, it may sometimes be necessary for a tribunal to determine whether the landlord has waived the right to rely on the covenant at all. If the covenant does not bind the tenant, because the landlord has waived its right to rely on it, there can be no question of the tenant having breached the covenant. But determining whether a covenant has been waived is a different matter from determining whether the right to forfeit for a particular breach of the covenant has been waived.

30. In *Triplerose Ltd v Patel* [2018] UKUT 374 (LC) the tenant under a long lease responded to an application under section 168 alleging that he had carried out unauthorised alterations to the demised premises by contending that the landlord had waived any breach of covenant by accepting rent and service charges with knowledge of the alterations. The Tribunal refused to determine that issue, explaining at [22]:

> "Whether that is correct or not it is not an issue in these proceedings. Neither the FTT nor this Tribunal is concerned with whether there has been a waiver of any breach of the covenant. If, as I will have to consider shortly, there has been a breach of covenant the Tribunal's function is to make a determination to that effect. It would then be a matter for the landlord to consider whether it wished to pursue proceedings for forfeiture and only at that stage would the issue a waiver become a live one before the County Court."

31. Exceptionally, there are circumstances in which it is necessary for the FTT to determine whether a breach of covenant has been waived in order to determine some other question. If a landlord seeks to rely on a tenant's contractual obligation to pay costs incurred by the landlord in taking steps (such as the service of notices) in contemplation of forfeiture it may be necessary for the FTT to determine whether the opportunity to forfeit existed at the time

the costs were incurred or whether the right to forfeit for the particular breach had been previously waived (see *Barrett v Robinson* [2014] UKUT 322 (LC), at [49]).

32. An example of that rare type of case is *Stemp v Ladbroke Gardens Management Ltd* [2018] UKUT 375 (LC) in which the question for determination was whether the landlord's costs of forfeiture proceedings following an alleged breach of covenant could be recovered as an administration charge. The FTT had considered that it lacked jurisdiction to determine whether the breach had been waived so that the forfeiture proceedings were always doomed to fail. The Tribunal (HHJ Huskinson) explained the extent of the Tribunal's jurisdiction in relation to an allegation of waiver:

> "At the hearing it was common ground between the parties (and I also agreed) that the FTT was wrong in concluding that, in the litigation before it in the present case, it had no jurisdiction to decide whether there had been a waiver by the respondent of the right to forfeit the lease for non-payment of the relevant demand. The decision in the Lands Tribunal (a decision of mine in *Swanston Grange Luton Management Ltd v Langley-Essen* [2008] L&TR 20) is a decision under section 168 of the Commonhold and Leasehold Reform Act 2002 and was to the effect that the Leasehold Valuation Tribunal did have jurisdiction to decide whether the right to rely on a covenant at all had been waived because without reaching such a conclusion the Leasehold Valuation Tribunal could not decide the question which was before it). In that case no question of whether there had been some right to waive an accrued right of forfeiture arose. In the present case, having regard to the decision in *Barrett v Robinson* [2014] UKUT 322 (LC); [2015] L&TR 1 referred to below, the FTT can only decide the matter before it (namely the amount payable by way of a reasonable administration charge under clause 2(vi)) if it reaches a conclusion upon the question of whether (and if so when) the right to re-enter for non-payment of the relevant demand was waived. Therefore the FTT has jurisdiction to decide this matter."

The FTT's decision

33. By its decision handed down on 23 December 2020 the FTT refused Mr Bedford's application to strike out the proceedings and made a determination that from some time after the end of 2011, and by no later than September 2018, he had on a number of occasions sublet the property without permission and in breach of covenant.

34. The only part of the FTT's decision which is relevant to this appeal concerns its treatment of the application to strike out.

35. The FTT first recorded that it was common ground between the parties that waiver could not be relied on as a defence to the section 168 application. As this Tribunal had explained in *Triplerose Ltd v Patel* and in earlier cases, the FTT has jurisdiction only to determine whether a breach has occurred and not whether the tenant has a defence to a subsequent claim to forfeit the lease on the basis of that breach. The FTT nevertheless described as "ingenious" the argument advanced on behalf of Mr Bedford that it ought to consider and determine whether the alleged breach had been waived as a necessary step on the way to determining his application to strike out the proceedings.

36. The FTT refused to strike the proceedings out and it gave two reasons for that refusal.

37. First, it did not consider that the proceedings would be a "futile exercise" even if Mr Bedford could show that the County Court would inevitably refuse to order forfeiture because of the suggested waiver. If a breach of covenant was established forfeiture was not the only remedy available to Paragon and it would be entitled to rely on a determination of breach by the FTT in support of a claim for alternative relief. In the view of the FTT "seeking such a determination, even if forfeiture is impossible, does not of itself amount to an abuse of process".

38. Secondly, and in any event, the FTT did not accept that it had jurisdiction to make a determination about whether or not there had been a waiver of the forfeiture in this case. It distinguished *Swanston Grange* and *Stemp* as cases in which a consideration of whether there had been a breach was a necessary step towards deciding some other question from this case "where the issue was simply whether or not there had been a breach".

39. The FTT's formal determination reflected the lack of evidence about what had occurred after 2011. It found that Mr Bedford "has, at some time after the end of 2011, and certainly no later than September 2018, and on a number of occasions between, sublet the property without permission and in breach of clause 3(15) of the lease."

The appeal

40. The FTT granted permission for Mr Bedford to appeal on two separate grounds:

    (1) That the FTT had been wrong to consider that the availability of other potential remedies justified the refusal of the application to strike out the proceedings. The possibility that the respondent might use the FTT's findings for some other "collateral purpose" did not mean that the proceedings were not an abuse of process.

    (2) That the FTT had jurisdiction to consider whether Paragon had waived the right to forfeit and it was wrong in law to have considered that it did not, because it was necessary to consider that issue in order to determine the application to strike the proceedings out.

41. In support of the appeal Miss Cattermole acknowledged that rule 9(3)(d) of the 2013 Rules conferred a discretion on the FTT whether to strike the proceedings out as an abuse of process. Nevertheless, where the grounds on which that discretion had been exercised were flawed, this Tribunal should set aside and remake the FTT's decision and strike out the application.

42. On the first ground of appeal the FTT had been wrong, Miss Cattermole submitted, to regard the potential availability of other remedies as a sufficient reason to refuse to strike out the application. The sole purpose of section 168 proceedings was as a precursor to forfeiture and the involvement of the FTT was unnecessary if any other remedy was sought. If the purpose of an application under section 168 was to secure a determination of breach which could then be used to seek a remedy other than forfeiture, that would involve using the process of the FTT in a way which was significantly different from the ordinary and proper

use of that process. In any event, Paragon had been perfectly clear that it wished to forfeit Mr Bedford's lease and any other remedy was both theoretical and collateral to the express objective of the application. If, as Miss Cattermole submitted, the breach had been waived, any benefit to Paragon of a determination of breach would be of such limited value as to "make the game not worth the candle" and to make the pursuit of the application abusive. The FTT therefore ought not to have taken account of the possibility of other remedies being available and its reliance on it as a reason not to strike out the application was an error of law.

43. On the second ground of appeal the FTT Miss Cattermole submitted that the FTT had simply been wrong to consider it lacked jurisdiction. It was necessary for it to decide whether the right to forfeit had been waived in order to determine the application to strike out.

44. The basic premise underlying Miss Cattermole's submissions was that it was clear that there had been a waiver of any breach of covenant. Yet she did not feel able to submit that the position was clear and indisputable; it was, she suggested, "plainly arguable" or "strongly arguable" that there had been a waiver. But that premise was disputed by Mr Gallivan before the FTT and on the appeal. It is not accepted by Paragon that it had sufficient knowledge of the occurrence of breaches of covenant to have waived its right to forfeit for them. Mr Gallivan acknowledged that the acceptance of rent after Paragon first became aware of subletting on 9 August 2018 waived the right to forfeit for that particular breach, but he submitted that Paragon had no knowledge of what had occurred after that date and was not in a position to make an election to forfeit for subsequent breaches. In particular, Paragon had not known until it received the application to strike out the proceedings that a new letting had been entered into on 1 September 2018, nor that the property had been let continuously in breach of covenant since 2011.

45. Miss Cattermole challenged Mr Gallivan's analysis and submitted that the acceptance of rent with knowledge that the property was sublet had the effect of waiving all breaches of the covenant against subletting whenever they had been committed.

46. I do not accept that the availability of alternative remedies for the breach of covenant was an irrelevant consideration in the FTT's assessment of whether the application was an abuse of process. On the contrary, it was highly relevant. The most obvious alternative remedy that a landlord might seek in the face of a persistent breach of covenant by its tenant would be an injunction compelling the tenant to comply, either by requiring that he terminate the current sub-tenancy or by prohibiting any future sub-letting. Mr Gallivan also referred to the possibility of a claim for compensatory damages on a negotiating basis, as had been directed, for example, by Lightman J in *Crestfort v Tesco* [2005] L & TR 20 where commercial premises had been sublet in breach of covenant.

47. Either of these remedies, an injunction or damages, could be sought by Paragon in proceedings in the County Court in which the primary remedy sought was forfeiture. Damages could be sought in addition to forfeiture and an injunction as an alternative to forfeiture. A waiver of the right to forfeit for the breach would not provide a defence to either type of claim (although waiver might be relevant to the exercise of the Court's discretion to grant an injunction if no further breach has been committed since Paragon last

demanded rent). Whichever remedies Paragon chose to pursue it would be essential for it first to be determined whether a breach of covenant had occurred; if it wished to forfeit it was essential that the determination of breach be made by the FTT. Unless it could be seen when the determination proceedings were commenced that the right to forfeit had indisputably been waived, and that a defence of waiver was guaranteed to succeed in the County Court, it is quite impossible to regard the determination proceedings as abusive.

48. As for the second ground of appeal, Miss Cattermole is obviously correct in her submission that, in principle, the FTT could have determined whether the right to forfeit had been waived as part of its consideration of the application to strike out. It was neither necessary nor strictly correct to approach the question as raising a matter of jurisdiction. But that does not take the appeal very far. Even if I was to take the view that the FTT had erred by suggesting that it did not have jurisdiction to consider the issue of waiver, its decision not to strike out was obviously correct because the proceedings were plainly not an abuse of process. Neither the detailed facts nor the application of the law to those facts was clear. Although Mr Bedford made a lengthy witness statement in relation to the allegation of breaches of covenant and in support of his application to strike the proceedings out, he did not include any detail of the subletting itself. Nor did the submissions prepared by counsel say any more than that "the property is sub-let" and only the 2018 tenancy agreement (which had expired in 2019) was exhibited. Until the facts about the breaches themselves are established it cannot be ascertained whether the Paragon had sufficient knowledge of those facts to amount to waiver, and until it can clearly be seen that there has been a waiver it cannot be suggested that the proceedings were an abuse of process.

49. Because the substantive application and the application to strike out came before the FTT at the same hearing the parties had prepared all of their evidence about the breach of covenant and had arranged for their witnesses to be available to be cross-examined about it. There were no significant savings to be achieved in time or money, for the parties or for the FTT, by striking the application out. On the contrary there would have been a significant waste of resources if the issue of whether or not there had been a breach of covenant had been left unresolved. Paragon would have been entitled to commence proceedings in the County Court for an injunction and for damages, in which the same evidence about the breach of covenant as had gone unconsidered by the FTT would have to be presented to the Court. There was therefore every reason for the FTT to deal with the substantive application and not to be side-tracked by Mr Bedford's procedural manoeuvrings.

50. I should make it clear that I consider that the procedural judge who refused Mr Bedford's request to stay the substantive application until the application to strike out could be determined and who listed both for hearing at the same time was entirely justified in taking that approach to case management. It is rarely proportionate for proceedings which raise straightforward factual issues to be delayed and over-complicated by procedural skirmishes and, faced with applications such as this, the better course is almost always for the FTT to find the facts and make its determination. In this case the hearing before the FTT was completed within a day (including consideration of the application to strike out) and there was never any significant saving to be made by dealing with the application separately from the main proceedings.

51. I therefore dismiss the appeal. Paragon is free to serve notice under section 146 and, if it chooses, to commence forfeiture proceedings. Mr Bedford can then raise the issue of waiver in its proper place, as a defence to the forfeiture claim.

Martin Rodger QC,

Deputy Chamber President

28 October 2021