Neutral Citation Number: [2024] EWCA Civ 1358

Case No: CA-2022-002174

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Martin Rodger KC, Deputy Chamber President
[2022] UKUT 240 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2024

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ANDREWS
and
LORD JUSTICE HOLGATE

- -

Between :

MARGARET FLORENCE CABO	**Appellant**
- and -	
KAREN TAMIE DEZOTTI	**Respondent**

- -
- -

Zane Malik KC and Asad Maqsood (instructed by **Lamptons Solicitors**) for the **Appellant**
Justin Bates KC and George Penny (instructed by **Hammersmith & Fulham Law Centre**) for the **Respondent**

Hearing date: 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 06 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This is an appeal from a decision released by the Upper Tribunal (Lands Chamber) (Upper Tribunal Judge Martin Rodger KC, Deputy Chamber President) on 2 September 2022 ("the UT Decision"). The appeal concerns a rent repayment order which the First-tier Tribunal (Judge Dutton and Ms S Coughlin MCIEH) ("the FTT") had made against the appellant, Ms Margaret Cabo, on 18 March 2021 ("the FTT Decision"). The Deputy President dismissed an appeal, but Ms Cabo now challenges his decision in this Court. As matters have developed, the essential issue is whether the Deputy President was justified in concluding that Ms Cabo had been an undisclosed principal as regards an agreement by which the respondent, Ms Karen Dezotti, was given the right to occupy a room in a house at 6 Bellamy Close in West Kensington ("the Property").

The facts

2. Ms Cabo has been the owner of the Property since 2005. The Property has six bedrooms.

3. On 16 January 2016, Ms Cabo entered into a written management agreement ("the Management Agreement") with Top Holdings Limited ("Top Holdings"), a company of which her husband, Mr Francesco Grasso, was the sole director and shareholder. After reciting that Top Holdings was "proposing to manage the Property on behalf of [Ms Cabo]", the Management Agreement provided for Ms Cabo to "cede all management rights" in respect of the Property to Top Holdings for five years (clause 1) and for Top Holdings to "manage the Property exclusively for [Ms Cabo] subject to this Agreement" (clause 3). The Management Agreement explained that it "was not intended to create any Landlord/Tenant relationship between the Parties, nor to create any Tenancy, Licence, or Lease, or any joint venture" (clause 2), but Top Holdings was to be able to "let" the Property. In that respect, clause 7 stated that Top Holdings was "permitted to let the Property during the term, however any letting shall only be through Licence agreements permitting Holiday Lettings only, as specifically defined under the Housing Act 1988" and clause 10 stipulated that Top Holdings "may only let the Property to individuals whom do not consider the premises as their main, sole, principal, or primary residence, and must not at any time permit the premises to become licensable as an HMO". Top Holdings was required to maintain the Property (clause 6), but Ms Cabo was responsible for insurance (clause 11) and council tax (clause 12) and, by clause 8, "Any income derived by [Top Holdings] from the Property shall be retained by [Top Holdings] with no recourse or accountability to [Ms Cabo]". Under clause 5, Ms Cabo was to pay Top Holdings a peppercorn a year.

4. Clause 4 of the Management Agreement recorded that Ms Cabo was "aware that [Top Holdings] does not manage properties in the usual course of its business, but will perform such duties on a strict private arrangement basis". In contrast, Mr Cabo told the FTT in a witness statement that she had been aware that Top Holdings "specialised in short term lets": see paragraph 19 of the FTT Decision. For his part, Mr Grasso confirmed that Top Holdings was "a company specialising in short term lets": paragraph 23 of the FTT Decision.

5. Ms Cabo told the FTT that she and Mr Grasso "had been living apart for more than 15 years and ran completely different financial arrangements": see paragraph 19.

However, the FTT commented that Ms Cabo's evidence that she was separated from Mr Grasso "does not appear to be borne out by the on-line information Miss Dezotti collected": see paragraph 70. In that connection, the Deputy President explained in paragraph 24 of the UT Decision:

> "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'."

6. In evidence to the FTT, Ms Cabo said that the Management Agreement had been "negotiated … on an arm's length basis": see paragraph 19 of the FTT Decision. While, however, the terms of the Management Agreement allowed Top Holdings to retain all income derived from the Property, Ms Cabo confirmed to the FTT that she paid "the council tax for the Property as well as the mortgage, which was £1,761.78 per month and the insurance": see paragraph 60. The arrangement for which the Management Agreement provided was obviously a lopsided one.

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

8. The agreement ("the Occupation Agreement"), which was dated 16 September 2016, was headed "Licence to occupy a room as holiday let". Ms Dezotti signed as "Licensee" and Mr Grasso signed on behalf of Top Holdings, "the Licensor". Ms Dezotti agreed to pay £200 per week, equating to £867 per month, with "bills included". The "Minimum stay" was "until 20th January 2017", but Ms Dezotti could "agree with the Licensor to remain on a month to month basis". Clause 8 stated that the agreement was "not intended to confer exclusive possession of the room on the Guest/Licensee or to create the relationship of landlord and tenant between the parties", that the room was to be occupied "for a Holiday" and that it was the intention of the "Guest/Licensee" to consider the room "only as temporary residence in London and definitively not as a main residence". According to clause 8, the "Guest/Licensee" "[i]n particular … agrees to waive all the rights deriving from the provisions of section 73 and section 74 of the Housing Act 2004 and will specifically refrain to make any application for rent repayment".

9. Despite what was said in the Occupation Agreement about use "for a Holiday" and "only as temporary residence", Mr Grasso had told Ms Cabo on 13 September 2016:

> "I cater to young professionals like yourself who are mainly focussed on their careers and therefore need a peaceful and tranquil home, where they can retire after a long day at work, a

> home where there is structured environment in place to avoid any potential disturbance.
>
> I still want this flat to be your home where you must be comfortable and feel free to do whatever you want, still with the full respect towards your fellow tenants who will have the same respect towards you."

10. The first month's "licence fee" and a deposit were paid into an account of Ms Cabo's brother Daniel. Ms Dezotti subsequently made payments in cash to Mr Grasso, but, having asked to pay by standing order, from September 2018 to May 2019 the "licence fee" was paid in that way to Mr Daniel Cabo. Mr Grasso told the FTT that Mr Cabo and a Miss Van Orden were "agents" for Top Holdings and that, after deducting a commission, they passed "licence fees" on to Top Holdings. However, Ms Dezotti never met Mr Daniel Cabo and was not aware of him having anything to do with the Property. Her only personal contact was with Mr Grasso.

11. While Ms Dezotti was living at the Property, there were always, it seems, at least four other occupants. When the local housing authority visited the Property in the latter part of 2019, there were six people living there.

12. In May 2019, Ms Dezotti gave one month's notice and, on 4 June, she moved out of the Property. On 1 May 2020, Ms Dezotti applied to the FTT for a rent repayment order seeking the full amount of the "licence fee" she had paid in the last year of her occupancy. The FTT determined in the FTT Decision that a rent repayment order should be made against Ms Cabo in the sum of £9,600. Ms Cabo appealed to the Upper Tribunal, but, as I have mentioned, without success.

13. The sole ground for which Ms Cabo has been given permission to appeal to this Court is whether she was Ms Dezotti's "landlord" for the purposes of the Housing and Planning Act 2016 ("the 2016 Act").

The statutory framework

14. Section 40(2) of the 2016 Act explains that a "rent repayment order" is "an order requiring the landlord under a tenancy of housing in England to (a) repay an amount of rent paid by a tenant, or (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy". As section 40(1) states, chapter 4 of part 2 of the 2016 Act (in which section 40 is to be found) "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". The relevant offences are listed in section 40(3) and include control or management of an unlicensed "house in multiple occupation" (or "HMO") in breach of section 72(1) of the Housing Act 2004 ("the 2004 Act"). An application for a rent repayment order can be made by either a tenant or a local housing authority: see section 41 of the 2016 Act. Where a tenant is the applicant and the offence in question is breach of section 72(1) of the 2004 Act, the amount awarded by way of rent repayment order must relate to rent paid during "a period, not exceeding 12 months, during which the landlord was committing the offence": see section 44 of the 2016 Act.

15. When the FTT made its decision in this case, it had been held that there was jurisdiction to make a rent repayment order against a superior landlord: see *Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18. However, the Supreme Court decided otherwise: see *Jepsen v Rakusen* [2023] UKSC 9, [2023] 1 WLR 1028. Lords Briggs and Burrows (with whom Lords Lloyd-Jones, Kitchin and Richards agreed) concluded in paragraph 30 that a rent repayment order "cannot be made against a superior landlord, that is, a landlord higher up the chain of tenancies than the immediate landlord under the tenancy which generates the relevant rent". Lords Briggs and Burrows said in paragraph 28 that this interpretation "excludes a superior landlord because it is not the 'landlord under' the tenancy which generates the rent". Lords Briggs and Burrows had observed in paragraph 25 that "[t]he landlord under a particular tenancy of housing will either be the freehold owner of the housing, or a tenant of it under a superior tenancy, which may include a number of housing units". Lords Briggs and Burrows added in paragraph 31 that "[r]epayment of rent paid most naturally refers to a direct relationship of landlord and tenant".

16. Section 77 of the 2004 Act defines "HMO" to refer to "a house in multiple occupation as defined by sections 254 to 259". By section 72(1), a person commits an offence if he is "a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed". Section 263 explains that "person having control" refers to "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" and that "rack-rent" means "a rent which is not less than two-thirds of the full net annual value of the premises": see subsections (1) and (2). By section 263(3), "person managing" means as regards an HMO:

> "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."

17. Section 72(5) of the 2004 Act provides a "reasonable excuse" defence to a charge of having control of or managing an unlicensed HMO.

The Tribunal decisions

The FTT

18. The FTT found that the Property "does constitute a mandatory HMO": see paragraph 68 of the FTT Decision. It explained in paragraph 69:

> "In support of the fact that we do not consider that the agreement with the tenants were intended to be short term lets, but was something of a sham, is the use of the wording in Mr Grasso's letter to Miss Dezotti referring to her use as a 'home'. Also, his concern that he wanted to make sure the Property appeared to be let so that people living there could be 'chummy chummy' with each other. This does not suggest a short-term holiday rent situation. Accordingly, on the criminal balance of beyond reasonable doubt we are of the view that the Property was an HMO and that a licence was required and that the failure to do so breached section 72(10 of the 2004 Act."

19. Turning to whether Ms Cabo was "a person having control of or managing" the Property, the FTT noted in paragraph 70 that "Top Holdings appear to be entrusted with maintaining the Property but with no property interest" and that the suggested separation between Ms Cabo and Mr Grasso "does not appear to be borne out by the on-line information Miss Dezotti collected" before saying:

> "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".

20. Having referred to evidence relating to the "licence fees", the FTT commented that, following the Upper Tribunal decision in *Rakusen v Jepsen*, "it would seem that there can be more than one party entitled to receive a rack rent" and that "[s]uch a person is, in our finding Ms Cabo and accordingly she is a person in control": see paragraph 71. In the next paragraph, the FTT said, "We do not find this arrangement between Ms Cabo and Mr Grasso to be credible". The FTT went on to say, however, that "even if this arrangement is true Ms Cabo will still fall within the definition of 'person managing the property'": see paragraph 73. The FTT accordingly concluded in paragraph 74 that "Ms Cabo falls within the definition in s.72(1) and is the person committing the offence".

21. As for whether Ms Cabo was "the landlord", the FTT said this in paragraph 75:

> "We must then consider whether Ms Cabo is the landlord in relation to the Property under the 2016 Act. Top Holdings have a contract for management but have no legal interest in the Property. The company cannot therefore be a landlord. They are acting on behalf of Ms Cabo and she must be the landlord of the property."

22. The FTT further recorded, in paragraph 76, that, "[a]lthough not specifically raised", it had "considered whether Ms Cabo has a reasonable excuse for the offence" before determining that there should be a rent repayment order in the sum of £9,600.

The Upper Tribunal

23. The Deputy President concluded that the FTT had not been entitled to find that Ms Cabo had been a "person having control" of the Property. For that to have been the case, Ms Cabo would have had to have been in receipt of a rack-rent. While, however, the FTT "was entitled to reject Ms Cabo's and Mr Grasso's evidence that she received nothing from the renting of the Property", "there was no evidence about how much money was going to Ms Cabo from the arrangements with Top Holdings and Mr Grasso" and the FTT did not "make any finding about how much Ms Cabo received; in particular it did not find that she received a rack-rent": see paragraph 48 of the UT Decision. Moreover, "sums which [Top Holdings/Mr Grasso] 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" since "[i]ndirect receipt is not enough for the purpose of section 263(1) [of the 2004 Act]": see paragraph 50.

24. On the other hand, the Deputy President considered that "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": see paragraph 59. Even taking the Management Agreement at face value, the requirements of section 263(3) of the 2004 Act were met as Ms Cabo would have received rents "but for having entered into an arrangement … 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": see paragraphs 52 to 58.

25. There remained the issue of "whether the FTT was right to find that Ms Cabo was Ms Dezotti's landlord": see paragraph 71. In that connection, the Deputy President considered Ms Cabo to have been an "undisclosed principal": see paragraph 74. The evidence, the Deputy President said, "shows that although [Top Holdings] let the Property in its own name, it did so on behalf of Ms Cabo as her agent" and "it thereby created the relationship of landlord and tenant between Ms Cabo and Ms Dezotti" and, since Ms Cabo was the owner of the freehold legal estate, "a tenancy granted by an agent acting on her behalf would be good against the world": see paragraph 81. The Deputy President had said in paragraph 77:

> "The FTT's rejection of the evidence of Ms Cabo and Mr Grasso 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 …. 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'."

26. That did not mean that Top Holdings had not granted a tenancy to Ms Dezotti. The Deputy President noted that the decision of the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 establishes that "a company (or other person) with no proprietary interest in land can grant a tenancy of that land and can be a landlord": see paragraph 65. In *Bruton v London & Quadrant Housing Trust*, Lord Hoffmann had explained at 415:

> "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."

Accordingly, the Deputy President said, "Top Holdings could grant a tenancy to Ms Dezotti" and "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": see paragraph 67. The Deputy President thought it "likely that [Ms Dezotti] could additionally have made a claim against the company itself, because the contractual relationship of landlord and tenant also existed between them", but it was not necessary to decide the point: see paragraph 82. What mattered was that Ms Dezotti was "entitled to make her claim for a rent repayment order against Ms Cabo, as her landlord": see paragraph 82.

Ms Cabo's case on appeal

27. Mr Zane Malik KC, who appeared for Ms Cabo with Mr Asad Maqsood, argued that the Deputy President was not justified in finding Ms Cabo to have been an undisclosed principal and, hence, was wrong to conclude that Ms Cabo was Ms Dezotti's immediate landlord for the purposes of the 2016 Act. Like the Deputy President, Mr Malik cited the summary of relevant principles to be found in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 ("*Siu*"). At 207, Lord Lloyd, giving the judgment of the Privy Council, said:

> "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."

28. Mr Malik relied on the first, second and fifth propositions. With regard to the first, Mr Malik pointed out that clause 7 of the Management Agreement stipulated that "any letting shall only be through Licence agreements permitting Holiday Lettings only, as specifically defined under the Housing Act 1988". That being so, Mr Malik argued, the Management Agreement did not authorise Top Holdings to enter into anything but a holiday letting with Ms Dezotti, and the FTT made no finding to the effect that Top Holdings' "actual authority" had extended more widely. Neither, Mr Malik said, had the FTT made any finding as to whether Top Holdings was intending to act for Ms Cabo when it entered into the Occupation Agreement. In any event, the terms of the Occupation Agreement were such as to exclude Ms Cabo's right to sue and her liability to be sued. The terms of the Occupation Agreement and the surrounding circumstances show, Mr Malik submitted, that Top Holdings was the true and only principal.

Discussion

"Actual authority"

29. In paragraph 75 of the FTT Decision, the FTT said that Ms Cabo "must be the landlord" of the Property because Top Holdings were "acting on behalf of" her. On its face, that would seem to imply that the FTT considered Top Holdings to have been acting with Ms Cabo's authority when it entered into the Occupation Agreement.

30. It is fair to say that the FTT made this remark after stating that Top Holdings could not be a landlord as it had "no legal interest in the Property", not in the context of a discussion about the implications of clause 7 of the Management Agreement. It seems clear, however, that Ms Cabo had not suggested that the part of clause 7 on which Mr Malik relied was of significance. Naturally enough, no transcript of Ms Cabo's oral evidence to the FTT is available, and we have not seen, either, her witness statement for the FTT hearing. However, Mr Malik accepted that there had been no engagement in that witness statement with whether Top Holdings had acted outside the authority it had been given by Ms Cabo. In fact, far from pointing to the terms of clause 7 or otherwise suggesting that Top Holdings had entered into agreements such as the Occupation Agreement without her sanction, Ms Cabo's position before the FTT appears to have been that she had left everything to Top Holdings. The FTT noted in paragraph 20 of the FTT Decision that Ms Cabo made "no comment as to whether [Top Holdings] was entitled to grant tenancies under the terms of the management agreement she had with them". Elsewhere, the FTT explained that Ms Cabo had

explained that she had left Top Holdings to deal with a notice which the council had sent "as Top Holdings had been managing" (paragraph 57); that, when asked why she had not applied for a licence, she had said that "Top Holdings was handling that issue and she did not have time for it, nor did she manage the Property" (paragraph 61); and that "[h]er idea was to have Top Holdings look after the Property" (paragraph 62). While, therefore, Ms Cabo denied having received any financial benefit from the agreements which Top Holdings had entered into with Ms Dezotti and others who had lived at the Property, she did not disavow the agreements.

31. On top of that, the FTT found that neither the Occupation Agreement nor the Management Agreement was a fully reliable guide to what was intended. The FTT explained that, contrary to what was said in the Occupation Agreement, the agreements with occupiers were not in fact intended to be short term lets and that the Occupation Agreement was "something of a sham": see paragraph 18 above. Further, the FTT did not find the arrangement depicted in the Management Agreement to be credible: see paragraph 20 above.

32. It is noteworthy, too, that the possibility of Ms Cabo having a reasonable excuse under section 72(5) of the 2004 Act was "not specifically raised" by Ms Cabo and was anyway rejected. Had Top Holdings entered into the Occupation Agreement without Ms Cabo's authority, she could have claimed to have a "reasonable excuse", but she evidently did not do so.

33. It is true that, as Mr Malik pointed out, the FTT did not in so many words identify Ms Cabo as an "undisclosed principal" or explicitly find that Top Holdings had been authorised by her to enter into the Occupation Agreement notwithstanding what was said in the latter part of clause 7 of the Management Agreement. That it did not do so is, however, unsurprising given the course which the matter had taken before it. It evidently was not Ms Cabo's position at that stage that Top Holdings had acted without her authority.

34. In all the circumstances, it seems to me that the Deputy President was justified in proceeding on the basis that Top Holdings had the requisite authority from Ms Cabo to enter into the Occupation Agreement.

Top Holdings' intentions

35. The position is similar as regards the issue of whether Top Holdings was intending to act on Ms Cabo's behalf when it entered into the Occupation Agreement. The Management Agreement explained that Top Holdings was not being granted any tenancy or licence in respect of the Property but was rather "proposing to manage the Property on behalf of [Ms Cabo]", was to "manage the Property exclusively for [Ms Cabo]" and was to be "permitted to let the Property" (albeit, according to clause 7, "through Licence agreements permitting Holiday Lettings only"). Top Holdings thus communicated to Ms Cabo its intention to act on her behalf as regards the Property. Nor did Mr Grasso dispute that Top Holdings had been intending so to act when it entered into the Occupation Agreement. The FTT had evidence from him both by way of statement and orally. Neither the statement nor a transcript of the oral evidence is before us, but the FTT summarised Mr Grasso's evidence in paragraphs 23, 24 and 41 to 54 of the FTT Decision. There was evidently no suggestion that Top Holdings had

not seen itself as acting for Ms Cabo, let alone that it had communicated an intention to act otherwise than on her behalf, when it entered into the Occupation Agreement.

Were the terms of the Occupation Agreement such as to exclude Ms Cabo's right to sue and her liability to be sued?

36. In *Siu*, Lord Lloyd noted that the contract which an agent has made with a third party "may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued". Lord Lloyd explained at 207 that the law in this connection had been stated by Diplock LJ as follows in *Teheran-Europe Co Ltd v S. T. Belton (Tractors) Ltd* [1968] 2 QB 545, at 555:

> "Where an agent has … actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing."

37. An undisclosed principal was held not to be able to sue in *Humble v Hunter* (1848) 12 QB 310. There, the plaintiff's son had executed a charterparty as "the owner of the good ship or vessel called the 'Ann'" when the ship was in fact owned by the plaintiff. The Court concluded that evidence was not admissible to show that the son had contracted as his mother's agent. Lord Denman CJ said at 315, "We were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the agent contracts as principal; and he has done so here by describing himself as 'owner' of the ship".

38. *Humble v Hunter* was followed in *Formby Brothers v Formby* (1910) 102 LT 116 and *Redebiaktiebolaget Argonaut v Hani* [1918] 2 KB 247. All three cases have, however, been distinguished in a number of subsequent authorities. One such was *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203, where Lord Shaw observed at 209 that "[t]he time may arise when the principles of [*Humble v Hunter* and *Formby Brothers v Formby*] may have to be reviewed in this House" and that he was "not prepared to be held as in any sense agreeing with the decision arrived at by Rowlatt J. in *Rederiaktiebolaget Argonaut v. Hani*". In *Epps v Rothnie* [1945] KB 562, Scott LJ said of *Humble v Hunter* and *Formby Brothers v Formby*, at 565, "Both these cases have been discussed on many occasions and I venture to express the opinion that they can no longer be regarded as good law, a view which is, I think, justified by the observations made on them by Lord Sumner in *Fred Drughorn, Ld. v. Rederiaktie-bolaget Trans-Atlantic*". In *Siu*, Lord Lloyd said at 209 that it was "unnecessary for their Lordships to decide to what extent, if at all, *Humble v. Hunter* (1848) 12 Q.B 310 and *Formby Brothers v. Formby* (1910) 102 L.T. 116 should still be regarded as good law", but commented at 208-209 that "[i]f courts are too ready to

construe written contracts as contradicting the right of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases".

39. The present case is closely analogous to *Epps v Rothnie*. There, a tenancy agreement had been made in the name of the plaintiff's brother, described in the agreement as "the landlord", although the house in question in fact belonged to the plaintiff. Scott LJ said at 565 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".

40. The principle that an undisclosed principal should not be able to sue, and should not be liable, on a contract which has expressly or impliedly excluded such a possibility makes very good sense. I do not think, however, that an intention to exclude the involvement of an undisclosed principal can be inferred from the mere fact that Top Holdings was described in the Occupation Agreement as "the Licensor". The reference to the plaintiff's brother as "the landlord" in *Epps v Rothnie* did not, in Scott LJ's opinion, prevent the plaintiff from relying on the tenancy agreement; no more should the Occupation Agreement's description of Top Holdings as "the Licensor" mean that Ms Cabo cannot be regarded as an undisclosed principal. Nor can I see anything else in the Occupation Agreement or the surrounding circumstances which could warrant the conclusion that Top Holdings was "the true and only principal" (to use words of Lord Lloyd in *Siu*). There is no reason to think that it would have mattered to Ms Dezotti whether she had Ms Cabo as a landlord.

41. I do not think, therefore, that Lord Lloyd's fifth proposition is of any help to Ms Cabo in the present case.

Conclusion

42. In all the circumstances, it seems to me that the Deputy President was justified in concluding that Ms Cabo was an undisclosed principal and, hence, Ms Cabo's "landlord" for the purposes of the 2016 Act. I would accordingly dismiss the appeal.

43. I should like, finally, to record that all the counsel who appeared before us were acting pro bono. The parties were very fortunate to have the benefit of such expert representation on that basis.

Lady Justice Andrews:

44. I agree.

Lord Justice Holgate:

45. I also agree.