

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2020] UKUT 0335 (LC)
UTLC Case No: LRX/33/2020**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – First-tier tribunal procedure – Refusal to adjourn - Breach of covenant – AirBnB lettings

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER
TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) UNDER S. 11
OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

BETWEEN:

BARRY COLIN WILLIAM GIBBINS

and

DAVID ALFRED GRAHAM GIBBINS

Appellant

Respondent

**Re: Top Floor Flat,
47 Agate Road,
London W6 0AL**

Before: His Honour Judge Hodge QC

**Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
on
27 November 2020**

Determination under written representations

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The following case is referred to in this Decision:

Nemcova v Fairfield Rents Limited [2016] UKUT 303 (LC)

The following cases were referred to in the written representations:

English v Emery Reimbold & Strick Limited (Practice Note) [2002] EWCA Civ 605, [2002] 1 WLR 2409

Fairhold Mercury Ltd v HQ (Block 1) Action Management Company Ltd [2013] UKUT 487 (LC)

Michael Hyde & Associates Limited v J D Williams & Co Limited [2001] BLR 99
Oxley v James (1844) 13 LJ Ex 358

DECISION

Introduction and overview

1. This is a leaseholder's appeal from a decision of the First-tier Tribunal Property Chamber (Residential Property) dated 11 December 2019 determining, under s. 168(4) of the Commonhold and Leasehold Reform Act 2002, that the appellant tenant was in breach of the following covenants in his lease of the top floor flat at 47 Agate Road, London W6 0AL dated 22 March 2005, namely: (1) clause 3 (1) (g) (ii) or, alternatively, clauses 3 (1) (g) (i) and (h) by using his flat for AirBnB lettings; (2) clause 2 and paragraph 1 of the second schedule by not using the flat as a private dwelling house in the occupation of one family only by virtue of the AirBnB lettings; and (3) clause 2 and paragraph 1 of the second schedule by (a) using the flat in a manner which is a nuisance to the owners, lessees and occupiers of the other flats in the property and in the neighbourhood by unacceptable levels of noise emanating from the flat at anti-social hours on a recurrent basis and trespass on the adjoining property at 45 Agate Road and (b) using or permitting the flat to be used for unlawful drug taking. On 27 February 2020 the FTT considered the appellant's request for permission to appeal and determined that it would not review its decision and it refused permission to appeal.

2. At paragraphs 9 to 13 of their decision the FTT determined a preliminary issue as follows:

9. After the start of the hearing the tribunal was handed an email from the respondent requesting that the hearing be adjourned. The respondent submitted that he had believed that the hearing had been 'discontinued'. The tribunal invited Mr Newman [the landlord's representative] to make representations on the respondent's request. He submitted that the respondent did know that the hearing was proceeding, referring the tribunal to a letter dated 18 October 2019 from Irwin Mitchell, acting for the applicant in another matter, to Royds Withy King, acting for the respondent in that matter, which he submitted made this clear.

10. The tribunal considered the respondent's email and Mr Newman's representations. It noted that the respondent's request had been made so late that the hearing had already started. If, as stated by the respondent, his request was being made in response to recent receipt by him of the Second Supplemental Statement of the applicant, the tribunal note that it had received its copy of this on 31 October.

11. Until the date of the hearing there was no request by the respondent for an adjournment nor any suggestion that he was unable to attend a hearing on the designated date. The tribunal noted that the applicant in this case had not sought to withdraw his application and there was nothing before the tribunal to suggest that the matter had been agreed between the parties.

12. The tribunal was also mindful that six witnesses for the applicant have attended the tribunal in the expectation of the hearing proceeding as directed.

13. The tribunal was therefore not prepared to agree to an adjournment of the hearing.

3. The email from the appellant requesting an adjournment was timed at 10.06 on Thursday 14 November 2019 (the day of the hearing) and it bore as its subject the correct case reference. It reads:

Dear Sir/Madam

In respect of the proceedings under Case Reference LON/00AN/LBC/2019/0062 I would confirm I am the respondent in these proceedings.

I believed the hearing which I now understand is scheduled to take place starting at 10:00 am today has been discontinued as it is connected with other proceeding in relation to the applicant which are being resolved without trial.

The day before yesterday having received a hard copy of a letter from D&S Property Management which contained 'Second Supplemental Statement of Case' I believe it is due to proceed.

I would respectfully request that the proceedings are adjourned in order that I may be allowed time to properly represent myself and will forward my Witness Statement in this respect shortly having first spoken to the court.

Please find attached a current report from my GP in respect of my health and current capacity.

Kind regards, etc

The attached letter from the Brook Green Medical Centre is dated 13 November and is signed by Dr Benjamin Loud. It is addressed "To Whom It My Concern" and begins with the Appellant's name, date of birth, address and NHS and telephone numbers. The body of the letter reads:

Mr Gibbins is a registered patient of Brook Green Medical Centre. He has been registered since 2002 and has been consulting with myself since 2011. Throughout the period of engagement with myself Mr Gibbins has struggled with his psychological health. In particular he has suffered with periods of low mood and debilitating anxiety. His ability to manage these psychological issues has been both complicated and exacerbated by an underlying mental health disorder characterised by emotional dysregulation. This, in turn, was triggered and propagated by his exposure to difficult experiences, abusive relationships, financial stressors and emotional abuse both as a child and as an adult.

He has sought help for his issues over a long period and has been under secondary care mental health services for long periods. Most recently he has been under the care of Dr Dale at the WLMHT. He has had multiple courses of therapy (DBT, CBT, group psychotherapy etc).

However, he has never managed to achieve a level of stability in his mental health in order to achieve a position where he is medication free and no longer dependent on prescribed medication.

Throughout this time Mr Gibbins wellbeing has been very dependent on the psychosocial stressors that he is exposed to. At times of increased stress he has struggled to manage his personal and domestic life. He has a tendency to self-neglect (in the context of disengagement from services and support) and has struggled to manage the administrative work that is needed to keep his life on track.

A repetitive pattern of his mental health has been a tendency to try and support others who have similar difficulties. This has typically included the tendency to try and help vulnerable people with underlying mental health issues who have dual issues with substance misuse.

Unsurprisingly his own mental health issues combined with a tendency to try and help the most vulnerable in society and an inability to manage stress is a volatile mixture.

Currently his attempts to support a friend with combined substance misuse and mental health issues has resulted in a spiralling deterioration in his own wellbeing. He is now suffering with insomnia, heightened anxiety, self-neglect, intrusive thoughts and an inability to concentrate and function effectively. His normal capacity to manage his affairs appears to have been compromised by this episode.

I would advocate that Mr Gibbins situation (someone with a chronic mental health issue) is being manifestly worsened by his domestic situation and the pressures of judicial proceedings.

This is putting his mental health at significant risk and I would advocate that he be allowed time to stabilise his mental health so that he can adequately manage the court proceedings that [he] is facing.

Yours sincerely, etc

4. The tenant's application for permission to appeal was filed on 12 March 2020. He contends that the FTT's decision shows that it wrongly interpreted, or wrongly applied, the relevant law and that it took account of irrelevant considerations, or failed to take account of relevant considerations or evidence, or there was a substantial procedural defect. The respondent seeks an appeal by way of review which, if successful, may require a consequential rehearing. Essentially, there are three grounds of appeal:

(1) In continuing in the absence of the appellant, the FTT acted outside of their discretion under regulations 3 and 32 of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016.

(2) The FTT's finding that the appellant was in breach of clauses 3 (1) (g) (i) and 3 (1) (h) of his lease or alternatively 3 (1) (g) (ii) is wrong since the FTT found no facts upon which to base a finding that the respondent was in breach of clause 3 (1) (g) (ii).

(3) The FTT erred in making a finding that there had been a breach of Schedule 2 paragraph 1 of the lease by means of illegal drug taking at the property as there was insufficient evidence before the FTT to support such a finding.

5. On 15 April 2020 the Tribunal received the landlord's reply to the appellant's application for permission to appeal (which is dated 27 March 2020). The landlord contended that the appellant had advanced no arguments or submissions to support the grant of leave to appeal. The FTT had not erred in law, fact or procedure so leave to appeal should be refused. Grounds two and three were based almost purely on technicalities. Even if those elements of the decision were to be reversed, this would not change the fact that the FTT had confirmed other breaches of covenant at paragraphs 28 and 31 their decision (which were not subject to any challenge). That left ground one. It was pointed out that since the hearing had not taken place in Wales – the case was heard in London - the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016 had no application and that the hearing had been governed by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. It was the landlord's contention that the FTT were best placed to determine how to exercise their discretion. There were no hard and fast rule that a hearing should not take place without a party being present. It is quite the reverse; there is specific provision to allow for it. The FTT had had sight of the email from the tenant and the letter from the Brook Green Medical Centre. The hearing had been adjourned for approximately 30 minutes for the panel to consider the same. The panel had heard representations on the matter and they had determined that in the interests of justice the hearing should proceed, with the panel testing the evidence presented with extensive questioning. Even if the tenant had actively participated at the hearing, it was highly unlikely that the FTT would have reached any different conclusion.

6. The application for permission to appeal came before the Tribunal (Judge Elizabeth Cooke) on 5 May 2020. The Tribunal granted permission to appeal considering it to be arguable that there was a prospect of a successful appeal on the grounds stated in the application for permission. The Tribunal stated that it was aware that the FTT's decision not to adjourn the hearing was a case management decision and therefore a matter of discretion with which the Tribunal would rarely interfere. However the Tribunal was troubled by the fact that the FTT had not mentioned the medical evidence that it had received; and it invited the parties to comment further on that, making provision for them to do so in its procedural directions. These included directions that: (1) the application for permission to appeal should stand as the appellant's notice and grounds of appeal; (2) the respondent's reply was to stand as his grounds of opposition; (3) the appeal was to be a review of the decision of the FTT, to be conducted under the Tribunal's written representations procedure; (4) the respondent was to make any further written representations he wished to make about ground one only; and (5) the appellant was to be entitled to respond to those representations (if any were made). There were further directions for the lodging of an appeal bundle and the original hearing bundle. Two points should be noted: First, permission to appeal was granted on all three grounds of appeal; but, secondly, further representations were directed only on the first ground of appeal. No application has been made for any further directions (as permitted by paragraph 11 of the Tribunal's order).

7. On 1 June 2020 the Tribunal received the respondent's notice and the respondent's additional representations, relating to ground one only, dated 26 May 2020. On 16 July 2020 the Tribunal received the appellant's response dated 13 July 2020.

Ground 1: refusal to adjourn

8. In his application for permission to appeal, the appellant relied on regulations 3 and 32 of the 2016 Wales Regulations. Regulation 3 of those regulations indicates that the overriding objective is to seek to deal fairly and justly with applications which the tribunal has to determine. Among the factors to be considered when making this assessment (in regulation 3(2)) are “(b) ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings”. Regulation 32 states that a tribunal may proceed at a hearing in the absence of a party if it is satisfied that notice has been given to that party in accordance with the regulations and “(b) it is not satisfied that there is a good reason for the failure to appear”. It is said to be highly significant that the FTT made no consideration of the medical evidence that was before them in assessing whether or not an adjournment should be granted. This is said to have been clearly a relevant factor in assessing: (1) the reason why such an application was not presented in a more timely manner; (2) the reason why the appellant might not have been aware of the proceedings, notwithstanding that he had received some previous correspondence in relation to them; (3) the reason why he might not have been aware of the landlord’s supplemental statement of case and a further statement of PC Matt Holland, dated 29 October 2019, until shortly before the hearing even if they had been posted in good time; (4) whether the appellant would have been able effectively to participate in a final hearing when an additional statement of case and evidence were filed at most two weeks before the tribunal hearing; and (5) whether the appellant’s failure to attend on the day was as a result of his underlying medical conditions. The FTT could not therefore have been satisfied that there was no good reason for the appellant to appear without actively considering his health issues and how they affected his ability to conduct the hearing. Alternatively, it was outside the FTT’s discretion in all the circumstances not to exercise its general case management powers under regulation 26 to adjourn the proceedings and allow time for the appellant to prepare. The FTT therefore erred in failing to take account of the appellant’s reduced ability to take part in proceedings on an equal footing on the basis of relevant medical evidence before it. Alternatively, the FTT acted outside the bounds of its discretion and/or in a manner that was procedurally irregular by failing to apply the overriding objective in order to allow the appellant sufficient time to prepare, as appropriate to his personal circumstances, in order that he might fully take part in the proceedings. The appellant relies upon case law authority from the Social Entitlement Chamber of the FTT for the proposition that a failure to consider whether a hearing should be adjourned on the grounds of the health of a party could give rise to a breach of natural justice. The appellant stresses that a party should have a fair and proper opportunity to put its case before the FTT in a way that enables the material points to be raised adequately. For those reasons, the matter should not have been heard on 14 November 2019; and the appellant should therefore be given an opportunity to present his case by way of rehearing.

9. In his reply, the respondent pointed out that since the hearing had not taken place in Wales, the 2016 Wales Regulations had no application and that the hearing had been governed by the 2013 Property Chamber Rules. These contain no reference to putting the parties on an equal footing; the appropriate question is whether or not, so far as practicable, the parties are able to participate fully in the proceedings. Rule 34 of the 2013 Property Chamber Rules makes no reference to any requirement for the FTT to be satisfied that there is no good reason for the failure to appear. The relevant question is whether the FTT

considers that it is in the interests of justice to proceed with the hearing. The FTT was best placed to determine whether or not reasonable steps had been taken to notify the appellant of the hearing. The respondent points out that throughout the duration of these proceedings, the appellant had been in receipt of legal representation with regard to another matter (referred to as “the studio litigation”). The respondent disputes that the second supplemental statement of case was only received by the applicant on 12 November 2019; but, in any event, there is said to be nothing in that document, or its covering letter, which had identified the hearing date. The appellant had not contacted the sender to ask why the second supplemental statement of case had been sent, as he should have done if he had thought that this matter had been discontinued, or to contact the FTT or his litigation solicitors in that regard. Instead he had made an immediate appointment to attend the Brook Green Medical Centre without contacting anyone else; and he had then waited until just after the hearing was scheduled to start to send his email to the FTT. The respondent contends that the appellant was fully aware of the hearing and was merely waiting until the last minute to attempt to obtain an adjournment so as to delay the inevitable. Reliance is placed on the letter from Irwin Mitchell which is identified at paragraph 9 of the FTT’s decision. It is said to be inconceivable that his solicitors would not have discussed the FTT hearing with the appellant and that they would not have disabused him of any apprehension that the FTT proceedings had been “discontinued”. Despite the fact that the decision makes no reference to the letter from the Brook Green Medical Centre, the respondent contends that the FTT correctly applied rule 34 when deciding to exercise its discretion to permit the proceedings to continue in the appellant’s absence, and that its decision clearly stated the reasons why the FTT reached that conclusion. The respondent points to rule 3.4 which requires the parties to help the FTT to further the overriding objective and to co-operate with the FTT generally. Despite that obligation, when the appellant first received correspondence from the FTT notifying him of the hearing, he did not assert that he was incapable of dealing with the matter; nor did he ask his solicitors to raise that issue with the FTT. It is clear from the letter from the appellant’s doctor that his mental health issues are not a new matter and that they have been ongoing for a significant number of years. The letter states that the judicial proceedings are having an adverse effect upon the appellant’s mental health. Prolonging them would only continue to produce such an effect. The respondent invites the Tribunal to note that this is not a service charges dispute but one regarding the appellant’s behaviour, which is having an adverse impact upon the residents of the property, and the neighbourhood as a whole. It was therefore in the interests of justice for the matter to be disposed of on 14 November 2019 as opposed to prolonging matters. In any event, it is contended that the FTT would have reached the same conclusion regardless of the appellant’s active participation. In this connection, the respondent notes that the FTT found additional breaches of the appellant’s leasehold covenants beyond those which he seeks to challenge in grounds two and three.

10. In the respondent’s additional representations, he contends that it was within the FTT’s discretion to continue with the hearing despite the fact that the appellant did not attend and sought an adjournment based on the letter from the Brook Green Medical Centre. The respondent contends that the FTT decision did not need to make specific reference to all of the documents which it had received and taken into account when reaching its decision. The letter was attached to the email from the appellant to which reference was expressly made in paragraph 9 of the FTT’s decision. The respondent highlights that the point which the appellant now raises is not quite the same as the point which he had raised in his application

for leave to appeal submitted to the FTT. There it had been asserted (at paragraph 6) that the applicant “was unable to prepare for nor participate in the hearing on 14/11/19 for medical reasons. He applied to adjourn by email on 14/11/19 for medical reasons but these [sic] was received after the hearing had taken place.” However, paragraph 9 of the FTT's decision clearly confirms that the email timed at 10:06 on 14 November 2019 had been received during the course of the hearing; and it was expressly considered at paragraph 10 of the decision. It was to this email that the Brook Green Medical Centre letter had been attached. It would appear that a second email, attaching a witness statement, had been received from the appellant after the hearing; and it was this latter email which, it was said, had not been taken into account by the FTT. Had the appellant made the point, in his initial application to the FTT for leave to appeal, that the first email, attaching the Brook Green Medical Centre letter, had not been received until after the hearing, it is said to be inconceivable that this would not have been corrected by the FTT in its later decision, refusing to review its original decision or to grant permission to appeal; and the FTT would have been in a position to shed specific light on the consideration which they had given to the Brook Green Medical Centre letter. The respondent contends that the FTT's decision does not contravene the overriding objective under the Property Chamber Rules of enabling the FTT to deal with cases fairly and justly. There is no absolute requirement for a tenant to be able to participate fully in the proceedings. The FTT panel which was hearing the matter on the day was best placed to know how to balance the competing elements which make up the overriding objective; and, regardless of whether all of the factors are specifically referred to in the FTT decision, the exercise of their discretionary power should not be interfered with unless it is clear that the FTT have strayed outside the proper boundaries of their discretion. The fact that no reference was made to the Broad Green Medical Centre letter in their decision does not mean that it was not properly considered, or that the FTT's discretion has been exercised inappropriately. There is no requirement for the FTT to have been satisfied that there was no good reason for the appellant's failure to appear. By allowing the hearing to proceed, the FTT must, by implication, have been satisfied the specific requirements set out in rule 34 had been fulfilled. It is neither essential, nor practical, for the FTT to be required to recite all the factors which they have taken into account when reaching their decision in accordance with the overriding objective.

11. In his reply the appellant notes that even if some of the FTT's findings are upheld on appeal, the question of which particular breaches of covenant may or may not have been found to have occurred is not a moot one. The precise nature of the FTT's findings will be relevant in any subsequent forfeiture application that the respondent may make. The applicant apologises for the drafting error in incorrectly placing reliance upon the Wales Regulations 2016 and accepts that the relevant rules are the Property Chamber Rules 2013. Insofar as the need to put the parties on an equal footing is not explicitly contained within the overriding objective, the appellant notes that rule 3 (1) indicates that the factors at rule 3 (2) are not exclusive, and that it is appropriate to consider any relevant factor that impacts upon the FTT's ability to deal with the case fairly and justly. Further rule 3 (2) (a) requires the FTT to consider the resources of the parties in assessing the proportionality of their proposed course of action, whilst rule 3 (2) (c) requires that the FTT should ensure that the parties are able to participate fully in the proceedings. It was therefore necessary for the FTT to take account of the evidence they had before them in respect of the appellant's health condition before coming to a conclusion that it was in the interests of justice to proceed. As regards rule 34,

the appellant notes that consideration of whether or not a party had good reason not to appear will be highly relevant to the question of whether the FTT are satisfied that it is in the interests of justice to proceed in any event. A party's medical needs may potentially also have some bearing on what steps it is reasonable to take to notify the party. The thrust of the appeal therefore remains that the FTT made no proper assessment about the appellant's medical condition, or any specific needs arising from that condition, and therefore failed to take into account relevant facts when assessing whether it was in the interests of justice to proceed with the hearing. It is said to remain the case that where a tribunal fails to give consideration as to whether a hearing should be adjourned on the grounds of ill health, this can amount to a breach of the principles of natural justice, and may prevent a party from having a fair and proper opportunity to put their case in a way that allows material points to be raised adequately. The appellant submits that the FTT made no finding as to the date when the appellant first knew of the hearing on 14 November 2019. Even if the FTT were satisfied that reasonable steps had been taken to notify the appellant of the hearing, a reasoned finding that it was in the interests of justice to proceed with the hearing was also required; and this necessitated consideration of the appellant's medical evidence. While there may be no obligation to refer to any particular piece of evidence, in the present case the FTT had not given sufficient reasons for their decision because they had failed to address their assessment of the weight they had placed on the medical evidence provided by the appellant, and why, nonetheless, they still regarded it as fair and just proceed in the light of that evidence. The appeal before the Tribunal is to be decided on the basis of the grounds of appeal now advanced before it, and not on the basis of the grounds of appeal raised at the first instance permission stage. The fact that the grounds have changed is a reflection of the fact that further consideration of the FTT's reasons have engendered a more nuanced understanding of the issues in the case. The appeal stands on its own merits, and it is no answer to those merits to suggest that earlier grounds of appeal lacked merit. Whilst it is acknowledged that there is authority for the proposition that it is appropriate to go back to a trial judge for further reasons, in the present circumstances it would not be appropriate to go back and ask the FTT for further reasons on the basis that considerable time - almost nine months - had elapsed (by the time of the reply submissions) and it was highly improbable that any of the panel would remember the reasons for a case management decision made at the beginning of a hearing after this length of time. There would therefore be a significant risk of post hoc rationalisation even though the FTT would doubtless do their best to recall the detail of their deliberations. For these reasons, and for the reasons given in the grounds of appeal, the appellant contends that the decision of the FTT in this matter should be set aside.

12. Those were the submission on the first ground of appeal. The Tribunal considers that it is unfortunate that the appellant's application to the FTT for permission to appeal did not expressly take issue with any part of paragraphs 9 to 13 of the FTT's decision when these now form one of the principal focuses of his present appeal to the Tribunal and constitute the principal reason why this Tribunal gave permission to appeal. Had the appellant done so, this would have afforded the FTT the opportunity to have reviewed their decision and to have indicated whether any, and if so precisely what, weight had been given to the medical evidence attached to the appellant's email when the matter was still fresh in the minds of the panel members. This is one the reasons for the requirement (in rule 53 (1) of the Property Chamber Rules 2013) that "on receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 3, whether to review

the decision in accordance with rule 55 (review of a decision)". This salutary requirement is directed to reducing the number of appeals to the Tribunal, for the benefit of the parties to proceedings in the FTT as much as the Tribunal's resources. The Tribunal accepts that, realistically, it is now too late for this omission to be rectified, and that this appeal must be determined upon its own merits; but prospective appellants to the Tribunal should appreciate that it is likely to look critically at grounds of appeal which are founded upon assertions of a failure to give adequate reasons for the making of a discretionary case management decision (particularly one involving the refusal of a late application for the adjournment of a hearing) where the point could have, but has not, been sufficiently raised and identified in the application to the FTT for permission to appeal.

13. As the Tribunal observed when giving permission to appeal, the FTT's decision not to adjourn the hearing was a case management decision and therefore a matter of discretion with which the Tribunal will rarely interfere. In this case, however, the Tribunal was troubled by the fact that the FTT had not mentioned the medical evidence that they had received. However, the FTT had expressly mentioned the email to which the medical evidence was attached. That email was relatively short; and it concluded: "Please find attached a current report from my GP in respect of my health and current capacity." The FTT had clearly read the email because they quoted the word "discontinued" from the second paragraph. At paragraph 76 of the respondent's reply to the application for permission to appeal it is stated that "the hearing was adjourned for approximately 30 minutes for the panel to consider" the email. In all the circumstances, the Tribunal finds it to be inconceivable that the FTT did not read, or have regard to, the letter from the appellant's doctor. The weight to be given to this letter, in the context of the adjournment application, was a matter for the FTT. The Tribunal accepts the respondent's submissions: (1) That there is no absolute requirement for a tenant to be able to participate fully in proceedings before the FTT; that would be inconsistent with both the qualifying words in rule 3 (2) (c) "ensuring, so far as practicable ..." and the express power in rule 34 to proceed with a hearing in a party's absence. (2) The FTT panel which was hearing the matter on the day was best placed to know how to balance the competing elements which constitute the overriding objective; and, regardless of whether all those factors were specifically referred to in the FTT decision, the exercise of their discretionary power should not be interfered with unless it is clear that the FTT have strayed outside the proper boundaries of their discretion. (3) The fact that no reference was made to the Broad Green Medical Centre letter in the FTT's decision does not mean that it was not properly considered, or that the FTT's discretion has been exercised inappropriately. (4) There is no requirement for the FTT to have been satisfied that there was no good reason for the tenant's failure to appear. Rule 34 required the FTT to be (a) satisfied that the tenant had been notified of the hearing, or that reasonable steps had been taken to notify him of the hearing and (b) to consider it to be in the interests of justice to proceed with the hearing. (5) By allowing the hearing to proceed, the FTT must, by implication, have been satisfied the specific requirements set out in rule 34 had been fulfilled. However desirable it may be, it is neither essential, nor is it always practicable or realistic, for the FTT to be required to recite all the factors which they have taken into account when reaching a discretionary case management decision in accordance with the overriding objective. The Tribunal will not lightly infer that a specialist tribunal, such as the FTT, have failed properly to exercise their discretion in accordance with the overriding objective and the applicable rules of procedure. At paragraphs 10 to 12 of their decision the FTT gave their reasons for refusing the

adjournment. Essentially these were: (1) the lateness of the application, (2) the failure to engage with the landlord, or the FTT, prior to the date of the hearing and, in consequence, (3) the fact that six witnesses had attended the hearing in the expectation that it would proceed. The FTT appear to have entertained some reservations about the genuineness of the appellant's assertion that he had not believed that the hearing was proceeding, but they made no express finding to that effect and therefore that factor cannot be relied upon in support of the FTT's decision. As against these three factors there was the tenant's email (which was clearly referred to and taken into account by the FTT) and its accompanying letter from the Brook Green Medical Centre (which was not referred to but which could not possibly have been overlooked). That letter was not a particularly impressive, or compulsive, document to pray in aid in support of an adjournment application. There is no indication that the writer was aware of the nature of the tribunal proceedings or of the issues that they raised. The letter merely refers to the appellant's "normal capacity to manage his affairs" appearing "to have been compromised by" a recent episode; it advocates that the appellant's "situation (someone with a chronic mental health issue)" was being manifestly worsened by his domestic situation and the pressures of judicial proceedings" which was "putting his mental health at significant risk"; and advocates "that he be allowed time to stabilise his mental health so that he can adequately manage the court proceedings that [he] is facing". No timescale was put upon the time that should be allowed for this. There is force in the respondent's point that prolonging the proceedings would only have served to continue to put the appellant's mental health at risk.

14. The application to adjourn fell to be determined by reference to the Property Chamber 2013 Rules and, specifically, rules 3 and 34. Rule 3 (headed "Overriding objective and parties' obligation to co-operate with the Tribunal") provides as follows:

3. — (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Rule 34 (headed “Hearings in a party's absence”) provides:

34. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

15. Clearly the requirement in rule 34 (a) was satisfied: the appellant was seeking an adjournment because he had been notified of the hearing. Although the FTT did not expressly address the requirement in rule 34 (b), clearly they must have been satisfied that it was “in the interests of justice to proceed with the hearing”; it is inconceivable that the FTT would have proceeded with the hearing had they considered that to do so would not be in the interests of justice. Although the FTT did not expressly mention rule 3 (4), the matters identified at paragraphs 10 and 11 of their decision clearly amounted to a breach of the appellant’s obligations under that sub-rule. The refusal of an adjournment advanced the aims identified at both rules 3 (2) (a) and (e). In connection with the former sub-rule, it is relevant that the case concerned the appellant’s behaviour, which was said to be having an adverse impact upon the residents of the property, and of the neighbourhood as a whole. The Tribunal accepts the appellant’s submissions that: (1) Whilst (for reasons not immediately apparent since it features at CPR 1.1 (2) (a)) the need to put the parties on an equal footing is not explicitly contained within the overriding objective in the Property Chamber Rules 2013, rule 3 (1) indicates that the factors at rule 3 (2) are not exhaustive, and that it is appropriate to consider any relevant factor that impacts upon the FTT’s ability to deal with the case fairly and justly. (2) Rule 3 (2) (a) requires the FTT to consider the resources of the parties in assessing the proportionality of their proposed course of action whilst rule 3 (2) (c) requires that the FTT should ensure, so far as practicable, that the parties are able to participate fully in the proceedings. (3) It was therefore necessary for the FTT to take account of the evidence they had before them in respect of the appellant’s health conditions before concluding that it was in the interests of justice to proceed with the hearing. (4) As regards rule 34, consideration of whether or not a party had good reason not to appear at the hearing will be highly relevant to the question of whether the FTT are satisfied that it is in the interests of justice to proceed in their absence. However, there is no proper basis for finding that the FTT did not weigh these all factors fairly in the balance.

16. In summary, therefore, and for the reasons set out at paragraphs 12 to 15 above, the Tribunal rejects the first ground of appeal. It finds that there is no appealable error of law in the exercise of the FTT’s discretion to refuse an adjournment of the hearing. There is no proper basis for finding that the FTT have taken irrelevant matters into account. There is no proper basis for finding that the FTT failed to take any relevant matter into account. There is

no proper basis for finding that the FTT failed correctly to give effect to the overriding objective. The FTT's decision was well within the proper bounds of their discretionary case management powers. Although, in the circumstances, it is no function of the Tribunal to re-make the FTT's decision, for what it is worth the Tribunal records that it would have reached precisely the same decision as the FTT in response to the adjournment request. It was made far too late in the day, and upon wholly inadequate grounds. The Tribunal reiterates that prospective appellants should appreciate that it is likely to look critically at grounds of appeal which are founded upon assertions of a failure to give adequate reasons for the making of a discretionary case management decision (particularly one involving the refusal of a late application for the adjournment of a hearing) where the point could have, but has not, been sufficiently identified and raised in the application to the FTT for permission to appeal. The Tribunal notes that in the instant case, the point that the appellant's application to the FTT for permission to appeal had not expressly taken issue with any part of paragraphs 9 to 13 of the FTT's decision was only taken in the respondent's additional representations, received after the Tribunal had already given permission to appeal.

Ground 2: Breach of alienation covenants

17. At paragraph 23 of its decision the FTT concluded, on the basis of the evidence provided to them, that on the balance of probabilities "the [Appellant] is letting the property in whole or part via AirBnB. This is in breach of clause 3 (1) (g) (ii) of his lease if he vacates the property during such lettings. If he does not vacate the property then the lettings are in breach of clause 3 (1) (g) (i) and 3 (1) (h) of his lease." Clause 3 (1) (g) of the lease is a tenant's covenant "(i) not to assign charge underlet or part with possession of part only of the demised premises" and (ii) "... upon any underletting to obtain an unqualified covenant on the part of the underlessee with the Lessor not to assign underlet or part with possession of part only of the demised premises and to perform and observe the covenants and conditions of this Lease save for the covenant to pay ground rent and service charges to the Lessor". Clause 3 (1) (h) of the lease is a tenant's covenant "not at any time during the term hereby granted to divide the possession of the demised premises by an Assignment or Underletting or parting with possession of part only ...".

18. The appellant submits that there is no evidence to support the suggestion that any arrangement by the appellant to allow others to stay in the property for money took the form of an assignment. It is clear from the wording of clause 3 (1) (g) (i) that, within the terms of this clause of the lease, assignment and underletting are considered to be distinct activities; but, in any event, "assignment" has a distinct ordinary meaning of parting with the lease for the whole of the remaining term in such a manner as to extinguish the assigning party's interest. There is no question that any short term rental could operate as an assignment of the property, even if the whole property were the subject of such a rental. It was not therefore permissible for the FTT to have found that clause 3 (1) (g) (ii) had been breached as legally the type of relationship found by the FTT did not amount to an assignment, and nor was there any evidence to support the suggestion of any assignment occurring. As the FTT had no proper basis upon which to make such a finding, their finding of breach in the alternative is unsustainable. In making this finding, the FTT wrongly applied the law, or, alternatively, it failed to take account of a relevant consideration in the evidence.

19. The Tribunal considers this ground of appeal to be wholly misconceived, and it so finds. As the respondent points out in his reply, it was never asserted, or determined, that the appellant had assigned the demised premises, as opposed to under-letting them on a short term basis without obtaining an unqualified government on the part of the underlessee with the landlord. The relevant covenants apply not simply to an assignment of the whole of the term of the lease, but also to a short term underletting; and it was this which the FTT found to have occurred. There is no proper basis for any challenge to paragraph 23 of the decision. The appeal on this ground is dismissed accordingly.

20. The Tribunal notes that there is no challenge to the FTT's determination (at paragraph 28 of its decision) that, by reason of the Air BnB lettings, the appellant was in breach of the restriction in paragraph 1 of the second schedule to his lease that the flat might not be used other than as a private dwelling house in the occupation of one family only. That determination was clearly in accordance with the decision of the Tribunal in *Nemcova v Fairfield Rents Limited* [2016] UKUT 0303 (LC).

Ground 3: Illegal drug use

21. The Tribunal notes that there is no challenge to the FTT's determination (at paragraphs 29 to 31) that the appellant was in breach of paragraph 1 of the second schedule to the lease by causing or permitting the flat to be used for purposes from which a nuisance could arise to the owners, lessees or occupiers of other flats in the building or in the neighbourhood. The appellant does, however, challenge the FTT's later determination (at paragraphs 32 to 37 of its decision) that, on the evidence, and on the balance of probabilities, there has been unlawful drug taking at the flat in breach of the further restriction in paragraph 1 of the 2nd schedule not to use the flat, nor permit the same to be used, for any illegal or immoral purpose. The appellant submits that in order for the FTT's conclusion to be justified, it must have made three findings: (1) that the appellant and/or his companion had taken drugs, (2) that they had used the flat to do so, and (3) that it was illegal for them to have taken the drugs that they did whilst using the flat. The appellant proceeds to review the FTT's findings and the supporting evidence. The appellant submits that the evidence as a whole supports a pattern of the appellant and his companion being perceived as drug users within the community, to the extent that this has become the received wisdom amongst their neighbours, who have been making complaints, but there is no direct evidence to support that finding. Given the pattern of the evidence considered by the FTT, and in the absence of any direct evidence of drug use, the respondent submits that no reasonable tribunal could have found unlawful drug use proven on the evidence before them. Likewise there is said to be no evidence of any use of the flat for the purpose of taking drugs as there is no evidence at all as to the location at which any substances were taken. Finally, it is said that not all drugs are illegal. The only evidence in relation to any specific drug that was before the FTT is hearsay evidence from the police and social services, with no apparent basis for concluding that any particular drug was involved, and no connection to the flat or evidence that any unlawful drug use had occurred within the flat. Even on the basis that the FTT could properly have been satisfied that the appellant or his companion were taking drugs in the flat (which is denied), there is said to be insufficient evidence to support any finding, on the balance of probability, that any drugs that were taken in the flat were illegal. The evidence is said to be entirely consistent with alcohol abuse, which would not involve using the flat for illegal purposes.

The possession of nitrous oxide is not of itself a criminal offence. The FTT is said to have failed to indicate any basis upon which they could properly have made any finding of illegality, or that any drugs taken were controlled within the meaning of the Misuse of Drugs Act 1971. The appellant therefore submits that the FTT erred by failing to take into account material deficiencies in the evidence before them that meant that no reasonable tribunal could properly have concluded, in the light of that evidence, that there had been any breach of the covenant to refrain from illegal activity on the premises.

22. In his reply, the respondent submits that the FTT heard all the evidence, asked questions of the witnesses who were present at the hearing, and reached their conclusion. That conclusion is said to be supported by the letter from the Brook Green Medical Centre, which the FTT saw on the morning of the hearing, which confirms (in the fifth paragraph) that the respondent has “a tendency to try and help vulnerable people with underlying mental health issues who have dual issues with substance misuse”. The respondent also notes that the appellant has not disputed the breach of covenant confirmed at paragraph 31 of the FTT's decision, that the appellant had committed, or permitted, acts of nuisance in relation to the flat; and this renders the appellant's arguments with regard to ground three technical and redundant because it is clear that paragraph 1 of the second schedule to the lease has been breached independently of the further finding that there has been unlawful drug taking at the flat.

23. This section of the FTT's decision begins (at paragraph 31): “Finally the tribunal is required to determine whether the [appellant] had used the property for an illegal purpose in breach of paragraph 1 of the second schedule.” The Tribunal is puzzled by this statement because nowhere in the landlord's application and original statement of case, his supplemental statement of case, or his second supplemental statement of case is there any allegation that the appellant has used the flat for any illegal purpose, as distinct from committing or permitting acts of nuisance. In circumstances where the appellant was not present at the hearing, and his application for an adjournment had already been refused, the Tribunal considers that it was procedurally unjust, and thus an error of law, for the FTT to have proceeded to consider, and determine, adversely to the absent appellant, a matter that had not formally been put in issue before the FTT. As the respondent points out in his reply, it was also unnecessary for the FTT to have proceeded to do so because they had already determined that the appellant had breached two earlier aspects of paragraph 1 of the second schedule (as to which there is no challenge on this appeal). For these reasons, the Tribunal would set aside the FTT's determination that the appellant has used the flat for an illegal purpose at paragraphs 32 to 37 of their decision. However, this does not affect the FTT's ultimate decision (at paragraph 1 (b)) that the appellant has breached paragraph 1 of the second schedule to his lease.

Decision

24. For the reasons stated above, the appeal is dismissed.

25. The First-tier Tribunal's determination that the appellant has breached, first, clause 3 (1) (g) (ii) or, alternatively, clauses 3 (1) (g) (i) and 3 (1) (h) and also, secondly, paragraph 1 of the second schedule to the lease is affirmed.

David R. Hodge

His Honour Judge David Hodge QC

27 November 2020