FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00ML/HMF/2022/0026
Property	:	Knoll House, Ingram Crescent West, Hove, East Sussex, BN3 5NX (1)
Applicant	:	Stride and others – see List of Applicants in the schedule attached
Representative	:	Mr George Penny of Counsel Instructed by Flat Justice CIC
Respondent	:	Oaksure Property Protection Limited
Representative	:	Mr Tom Morris of Counsel instructed by JMW Solicitors LLP
Type of Application	:	Application for a rent repayment order by Tenant Sections 40, 41, 42, 43 & 45 of the Housing and Planning Act 2016
Tribunal Members	:	Judge J Dobson Mr N Robinson FRICS Ms T Wong
Date of Hearing	:	30th August 2023
Date of Decision	:	23rd October 2023

PRELIMINARY DECISION

Summary of the Decision

1. **The Respondent held a lease of the Property.**

2. **The Applicants occupation was solely residential.**

3. **The Respondent was the person managing pursuant to its lease and was also the person having control, as the person receiving the rent.**

4. **Brighton and Hove Council was not the person managing the Property or the person having control.**

5. **There was no requirement for the Council to be both managing and having control for the purpose of Schedule 14 in any event.**

The Background and Application

6. On 10 October 2022 the Tribunal received an application [7- 51] under section 41 of the Housing and Planning Act 2016 (the Act) from the Applicants for a rent repayment order against the Respondent as the landlord. Originally there were 30 such Applicants, now 29 following the withdrawal of one. Varying amounts are claimed, the highest individual sum being £7200. The Applicants stated that the property did not have an HMO (House in Multiple Occupation) licence at least until an application for a licence was made by the Respondent on the 11 October 2021 but perhaps beyond that.

7. Knoll House ("the Property") is owned by Brighton and Hove Council ("the Council"), which is not a party to the application. It was formerly a residential care home but had then been unoccupied. It was converted by the Respondent to comprise 33 bedrooms and to include shared kitchens and bathrooms.

8. The Applicants are former occupiers of the Property as what are described as Property Guardians ("Guardians") pursuant to agreements they entered into, each described as a Licence Agreement [e.gs., 52- 70, 71-89, 94-112]. They occupied bedrooms in the Property.

9. The Respondent is a company which entered into an agreement with the Council to install Guardians in the Property. Its business is the provision of property guardianship services to owners of properties. The Respondent enters into a form of agreement which, it was said on behalf of the Respondent and not disputed, varies from instance to instance. Consequently, the Respondent said that the purpose, at least for the given property- owner, of the occupiers' occupation is to provide protection for the Property pending any longer- term arrangement in relation to the Property and also to achieve business rates savings.

10. The agreement between the Respondent and the Council is undated but provides for the provision of guardian services for a period commencing 1st November 2020. The relevant precise terms are returned to below.

11. It was agreed by the parties that the Property was not licensed as a House in Multiple Occupation and the dispute which is the subject of this Preliminary Decision is about whether or not the Property was required to be licensed.

12. The Respondent raised two defences relevant to this Decision:

    i) That the "person managing" is the Council and so the Property was not a licensable HMO, and
    ii) That the occupier's occupation was not solely residential.

13. The Respondent argued that each provides a complete defence to the application. The Applicants argued against both.

The History of the Case

14. There have a number of Directions given where the course adopted was that the Tribunal would determine first the legal issues addressed in this Preliminary Decision. Those legal issues were (subject to subsequent limitation of them by the parties or other clarification) identified as:

    i) Whether the Respondent was a lessee;
    ii) Whether the sole use of the Properties by the Applicant was residential;
    iii) Whether the local housing authority was managing or in control and
    iv) Whether the local authority must be both managing and in control to be exempt from licensing requirements or only one of those is required.

15. A number of complications arose which resulted in a hearing which was originally listed in late April only taking place at the end of August. It is far from clear with hindsight that the reason given for the hearing in June being vacated, which the Tribunal accepted at the time, in fact required the vacation of that hearing- the Respondent had a witness availability difficulty but, in the event, has not called that witness.

16. The Directions had provided for a hearing bundle. The Applicants provided one containing 814 pages including the index. This is a convenient point to record that whilst the Tribunal read the bundle in full, many of the documents are not referred to in detail, or in some instances at all, in this Decision, it being unnecessary to so refer. A substantial part of the bundle comprises the agreements entered into between individual Applicants and the Respondent and/ or other evidence of rent payments or otherwise there being an agreement for occupation, some 640 pages. The Directions had anticipated the parties agreeing one or more Applicants as lead Applicants and providing the Licence Agreements only for those but no formal directions were given in respect of the identification of any lead Applicant(s) for the purpose of determining the legal issues identified and none were identified by the parties.

17. Consequently, where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to specific pages from the bundle, that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page- numbering.

18. The Directions also provided for Skeleton Arguments from the parties and both parties Counsel submitted those. That of Mr Penny for the Applicant was 5 pages long and that of Mr Morris for the Respondent was 14 pages long. The Tribunal also considered those. A bundle of case authorities some 392 pages long was also provided by the representative of the Applicants and one 183 pages long by Counsel on behalf of the Respondent.

19. The Tribunal does consider it appropriate to record that the bundle on behalf of the Applicants appears to the Tribunal to comprise a collection of case authorities involving decisions which at one time other have been handed down which relate to rent repayment orders and/ or licensing offences regarding HMOs, or elements relevant to those matters one way or another, or relate to conduct of proceedings and costs. The relevance of most of the cases to the issues arising to be determined in the Preliminary Decision was difficult to discern and neither in the Applicants' written case or any oral or written submissions of Counsel were they mentioned. To that extent the presence of the Applicants' authorities bundle was not a great help. The Applicants' bundle did not, in contrast, include the case authorities most obviously relevant to the issues in the Preliminary decision. The bundle provided on behalf of the Respondent was of considerably more relevance to the actual issues.

The Hearing

20. The adjourned hearing proceeded as a hybrid hearing with the Tribunal sitting at Havant Justice Centre and the other participants attending remotely. As identified above, the Applicants were represented at the hearing by Mr George Penny of Counsel and the Respondent by Mr Tom Morris, also of Counsel. Certain of the Applicants were in attendance.

21. The hearing proceeded by way of submissions by Counsel for the parties, including in response to clarification and questions raised by the Tribunal. No oral witness evidence was taken. Counsel had agreed that given the nature of the issues, there was no need. No reference was made to witness statements of certain of the Applicants in the hearing bundle, neither side apparently considering the contents took matters appreciably further forward in relation to the Preliminary Decision.

22. Whilst one element in respect of whether the Respondent could commit a licensing offence had been the question of whether the Council was required by section 72 to be both the person managing and the person in control, Mr Penny conceded that the reference to "or" is clear. Hence, if the

Council was either the person managing or in control then the exception would apply and there would not be an HMO licensing offence committed.

23. It was also agreed by both Counsel that the Council was not the person having control. The Applicants case [756- 766] asserted that the Council did not receive the rack– rent only a portion of it (which it received indirectly by way of a profit share- see below). The Skeleton Argument of Mr Penny referred to the authority of *Cabo v Dezotti* [2022] UKUT 240 (LC), an authority familiar to the Tribunal and argued why the Council was not in control, irrespective of whether the Respondent had a lease. The Tribunal does not consider it necessary say anything about those matters in the circumstances.

24. Counsel additionally agreed that the Respondent was the person in control. The Tribunal considers must be correct- the payments were made to the Respondent by the occupiers.

25. The Tribunal records its gratitude to Mr Penny and Mr Morris for there clear submissions and assistance and for giving the Tribunal much to think about. Also Mr Morris for his responses to the several queries raised of his client's case by the Tribunal.

The law and jurisdiction in relation to Rent Repayment Orders generally

26. Rent repayment orders are one of a number of measures introduced with the aim of discouraging rogue landlords and agents and to assist with achieving and maintaining acceptable standards in the rented property market. The relevant provisions relating to rent repayment orders are set out in sections 40 -46 Housing and Planning Act 2016 ("the 2016 Act").

27. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Reference is variously made to "the landlord" in that provision, "a landlord" and "that landlord", which has caused some issues in other cases but does not in this one. The 2004 Act had referred to "the appropriate person", being the person entitled to receive payments but the 2016 Act altered that.

HMO Licensing Offences

28. An offence under Part 2 section 72(1) of the 2004 Act is committed by a person (or company) having control of or managing where a property is required to be licensed as a house in multiple occupation and is not so licensed. Section 61(1) requires that every such house to which Part 2 applies must be licensed unless limited exceptions apply.

29. Section 263 reads as follows in respect of a person in control:

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises."

30. Rack- rent is a phrase used for many years but can be regarded for these purposes, if imprecisely, as essentially a market rent for the occupation granted.

31. In respect of a person managing, Section 263(3) provides as follows:

"In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises –
(a) receives (whether directly or through an agent or trustee) rents or other payments from –
(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; … or
ii) 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."

32. The owner of the given premises (section 262(7) includes for such purposes holding a lease for an unexpired term of 3 years or more in addition to the freehold owner, or a lessee under another lease. Hence, as the owner or lessee, the person managing must either receive payments or would do but for agreeing that another will. The first possibility is simple enough: the latter provides ground for dispute.

33. The definitions of person managing and person having control apply throughout the 2004 Act and are not limited to provisions regarding HMO licences. It might be considered something of an oddity that the person managing a property for the purpose of the 2004 Act is the landlord. That is notwithstanding that the landlord may not be managing the property at all in the manner the term managing would ordinarily be understood. It might be perceived that a managing agent, where there is one, manages the given property. In contrast, it might at first blush appear logical that the person whose property it is has control of the property. Instead, by way of receiving the rack- rent, even if only to pass it or most of it to the landlord, if there is an agent it is the agent which is the person in control pursuant to the 2004 Act. If the rent is paid to the landlord and not to any agent, the landlord is the person in control, as defined, in addition to being the person managing.

34. Having control is presented as relating to day- to– day involvement and it is the person having control who is to be assumed to be the most appropriate person to be the licence holder (section 66(4)) and would also be the person on whom an improvement notice under Part 1 of the 2004 Act would be served. Those managing or having control may also be the subject of civil financial penalties (section 249A) as an alternative to prosecution for a licensing offence.

35. Not all HMOs require to be licensed. In terms of the requirement for the HMO to be licensed, an HMO is of a prescribed description for the purpose of section 55(2)(a) of the 2004 Act if it is occupied by five or more persons, unless additional licensing requirements (as allowed for in section 56) have reduced that number. A building must also meet one of the relevant tests and will meet the standard test set out in Section 254(2) of the 2004 Act in the event of all of following circumstances:

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
(b) the living accommodation is occupied by persons who do not form a single household (see section 258);
(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
(d) their occupation of the living accommodation constitutes the only use of that accommodation;
(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

36. Those properties which do not meet the tests do not require licensing.

37. Before granting a licence, the local housing authority must (pursuant to section 64) be satisfied about a number of matters, including that the house is suitable for multiple occupation, that the licence holder is a fit and proper person to be the licence holder, that the proposed manager of the house is a fit and proper person for that purpose, and that the proposed management arrangements are otherwise satisfactory. Under section 67 a licence may include such conditions as the local housing authority consider appropriate for regulating the management, use and occupation of the house and its condition and contents. The exercise described in this paragraph inevitably will not be undertaken unless a licence is sought.

38. Section 61(1) requires that every such house to which Part 2 of the 2004 Act applies must be licensed unless limited exceptions apply. Significantly, in the context of this case, Schedule 14 of the 2004 Act provides for other exemptions from the general requirement for licensing. The key exemption for this case is that a council (or other relevant body) is the person managing or having control of the Property. The specific wording of the provision is:

"2 Buildings controlled or managed by public sector bodies etc.

(1) A building where the person managing or having control of it is–
(a) a local housing authority,
[
(aa) a non-profit registered provider of social housing,
] 1
(b) a body which is registered as a social landlord under Part 1 of the Housing Act 1996
....."

39. Matters in relation to reasonable excuse for not licensing or indeed any other matters which would be relevant in the event that the Property is determined to require licensing are not dwelt on. They do not form part of the subject matter of this Preliminary Decision.

40. The making of a rent repayment order in this case, if determined appropriate in due course, would therefore be a sanction imposed arising from an unlicensed HMO where the landlord has committed the offence and imposed against the landlord.

The contract between the Council and the Respondent

41. It is necessary to address the contract between the Respondent and the Council ("the Contract") [722- 741]. The provisions and their effect lie at the heart of the main issues.

42. The Contract comprises 22 pages and so the Tribunal does not seek to recite the contents in full but rather refers, by summarising the provisions where possible, to the clauses it found most relevant to the answer to the question to be determined. As will be seen below, although the document is termed "Contract" on its front page and that is the description used by the Tribunal, the provisions of the Contract use the description "Agreement".

43. The Contract states as to the purpose of the Contract at 1.1 of the Recitals at the start of the Contract the following:

> "The purpose of this Agreement is to allow the Service Provider to provide property protection services to the Owner through the installation of Guardians at the Property and it has been agreed between the Owner and the Service Provider that for that purpose the Service Provider shall be permitted to grant Licences under the terms of this Agreement."

44. The remainder of the Recitals say as follows:

> "1.2 Under the terms of this Agreement the Service Provider will be permitted to install persons in temporary occupation of part of the Property under the terms of a Licence in consideration for a licence fee paid to the Service Provider by such persons."

45. The commencement date of the Contract is 1st November 2020. The Council is referred to in the Contract as the "Owner" and the Respondent as the "Service Provider".

46. As to the term of the Contract, clause 5 says as follows:

> 5.1 The Owner hereby appoints the Service Provider as the sole and exclusive provider of Guardian Services at the Property and the Service Provider hereby agrees to act in that capacity subject to the terms and conditions of this Agreement for a minimum period of 6 months commencing Sunday 1st

November 2020 and terminating on Friday 30' April 2021, this may be extended at the sole discretion of Brighton and Hove City council.
5.2 The Owner authorises the Service Provider to install the Facilities in the Property for use by the Guardian(s) at the Property during the continuance of that person(s)Licence.
5.3 This Agreement shall commence on the Commencement Date and shall continue in force thereafter unless and until terminated in accordance with this Agreement.

47. The Council is, pursuant to clause 7.5 of the contract, responsible for the payment of the all the cost of providing utilities, up to a level of £12,000.00 over 6 months. The excess is payable by the Respondent.

48. The repairing obligation in respect of the Property generally remains with the Council, pursuant to clause 7.8, requiring works within 2 weeks of notification by the Respondent. There is separately a specific provision about remedy of defects with electricity, heating and water, clause 7.6.

49. The Respondent is required to inspect the Property every month for the purpose of reporting to the Council repairs, decorating and cleaning required.

50. It is the Council which must comply with any national requirements in respect of the Property, or indeed local authority requirements. (Of course, the Council is the local authority, but the Tribunal considers that has no specific significance, rather the form of contract appears to be one used for properties more widely and the Tribunal perceives that is was perhaps not noted that the last set of requirements was effectively superfluous, although alternatively perhaps it was not thought worthwhile to remove it.)

51. Clause 7.11 specifically states that there is no obligation on the Respondent to attend to repairs, although grants an ability to undertake emergency repairs having informed the Council. The cost still falls on the Council which must reimburse the Respondent.

52. Clause 7.9 gives the Respondent a further right to undertake work if the Council fails to do so within the two weeks of notification in which clause 7.8 requires.

53. Clause 7.4 addresses keys, door and locks. The Council has to provide keys to existing locks. The Respondent can remove and replace any door or lock but must remove them at the end of the Contract if required to at its own cost. A full set of keys and access codes must be provided.

54. Clause 8.1 requires the Council to attend to the insurance of the Property.

55. The Council may inspect the Property on giving 24 hours' notice to the Respondent pursuant to clause 9.7 or more specifically, the Respondent "shall..... allow such inspection".

56. Clause 9.1.9 states that the Respondent does not occupy the Property and may not grant possession or a tenancy. More specifically it says:

> "At no time shall the Service Provider:
> 9.1.9.1 Occupy the Property themselves, or by their servants or agents;
> 9.1.9.2 Grant or purport to grant any tenancy of the Property or any part of it;
> 9.1.9.3 Allow any Guardian or any other person to take possession of the Property or part of it;
> 9.1.9.4 Allow any person to occupy the Property or any part of it, other than the Guardians under Licences;
> 9.1.9.5 Carry on a business in all or any part of the Property."

57. The Respondent is required by clause 9.1.5 to take steps to pursue action against a Guardian who fails to vacate the Property and provides that the Council may require the Respondent to be substituted as the claimant in proceedings to evict. Specifically, the Contract says:

> "commence and take steps to pursue appropriate legal action against any Guardian failing to vacate the Property when lawfully required to do so by the Service Provider or the Owner and by written notice the Owner may require the Service Provider to be substituted as claimant in any legal proceedings commenced by the Service Provider to evict any Guardian. Legal costs incurred by the Owner in cases resulting from Guardians failure to vacate the Property at the end of the agreement will be met by the Service Provider. The Service Provider shall meet their own legal costs resulting from Guardians failure to vacate the Property;"

58. In addition, Clause 14.3.11 also states that on termination of the Contract, the Respondent will cease occupation and give vacant possession. The precise wording is:

> "On giving notice of termination by either party in accordance with this Clause, the Service Provider shall without delay cease occupation of the Property and shall terminate any Licence or Licences granted under this Agreement."

59. The Contract provides [725] that the Council is paid a fee by the Respondent and that the Council is to receive 50% of the net profit share. (It is not clear what the net profit was as opposed to gross profit or any other form of profit or how those are calculated, but nothing turns on that.)

The Licence Agreements

60. The Licence Agreements are relatively lengthy where they exist. It is not intended to recite the majority of the contents of any given example. The extracts below are specifically taken from the first such agreement in the bundle, that of Mr Stride and primarily are relevant to the question of the person managing the Property. Highlighting and/ or capitals appearing below are reproduced from the Licence Agreements which set the matters out in that manner.

61. The relevant extracts are as follows:

“Before signing this Agreement, please note:

1. This is an agreement under which Oaksure agrees to grant you a licence to share living space in a building as a Live- in-Guard
2. You do not get the right to exclusive occupation of any part of the living space

……

5. **This sort of sharing agreement does not create a tenancy**

…….

LICENSING AGREEMENT FOR NON- EXCLUSIVE SHARED OCCUPATION OF PREMISES

2.1.6 “Owner” means the owner of the Property

……..

3.1 Oaksure provides services to property owners to, amongst other benefits, secure premises against trespassers and protect such premises from damage. Oaksure has agreed to provide such services to the owner in respect of the Property

3.2 To assist Oaksure in providing those services the owner has agreed that, during the period set out in Oaksure’s agreement with the owner, Oaksure may enter into license agreements with persons who will share accommodation in the Property.

3.3 Oaksure has permission to grant temporary, non- exclusive licences to persons selected by Oaksure to share occupation of such part or parts of the Property as Oaksure may from time to time designate, on terms which do not confer any right to the exclusive possession of the property or any part of it

3.4 Oaksure are not entitled to grant possession or exclusive occupation of the property or any part of it, to any person. In entering this agreement, Oaksure does not act as agent for the owner and has no authority to do so

…..

4.1 Oaksure gives the Live- in Guard permission to share the living space with such other persons as Oaksure may from time to time designate, provided that there shall always be sufficient living space to provide at least one room for each of the living guards who are authorised to share the living space

4.2 This permission is personal to the Live- in Guard it may not be assigned

……..

4.4 Oaksure may alter the extent and location of the Living Space within the property at any time on reasonable notice, provided that there shall always be sufficient Living Space to provide at least one room for each of the Live- in Guards who are authorised to share the Living Space

4.5 This agreement does not give the Live- in Guard the right to use any specific room within the Living Space. The Live- in Guards occupying the property at any given time must agree where each Live- in Guard is to sleep (subject to the terms of this Agreement)

……

5.1 This agreement will come to an end when the Licence Period expires. It may also come to an end before then in [sic] any of the circumstances described in this clause arise

5.2 This Agreement will come to an end if Oaksure’s own permission to use the Property is terminated. If that happens, Oaksure will inform the Live- in Guard as soon as reasonably possible

…….

10.1 THE LIVE-IN GUARD WILL:

10.1.1 use the Living Space as a place to live in and not, without Oaksure's prior written consent, sleep away from the living space for more than two nights.....

10.01.10 Notify Oaksure immediately if they become aware of any person attempting to gain access to the Property without permission of Oaksure or the Owner

.....

I confirm that in recognition of the temporary nature of this license to occupy, I will not use this Property as my Principal address or register it formally as my main and only address for legal and statutory purposes

SIGNED....."

Consideration

62. The Tribunal does not recite each side's case at length in advance of addressing the issues but rather refers to the relevant arguments advanced when discussing related matters in the course of formulating this Decision.

63. The Tribunal takes first the most significant aspect in its opinion, being the question of whether the Respondent held a lease of the Property. The Tribunal repeats that a rent repayment order may only be made against a landlord, more specifically the immediate landlord of the occupiers.

64. If it did hold a lease, the Respondent was the person managing and the Respondent may then commit a licensing offence. If it does not hold a lease, the Respondent cannot be the person managing either, only the person having control- so it can commit a licensing offence if the Council was not the person managing. However, it cannot be the subject of a rent repayment order (and hence any licensing offence ultimately does not matter for these purposes).

65. As explained below, the Tribunal determines that the Respondent did hold a lease.

66. The remaining matters related to the question of the Council managing are only considered relevant if the Tribunal is found to be wrong about that. In case that situation arises, the Tribunal does deal with the remainder of that element of defence raised on behalf of the Respondent. That includes a wider question of whether the Council would or would not be the person managing as defined by the 2004 Act. The Tribunal then turns to the question of sole use and hence whether the standard test was met with the effect that the Respondent with a lease was required to license the Property. The point would have been irrelevant if there was no lease.

Did the Respondent hold a Lease of the Property?

67. The Applicants contend that the Respondent was a lessee: the Respondent contends that it was not. It was agreed that any lease created by the Contract was not long enough for the Respondent to meet the definition of owner. This is a strand of the argument as to whether the Council was the person managing, and the first and principal element of defence i),

although the Tribunal considers its significance goes beyond that. The Tribunal starts with the legal background.

68. The basic principles of whether a lease exists are well- established. The Applicant relied on the authorities of *Street v Mountford* [1985] UKHL 4 and *Bruton v London and Quadrant Housing Association* [1999] UKHL 26. The headnote summary of the judgment in *Street v Mountford*, which is a useful suumary for these purposes, records that the House of Lords held:

> "that where residential accommodation had been granted for a term at a rent with exclusive possession, the grantor providing neither attendance nor services, the legal consequence was the creation of a tenancy; and that, accordingly, on its true construction, the agreement between S. and M., notwithstanding the use of the word "licence," had the effect of creating a tenancy".

69. More specifically, Lord Templeman said, having noted the stated intention of the parties in that case to create a licence, the following:

> "Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence."

70. Hence the question is not that which is said by the contracting parties to be created but rather that which in law is created by the rights and obligations created by the agreement entered into. Whilst the Contract says that the Respondent is merely able to grant licences to occupiers, if in law the Respondent actually had a lease, it matters not that the parties sought to suggest it to be something different.

71. The Tribunal is mindful of the words of Lord Templeman that:

> "the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts".

The same must equally apply in respect of requirements and protections of other Acts.

72. Specifically in terms of the question of exclusive possession, Lord Templeman noted that if there is exclusive possession, "exceptional circumstances" are needed to negative the prima facie creation of a tenancy.

73. In *Bruton*, there was a licence granted by a local authority, to a housing trust, to use accommodation temporarily that the local authority was to develop. The occupier signed an agreement said to grant a licence. However, it was held by the House of Lords that the agreement had all the

characteristics of a tenancy, including that exclusive possession had been granted and there were no "special circumstances" enabling the agreement to be construed as a licence. The occupier had a tenancy. That was even though the housing trust held a licence and despite the parties in that case stating in the agreement there was not a tenancy. The housing trust could be a landlord despite holding no proprietary interest.

74. Careful consideration of the Contract is required to determine whether the "true construction"- to use the phrase of Lord Hoffman in *Bruton*- is that exclusive possession was granted. It is understandable that the Applicants set store on that judgment.

75. The Respondent's bundle included an authority of *Pye v Graham* [2003] 1 AC, which arose from a farmer possessing land without the consent of the paper owner and subsequently claiming possessory title. The Tribunal found this authority generally of rather less assistance because of the rather different facts and legal dispute. The statement by Lord Hope that only one person can be in possession at any one time and that exclusivity is of the essence of possession is, however, very relevant.

76. The Respondent also relies on the judgment of the Court of Appeal in *Global 100 Ltd v Laleva* [2022] 1WLR. That specifically related to property guardians and a company which gave them what were described as licences to occupy a building. The Court of Appeal essentially held that on the proper interpretation of the agreement, considered in the light of the surrounding circumstances and the purpose of the agreement, there was no real prospect of establishing that the agreement created a tenancy rather than a licence or that the agreement was a sham. It is however, important to identify that the judgment was given in the context of a claim for possession by the guardian company and the tenancy or licence was that of the occupiers (a distinction not relevant in this case where both amount to the occupiers being tenants as defined in the Act) and because the occupiers were estopped from denying the right of Global 100 to possession against them. Right, or lack of it, to possession of Global 100 against others was not relevant. The agreement between NHS Property Services Limited and Global Guardians Management Ltd, which then contract with Global 100, had purported to grant "a right of possession of the Property for the sole purpose of enabling eviction of ……", which may at first blush involve a contradiction but was held enough to maintain the claim against the occupiers.

77. As explained in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] 2 All ER 685 referred to by Mr Morris (and quoted in *Global 100*), the starting point is to identify what the legal rights and obligations are. Then they can be classified as creating one thing or another.

78. The Tribunal accepts that, as also identified in *Global 100*, the surrounding circumstances are relevant. In *Global 100*, another judgment of Lord Templeman, this time in *AG Securities v Vaughan* [1990] 1 AC 417 was quoted. The relevance of the circumstances in which the agreement was

made was also identified as relevant in *Street* and *Bruton,* amongst others. Lord Templeman specifically said in *AG*:

> "In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation."

79. Finally, at least for these purposes, the Respondent's bundle of authorities included the judgment of Fancourt J sitting as President of the Lands Chamber of the Upper Tribunal, in *Global Guardians Management Ltd and others v London Borough of Hounslow and others* [2022] UKUT 259 (LC). Given the obvious broad similarity with this case, features of that one merit identifying. Global Guardians Management (referred to as "GGM" below) entered into an agreement with NHS Property Services Limited to provide guardianship services. GGM also entered into an agreement with a sister company – Global 100 (referred to as "G100" below) – pursuant to which Global 100 identified guardians. The local housing authority, the equivalent of the Council in this case, had satisfied itself that the property was an HMO and was required to be licensed. A financial penalty had been issued to the owner NHS Property Services Limited.

80. The agreement between GGM and NHS Property Services Limited (NHSPSL) was described as one for the provision of services, although NHSPSL did not pay for them and a monthly sum was payable to the owner. NHSPSL was liable for maintenance as in the Contract, although in contrast to the provisions of the Contract, GGM was responsible for payment of utilities. In general, the provisions were in a similar vein to those in the Contract, although in a further agreement the "right of possession of the Property for the sole purpose of enabling eviction" was again included "To the extent that such a right does not already exist on an ongoing basis under the terms of the agreement." That suggests that a right of possession was intended and the additional right to enable eviction was provided in case for some reason possession had otherwise failed to be given to GGM.

81. The First Tier Tribunal held that, despite the expression of a licence and service agreement, the reality was that GGM was the tenant, including on the basis of GGM's intended possession and control. Amongst other matters, it concluded that NHSPSL had no interest in permitting the property to be used as residential accommodation and noted that G100 collected licence fees of some £15,000 per month from the guardians, but only paid £600 per month to NHSPSL. The Upper Tribunal characterised the findings as being that the service to be provided to NHSPSL, protection and security for that property, was a by-product of GGM's intended exclusive beneficial use of that property and agreed that the reality was that the services were only provided by GGM having exclusive possession. That said, the Upper Tribunal held that G100 was granted by GGM only authority to grant non-exclusive licences of parts of the Property and the

right to manage, protect and occupy the premises as required to protect them through their guardians, described as "only a restricted right to occupy and manage, not a right to possession", although notably it was a general agreement between those companies and did not even refer to the particular property.

82. The Applicant essentially argued that there is a term for the Contract, there is exclusive possession and there is rent by way of the profit share agreed. Hence, irrespective of the words used in the Contract, the legal effect was to create a tenancy (a lease) in favour of the Respondent. A tenancy is a legal estate in land. The Respondent argued for a licence, in the absence of exclusive possession and giving no proprietary interest in the Property. As explained by Lord Templeman:

> "A licence in connection with land while entitling the licensee to use the land for the purposes authorised by the licence does not create an estate in the land."

83. The Tribunal makes the general observation that the Contract presents as a general one entered into by the Respondent with property owners. The fact of there being reference to local authority requirements indicates that provisions have been used in other cases not involving this or other local authorities as mentioned above. It does not appear to the Tribunal that there has been a specific attempt to take advantage of the exception to licensing requirements for properties owned by local authorities or other public bodies. That is not therefore a circumstance relevant to the construction of the provisions of the Contract.

84. The Tribunal accepts the surrounding circumstances include the reason why the occupier has been let into occupation. It was common ground that the Property was formerly a residential care home but had then been unoccupied. It was not secure and the Tribunal infers both from the documents provided and wider experience of properties that it was at risk of vandalism and/ or occupation by squatters. Little has been provided of the background circumstances and so any more than that is not clear. The Tribunal has noted that the Contract refers to a tender email from the Respondent, indicating that some form of tender process was entered into by the Council regarding the provision of guardian services or other potential services in respect of the Property. The reasons identified by the Council for the involvement of the Respondent are only known from the wording of the Contract. There is no other specific evidence from the Council. Given the need to focus on the words used when construing the Contract, that is not problematic.

85. The fact that a contracting party was the local housing authority is in itself a circumstance. It merits taking account of. The Tribunal makes a number of observations about the involvement of a public body, in particular hearing a local authority, further below.

86. The Tribunal notes that the stated purpose of the Contract "to allow the [Respondent] to provide property protection services to the Owner through the installation of Guardians at the Property and ..... for that purpose the Service

Provider shall be permitted to grant Licences under the terms of this Agreement" understandably supports the Respondent's position but that is not the be all and end all.

87. The Tribunal finds that there is 6- month period for the Contract, between dates specified, although one which may be extended solely by the Council- clause 5.1. The Tribunal does not find that problematic.

88. Mr Morris argued that clause 5.3 conflicted and prevented there being a certain term. The Tribunal does not accept that argument. The fact that the Contract would continue until properly terminated did not, the Tribunal determines alter the term of the agreement. The Contract could, if appropriate, be terminated within the 6 months as well as a later time in the event of a breach but that potential does not make a term uncertain. Neither does later termination of an agreement which has continued.

89. The Tribunal agrees that there is a payment made by the Respondent to the Council. It is not a specific amount but is able to be calculated. It is calculated as 50% of a profit share, which is not the usual way of expressing a payment of rent. It is nevertheless sufficient, the Tribunal considers, to amount to rent and hence to enable there to have been a lease in the event that the other required features are present.

90. There is nothing which prevents the Council and the commercial entity Respondent agreeing rent payable calculated in accordance with a formula or calculated by any other identifiable method. Whilst the sum is not immediately obvious, it can be ascertained. The Tribunal notes that the rent might be a significant sum and potentially considerably greater than NHSPSL received from GGM, for example. However, the Tribunal avoids making assumptions as to what 50% of however net profit is defined may be.

91. The issue at the heart of this matter is whether or not the Respondent had exclusive possession of the Property. It does not follow that exclusive possession equates to a tenancy- persons from a freehold owner downwards may have exclusive possession. However, if there is exclusive possession of the property or a particular part of it, in the circumstances of this case, it is highly likely that is a tenancy/ lease. In contrast, if there is not exclusive possession- the right to keep anyone out unless that be the landlord in certain limited situations- the Respondent would not have a tenancy/ lease.

92. The Applicants say that the provisions are all clever drafting on the part of the Respondent (perhaps and the Council). They submit that the terms of the Contract are all carefully dressed up to make it look as if the Respondent is not the landlord and is not entitled to possession. Given that the Respondent wished not to have the responsibilities of a lessor it follows that the Contract seeks to avoid that. The Applicants were necessarily not parties to the Contract, the wording of which suited the contracting parties' objectives. The Applicants argue that features of the agreement nevertheless reveal that in fact the Respondent held a lease.

93. The Respondent denies that and say that the provisions properly reflect the rights and obligations of the parties. Their intention is apparent from the words used. The Respondent relies on clause 1.1 and the stated intention of the parties, namely that the Respondent would provide property protection services and be permitted to grant Licences (and no more). Clause 9.1, particularly 9.1.9, is also relied on. The Contract is one for the provision of services and does not grant property rights. It does seem plain that the agreement was predominantly drafted by the Respondent or its representatives.

94. The Tribunal turns to various provisions of the Contract and considers the rights and obligations provided for. Counsel made submissions about clauses beyond those referred to in this Preliminary Decision but not ones which the Tribunal consider add anything substantial.

95. The Contract provides specifically that the Respondent has no rights to occupy. The Respondent could not hold a lease and yet lack rights of occupation of the property leased as against its lessor. The specific agreement that the Respondent will have no rights of occupation is consistent with the Respondent having the right to grant rights of occupation on behalf of the Council and so the Contract being one giving the right to do that and not with the Respondent having property rights. If the Respondent cannot occupy the Property, it necessarily cannot have exclusive possession and property rights in the Property.

96. However, the Tribunal is cautious about reading too much into the words used by the Council and the Respondent unless borne out by the reality of the occupation of the Property. The case authorities are littered with the parties stating one thing- generally that there is no tenancy- but the legal reality is another thing. The Tribunal therefore notes the words used by the parties to the Contract but in the context of the wider picture.

97. The Tribunal has noted the various obligations which remain with the Council in respect of the Property. That includes the obligations to repair the Property. The Respondent asserts, those are only consistent with, for example, the Respondent not otherwise having an entitlement to undertake such repairs. The fact that the Contract requires the inclusion of a specific provision to enable the Respondent to undertake even emergency repairs, is argued by Mr Morris to be significant as running contrary to exclusive possession. There is no express reservation to the Council of the right to repair, which would support the Respondent having exclusive possession, rather it is the Respondent which is given, limited, repairing rights.

98. Similarly, the provisions in respect of utilities is argued to be consistent with the Respondent not having exclusive possession. It is the Council which must meet those, at least unless and until the cost reaches the not inconsiderable sum stated in the Contract.

99. The Tribunal accepts that where there is a lease one potential scenario is that at least some of those obligations would fall on the Respondent. That does not rule out it being open to the parties to contract in other terms.

100. The Tribunal reminds itself that this was not an agreement involving a consumer but one between a local authority and a private company, and so of a commercial nature. It was open to those parties to agree such terms as they wished. They were entirely able to decide on whom repairing and other obligations should fall and how those would be met and able to make other provisions, including as to payment passing between themselves, to reflect that.

101. The fact that the freehold owner is obliged to repair and that a party which may be a lessee has limited repairing rights is not regarded by the Tribunal as inconsistent with a lessee having exclusive possession or otherwise with there being a lease. Indeed, the other contracting party having a right to repair if the freeholder fails to fulfil its obligation to do so causes the Tribunal no difficulty. The Tribunal did not accept the submission that there was a limited right to enter for the Respondent to deal with certain matters contradicting any wider possession as Mr Morris argued. Neither is the freeholder paying for utilities and any relevant contribution from a tenant being made by way of rent or another means than paying the utility companies directly.

102. The Applicants argued that the Respondent's ability to take action against Guardian who does not vacate, clause 9.1.5, must be founded on a right to vacant possession as against that Guardian or some other right on the basis of which the Guardian can be required to leave. The Tribunal has considered that but also noted that possession may be taken against an occupier who has entered into a Licence Agreement without the Respondent having an estate in land- see *Bruton*. Hence, the Respondent is not necessarily required to hold a lease in order to have the ability to take that action. The provision does not therefore take the Applicants far. Further, the Contract differs from the GGM/ G100 agreements in that there is no grant even of limited rights to possession for the purpose of taking proceedings.

103. On its face, the Tribunal notes that clause 14.3.11 also indicates that the Respondent occupies and has possession, given that otherwise there is no need for it to, indeed it cannot, cease to occupy or relinquish possession. The Applicants unsurprisingly placed significant emphasis on that provision, given that such exclusive possession would here very strongly support a lease. Mr Morris on behalf of the Respondent answered that by submitting that the occupation in question is occupation by the Guardian occupiers.

104. The Tribunal agreed that it is possible without straining the wording excessively to construe clause 14.3.11 as requiring the Respondent to ensure that the Applicants and other occupiers had vacated and so there could be vacant possession returned, so the explanation is plausible. That said, the provision the Respondent argues for would only be obvious if the

words “by the Guardians” were inserted between the words “occupation” and “of the Property”.

105. The fact that it is possible does not also mean that it is the appropriate. Construction. The Tribunal determined that the words used in the Contract and not those words with other selected words inserted is the proper approach to construction and that the words should be given their natural meaning. The Respondent gives back possession.

106. As to the means of achieving possession as the outcome of proceedings, clause 9.1.5 contains a five- line first sentence and with the arguably odd statement that the Council can require the Respondent to be substituted as claimant in proceedings. That appears to the Tribunal to intend to address a situation in which the Council has not itself taken proceedings but been named as the claimant. The Tribunal considers that the provision supports the intention that the Council should not be the claimant, but rather the Respondent should. The fact that the Respondent must meet any legal costs of the Council in relation to the proceedings could be interpreted a number of ways but is certainly not inconsistent with the above.

107. Taken in context, the Tribunal found that clauses 9.1.5 and 14.3.11 did cast significant doubt on the Respondent having no right to possession or occupation.

108. The Applicants also specifically highlighted in their written case [756-764] the provision about keys and doors- clause 7.4. The Applicant argued that the correct construction only requires the Respondent to provide the keys at the end of the Contract. The Tribunal disagrees. The Tribunal notes that the Council can require the removal of any door or lock on termination of the Contract, in the second of the two sentences within the clause. The third sentence refers to the provision of a full set of keys. It makes no reference to the previous sentence. There is nothing which identifiably links the provision of keys generally to the potential removal of doors and lock at the end of the Contract. The requirement to provide keys is expressed as a separate and continual one. If it was intended to be linked to the previous sentence as requiring keys on termination of the Contract, for example by “and” linking the provisions or by other reference in the third sentence to the second, it does not say so.

109. The Tribunal therefore does not find this provision specifically assists the Applicants. It provides a modicum of assistance to the Respondent by providing that the Council must be enabled to access the Property by having full sets of keys and codes. Nevertheless, it is not unusual in the Tribunal’s experience for a landlord to hold a set of keys, which may be useful in an emergency for example. That does not entitle the landlord to then access the given property whenever it chooses but simply facilitates the landlord’s access where it is entitled to access. It does not prevent a tenant being a tenant, having exclusive occupation.

110. The Tribunal considered that the requirement that the Council gave the Respondent 24 hours’ notice of an inspection supports the existence of a

lease. The Tribunal notes that a tenancy agreement would be expected to provide that the tenant is given 24 hours' notice or another appropriate period of notice, whereas in principle a licensee does not need to be given notice. The Tribunal finds it understandable that the Respondent would wish to give the occupiers notice as a matter of practice and that it would wish to be given notice by the Council in order to be able to do so even if the Respondent lacked exclusive occupation and the Council could enter when it wished. That is a sensible practical matter. However, the Tribunal does not consider that much assists the Respondent in arguing for only a licence.

111. Rather, the Tribunal considers that the agreement that the Respondent is to "allow" access runs squarely contrary to the Council having other right to access consistent with a licence. Whilst Mr Morris persuasively sought to explain a provision which is not otherwise consistent with a licence but entirely consistent with a lease, in the end not persuasively enough.

112. The Tribunal did not find the Council's right to exclude the Respondent of assistance. All rights of occupation, including tenancies, come to an end in given circumstances and the landlord is then entitled to possession, so necessarily to exclude the tenant or other occupier.

113. Similarly, the fact that the Contract provided that areas of the Property could have restricted access and the Respondent should label that the occupiers could not enter them was not found of weight. It was unclear whether such areas existed and to what extent. However, even if some particular parts were ones for which the Council retained possession, that would not preclude the Respondent having exclusive possession of other parts.

114. Whilst the Respondent was obliged to pay the Council 50% of the net profit and that appears at first blush a relatively large share- as much net profit as the Respondent receives- it is unclear how much the payment was (notwithstanding that it could be ascertained). The Council would receive a significant sum if the share were of sums payable by the various occupiers at the rates provided for in the Licence Agreements but there was no evidence as to how much of that sum is deducted to arrive at the net profit figure. If the net gain to the Respondent were relatively lower then GGM/ G100 achieved as compared to NHSPSL then it may be right to bear that in mind. In the absence of any evidence of the figures, it is impossible to place any weight on net profit share.

115. Taking matters as a whole, the Tribunal finds that the Respondent was able to do with the Property that which it wished to and the fact that the purposes of the Council in respect of a previously empty property were met were secondary. The Tribunal finds that the Respondent did have exclusive possession of the Property.

116. The Tribunal is alive to the fact that there are some provisions in the Contract which on their face run contrary to that, not least clause 9.1.9. However, the Tribunal finds that the statement there that the Respondent

shall not occupy is contradicted in terms of legal possession by other clauses and the limit to what occupiers may do does not add much support for the Respondent and are not inconsistent with a lease. The provisions which support exclusive possession have more than ample weight to overcome that and when the wider picture is viewed the balance is firmly in favour of exclusive possession. It follows that the Respondent's argument that if the Respondent had sought to assert rights of possession it would have been in breach also fails. That was necessarily premised on the nature of the agreement being as asserted by the Respondent. The Tribunal does not identify any exceptional or special circumstance which negatives the grant of exclusive possession creating a tenancy.

117. The Tribunal has not accepted the Respondent's case, much as there is far from a lack of merit in the Respondent's argument and the Tribunal has carefully considered the Respondent's points. The Tribunal classifies the rights granted to the Respondent as creating exclusive possession and holding a lease, having a tenancy.

118. The Tribunal emphasises that whilst it has referred to the decision of a Tribunal panel in another region in a different case, it did so by way of identifying contrasts, which potentially assisted the Respondent, and it has made its determination on the basis of the Contract and not the determinations of other Courts and Tribunals about the provisions of other agreements in different terms.

119. It necessarily follows from the Tribunal's determination that the Respondent did hold a lease of the Property that the Respondent was the person managing, assuming of course that it meets the remainder of the requirements of section 263(3) and the Property met the standard test to be HMO- see below as to sole use. There seems no basis for argument against the Respondent meeting the requirements, given the receipt of payments from the occupiers, of being both the person managing and the person in control (not that the latter greatly matters).

Was the Council the person managing the Property?

120. The Tribunal considers that strictly, there is no need to address this aspect of the Respondent's case, which was the second element of defence i). As the Respondent did hold a lease, it was the person managing (as well as having control).

121. The Tribunal's view is premised on there being one person who is the person managing. That is much as there could be more than one person who meets the statutory definition of a person managing a property - the freeholder and a lessee most obviously. The Tribunal understands that the Applicants accept that there can only be one person managing- the Skeleton Argument of Mr Penny says as much. It adds an understanding that the Respondent agrees and the Respondent's Skeleton Argument identified that the first element of the Schedule 14 defence- the "person managing" is the Council and so the Property was not a licensable HMO, is that the Respondent does not have a lease. Implicit is an acceptance that

the defence falls if the Respondent had a lease. Hence, the Tribunal believes only one person managing to be common ground.

122. The Tribunal is mindful that *Global Guardians Management Ltd and others v London Borough of Hounslow and others* it appears to have been proceeded on the premise that there could potentially be both GGM and G100 as person managing but G100 was not found to meet the definition. It is not clear to the Tribunal whether there might otherwise have been consideration of whether both could be a person managing at the same time otherwise or what conclusion might have been reached. However, the Tribunal stands on the common ground in this case.

123. There were various arguments advanced about whether the Council was the person managing. They appear to the Tribunal not to be relevant to the making of a rent repayment order (because if the Respondent had not been found to hold a lease it would not be a landlord or person managing, only a person in control and could commit a licensing offence but could not be the subject of a rent repayment order). Hence with some caution, the Tribunal sets out its determinations about points raised.

<u>The Person or the Property?</u>

124. The Applicants' first argument about any Schedule 14 exemption from licensing as advanced in Mr Penny's Skeleton Argument, which was not obvious from the Applicants' written case and Mr Morris had not addressed in his Skeleton Argument, was that the Schedule applies to a particular person rather than a particular building, such that it was irrelevant whether the Council was in this case a person managing (or being in control) for the purpose of the Respondent committing a HMO licensing offence. It was argued the exemption would only apply to the Council itself- one person in the chain, not all.

125. The argument advanced was that the reference to "any purposes" in paragraph 1(1) of schedule 14 meant in respect of each and every individual purpose a property meeting the description in the Schedule would not be a HMO and that there was a discrete question each time the Schedule fell to be applied.

126. In this argument, the Tribunal finds one matter it can deal with in brief terms. The Tribunal was unable to identify that the first limb of the argument took matters anywhere and considered it appeared to be based on a mis- interpretation of the 2004 Act. The provisions of the Schedule state that for a building where, for example the person managing or in control is a local housing authority, the building is not a house in multiple occupation for any purpose (other than those in Part 1). The answer will be the same what the particular purpose is.

127. There was another limb that a private company ought not to be able to take advantage of an exclusion related to public bodies. However, the Tribunal deals with that when addressing the question of receipt of payments and related below.

Receives payments or would but for an arrangement

128. The Applicants' other argument about the Council being a person managing related to receipt of payments or an arrangement about them pursuant to Section 263(3) and that engaged more directly with the Respondent's second strand of defence i).

129. The Tribunal ventures into this point with particular caution. Firstly, for the reason that if the Respondent had not been an owner or lessee and so could not be the subject of a rent repayment order, the answer appears to matter little in this case, the Tribunal considers. Secondly, in the knowledge that the Tribunal's view diverges from the Upper Tribunal in another case.

130. The first limb of the sub- section requires consideration of whether the Council receives rents or other payments directly or through an agent or trustee. Plainly, the Council does not receive the payments directly- the occupiers pay them to the Respondent. The Tribunal also determines that the Council does not receive payments from the Applicants through an agent or trustee. If the Council and the Applicants had entered into an agreement but in practice those payments were not made directly to the Council but were paid via a third party, the payments would be received from the Applicant (perhaps less a commission or similar). However, the Council and the Applicants entered into no agreement at all.

131. The Applicants made payments to the Respondent with which they had contracted. It so happens that a portion of that payment- the 50% share of net profit- was then passed to the Council. However, that was pursuant to the Contract entered into between the Respondent and the Council. There is no indication that the Applicants were aware of the terms or that the terms were directly relevant to them. There is no hint in the documents in the bundle that the Applicants considered that they were making payments to the Council via the Respondent.

132. The remaining and more difficult issue is whether the Council would have received rents or other payments but for having entered into an arrangement, the Contract, with the Respondent.

133. It was not in dispute that if the Council had not entered into the Contract, the Council would have received any rents or payments which any occupiers made. It is equally apparent that in practice the Council would not have contracted with the Applicants in a similar manner to the Respondent, or indeed at all. There is no evidence that the Council had entered into any contract with any occupier prior to the Contract with the Respondent.

134. That brings directly into relevance the decision of Fancourt J in *Global Guardians Management Ltd and others v London Borough of Hounslow and others*. As noted above, GGM entered into an agreement with NHS Property Services Limited to provide guardianship services. However,

GGM also entered into an agreement with a sister private company – G100– pursuant to which G100 identified guardians. To that extent, there is an obvious difference between the circumstances of that case and those of this one.

135. Consideration was particularly given to whether section 263(3) applied where the owner could have granted licences (as were granted) but instead entered into an arrangement with another party to do so, or alternatively whether it only applied if there was already payment to the owner and an agreement was entered into such that payments were then to be made to that other party. The former was termed "a new licence case" and the latter "a diversion case". It will be appreciated that the situation in this application would be the former.

136. Fancourt J identified that the subsection was not clear whether it included both cases or only the latter case. He added to that comment as follows:

"[66] It seemed to me on an initial consideration of the section and the rival arguments that what is contemplated by para (b) is receipt of the income from the actual occupiers: "those rents or other payments" in para (b) refers back to the rents or other payments paid by those who are in occupation, in para (a). If the relevant licences were granted by Global 100 in the first place, GGM never had a right to those fees and so arguably would not receive them but for the G100 Agreement.

[67] However, if that is the right approach, the effect is that neither the owner nor the other person receiving the rent is a "person managing" the premises, even though the lessee who owns a sufficient interest to manage and exploit them permits another person (which may be a company in the same group or a family member) to manage and exploit the full value of the premises. That is such a counter-intuitive conclusion to reach in this context that I am driven to the conclusion that para (b) can apply both in a case (1) where the owner or lessee, who would otherwise have received income from occupiers of the premises, enters into an agreement to permit someone else to exploit the premises in their own right, and (2) where the owner or lessee was receiving or entitled to receive income from actual occupiers but then diverted it to the other person by agreement. The rents or other payments that the owner or lessee would have received are, as a matter of construction, rents or payments for occupation of parts of the HMO at the relevant time. There does not seem to me to be sufficient justification, given the clear policy of the Act, to construe s.263(3)(b) more narrowly so as to exclude from the definition of "person managing" persons in the position of GGM.

[68] Accordingly, in my judgment the FTT was right to conclude that GGM was a person managing the Property, though not for the reason that it gave. GGM agreed with NHSPSL to convert the Property and grant occupational licences of parts to guardians, but instead of doing so it agreed with Global 100 that that company would do so instead. But for the G100 Agreement, GGM would itself have granted occupational licences (because it was obliged to do so) and would have received the income from the Property at the relevant time. The fact that those licences would have been different agreements from the licences granted by Global 100 is of no materiality".

137. It will be noted that there was no determination that the public body, NHSPSL was the person managing, but rather the question was about a private company. The public body had entered into an agreement with a private company. That company entered into an agreement with another private company, as it was able to do. The private company GGM was the owner in question. If GGM was not the owner or lessee under the 2004 Act because the nature of the arrangement meant it did not fall within section 263(3) despite the nature of its interest preventing NHSPSL being relevant, the particular property escaped (for want of a better word) licensing where otherwise needed to as no-one was managing as defined. There being a public body owner managing- and so the Schedule 14 exemption- did not arise.

138. In contrast with the above case, here if the Respondent company is not the landlord, there being a public body owner becomes the situation under consideration. The result of there being another person managing would be the opposite to that in *Global Guardians*.

139. Mr Penny sought to emphasise the reference to "in this context" in paragraph 67 as excluding a context in which the Council may be the person managing. He noted GGM and G100 to be part of the same private group and referred to the result- there an offence, whereas here none. He argued for a narrow interpretation of section 263(3) where a public body was involved.

140. The Tribunal considers that the nature of the party which may have been a person managing - a public body as against a private one- is a significant distinction between that case and this. The Tribunal accordingly distinguishes *Global 100* on the facts of this case. The Tribunal considers that it is not therefore bound by the reasoning in the *Global Guardians* decision.

141. The definition in the Act is, the Tribunal considers, one aimed at identifying one or more parties with sufficient involvement or ability for involvement with the given property that it ought to be liable where the Property is one which should be licenced and is not. The Tribunal respectfully does not consider that there is a fundamental difficulty with there being no party which meets the particular statutory definition of a person managing.

142. Section 72 of the 2004 Act is headed "Offences in relation to licensing of HMOs" but the following clause is headed "Other consequences of operating unlicensed HMOs: rent repayment orders". Provisions about rent repayment orders have moved on from the 2004 Act, hence the reference above to sections of the 2016 Act. However, the Tribunal considers that the use of the word "operating" is of assistance. It indicates that for the purpose of licensing of HMOs having control of or managing were ways in which a person could operate a HMO and should be considered in the context of types of persons who may operate an HMO rather than in some more general context.

143. The question is not, the Tribunal considers, one of whether there has to be a person managing a given property in some wide sense. A person managing is defined in the particular context of licensing offences which may be committed under the 2004 Act: the phrase 'a person managing' may mean something entirely different in another context but that matters not.

144. The formulation is explained in the Upper Tribunal decision in *Rakusen v Jepsen* [2020] UKUT 298 (LC) (accepting that decision does not stand more generally and the Tribunal does not rely on more generally) to be one with "a considerable history going back at least to 1847" and with the purpose of identifying the person or group of persons who collectively have the relevant interest to be made subject to a statutory obligation to undertake work or make a contribution to the cost of public works.

145. The Tribunal does not therefore consider that it is necessary for there to be a body which meets the definition of a person managing under the 2004 Act. It may be that there is not a body which meets the definition in a given instance. There are other situations where none meet a particular definition. It is particularly relevant that a person having control is an available alternative.

146. In contrast, it is considered by the Tribunal necessary for a property to have a person having control and indeed inevitable that there will be such a person. It is necessary because, as identified above, the person in control is assumed in the statutory provisions to be the appropriate person to hold the HMO licence and the recipient of an improvement notice and so clearly the draftsman expected and intended there to be such a person. It is inevitable because the person having control is the person to whom payments are made.

147. That person in control may also be the person managing. Or it may not be and only be the person having control. Whichever way, it will be involved in day to day dealing with the given property and receive the rent.

148. In contrast, if the person managing is not also the person in control, its relationship with the given property is a step removed. Not so removed that it should not be liable for a licensing offence or to ensure other compliance with requirements of the 2004 Act, but a step removed all the same. It is arguably the person managing which is the extra party held responsible in addition to the basic party of the person in control. Whereas the definition of person managing therefore creates the possibility of there not being a person managing as defined, there is not the, at least realistic, possibility of a lack of a person having control.

149. The Tribunal noted with some concern that section 234 of the 2004 Act in reference to the making of management regulations in respect of HMOs talks only about the person managing and does not mention the person having control. However, the Tribunal is re-assured that relates to the manager of a property licensed and considers it no more than unfortunate that section 234 refers to the person managing rather than the manager.

The Tribunal also notes that section 64 which relates to the grant of a licence and who should be the licence holder refers to the proposed manager of the property, who shall be the person having control or an employee of that person and then section 66 goes on to refer to an assumption that a person having control is more suitable to be the licence holder than another person. Overall, the Tribunal considers that supports its view, rather than detracts from it.

150. There being no party which meets a specific statutory definition of person managing- especially where there is a relevant alternative- is not, the Tribunal considers, an absurd result under the 2004 Act, much as it is likely to be a rare one. In particular, not in the circumstances of this case. Mr Morris did not express agreement with that. although Mr Penny was content with the possibility, at least insofar as a public body was involved.

151. Consequently, the Tribunal considers that the situation which Fancourt J was "driven to the conclusion" he had to avoid does not have to be avoided in this case. It is apparent from the words used that the conclusion was not reached by the Judge willingly and was not the one he would otherwise have regarded appropriate.

152. Rather, the outcome of his initial consideration, namely that what was contemplated by the section was income which the owner was already receiving, is able to stand on the facts of this case and the Tribunal determines is both the more natural construction of the section and the appropriate conclusion to reach.

153. The Tribunal determines that this is not a diverted payments case and that on the facts here, only such a case is relevant for the purpose of section 263(3).

154. The Tribunal therefore determines that the Council was not a person managing the Property for the purposes of the 2004 Act.

155. The Tribunal considers it ought to say only a little, if anything, about the assertion that the Respondent seeks to take advantage of a provision in relation to public bodies in the circumstances. With continuing caution, the Tribunal observes that the Tribunal does not regard it as a perverse outcome for licensing offence purposes that if the Respondent did not hold a lease and the only property right vested in the Council hence there was no requirement for a licence, the Respondent is not liable to be prosecuted or pursued in respect of a licensing offence.

156. The Tribunal considers it is entirely clear that Councils do not need HMO licences for their own properties. That is to say properties of which it is the freeholder or lessee and in either event grants tenancies or licences. Parliament did not require them to. The Tribunal perceives that to be on public policy grounds, a view shared by both Counsel. It may be that is because it is considered that issues arising in other houses in multiple occupation are less likely to arise in properties owned by public authorities, although the Tribunal does not find in its experience it to be

impossible for such issues to arise. It may alternatively be that other factors weighed. The Tribunal does not consider that interpretation of the provision enables, or requires, the Tribunal to go beyond the words used in the 2004 Act. The Tribunal observes in any event that it is the Council which is the licensing authority and the grantor of HMO licenses and similarly has obligations to take action in respect of licensing offences. The Tribunal finds it entirely logical that a Council is not required to licence its own properties and notes that it could not take enforcement proceeding against itself, so that element of the statutory provisions would be rendered worthless in any event.

157. A local housing authority may employ an agent or similar but it remains responsible for the properties let on its behalf. The company utilised by a local housing authority is not obtaining an advantage where it is in control but the local authority manages. The key feature is the local authority's interest. The Council should be able to ensure that the purposes of the licensing regime are fulfilled without a licence being required in order to achieve that. Indeed, the Council should be able to do the same if it were the person in control of a property manged by another. Where arrangements involve the public body in the operation of the property, the fact that no licence is thereby required is not apt to be described as taking advantage. The lack of a need for a licence for properties in which public bodies are involved is not inconsistent with the licensing regime but rather part and parcel of it.

The Status of the occupiers

158. The Applicants also argued that as the Applicants each has a key to their room, they had exclusive occupation of that room and so in law were tenants, meeting the other requirements. Reliance was placed on the authority of *London Borough of Southwark v Ludgate House Ltd* [2020] EWCA Civ 1637.

159. The Licence Agreements are very firm in their wording that there is not a tenancy but that is not determinative, as explained above. The Tribunal notes that in the *Ludgate House Ltd* decision, the occupiers were held not to be in rateable occupation, which required exclusive occupation. In *Laleva*, discussed above, the occupiers were held not to be tenants. The Applicants did not therefore have an easy task to succeed with the arguments.

160. However, the Tribunal mentions this element last as the Tribunal did not consider that the existence or otherwise assisted with the relevant questions. It matters not for the purposes of an application for a rent repayment order more generally or licensing requirements more particularly whether the occupier is a tenant in law as the definition of tenant in the legislation encompasses licencees. If the Applicant were found to be tenants under the law generally, as opposed to the legislation defining them as tenants for the purposes of the 2004 Act, it would not follow that the landlord in respect of such a tenancy is the Respondent. The relative rights of the Respondent and the Council would still be highly

relevant and the Tribunal has answered that question on the basis of the rights between those parties. The Tribunal realises that if the Applicants were tenants and of the Council, that would have other effects and it has been mindful of potential desire of the Council to avoid that when construing the provisions, although in the event that does not alter the Tribunal's decision in respect of the construction of any individual clause or the Contract as a whole.

161. The Tribunal does not conclude whether the occupiers were or were not tenants given that it identifies nothing which turns on that. The matter can be re-visited later in the case if in any way then relevant.

Doubtful penalisation

162. The Tribunal ought for completeness and the avoidance of doubt mention that Mr Morris referred to the principal against doubtful penalisation. He argued that if there was doubt about the effect of section 263 and schedule 14, so as to whether the Respondent could avoid a penalty on the basis of whether the Council were a person managing, that doubt ought to be resolved in favour of the Respondent.

163. The Tribunal accepts the principle exists, of that there can be no doubt. The Tribunal does not accept ambiguity as to whether the Respondent or a party in an equivalent position may be liable.

Was the occupiers' occupation solely residential?

164. All of the above discussion of who was a person managing would be academic if the Property is not one which could need to be licensed because it did not meet the prescribed description for the purpose of section 55(2)(a) of the 2004 Act. The only element of that description in issue is "(d) their occupation of the living accommodation constitutes the only use of that accommodation;".

165. The other elements were accepted as applying and do not require considering. Therefore, notwithstanding that the Licence Agreements include a statement that the Applicants did not occupy as their only or main residence, the Respondent did not argue that to in fact be the case. If they had, the Tribunal would have required evidence and submissions on the point before making any determination.

166. The Tribunal determines that the occupiers' occupation as residential accommodation was their only use.

167. Mr Morris accepted that the current legal position is firmly against the Respondent. The only conclusion that the Tribunal considers that it can reach is that the occupiers' use was solely residential. The Upper Tribunal decision in *Global 100 Ltd v Jimenez* [2002] UKUT 50 (LC) (Martin Rodger KC, Deputy Chamber President) dealt with the same argument as advanced by the Respondent in this case and rejected it. The Tribunal does not consider that decision can be distinguished. In any event, the Tribunal

agrees with the reasoning of the Upper Tribunal, which it is not considered necessary to repeat.

168. The Tribunal notes that permission to appeal that point was granted and, in the absence of settlement in the meantime, there will be a Court of Appeal judgment on the point. However, as far as the Tribunal is aware, the appeal has not yet been determined. In case it may be relevant following the judgment in that appeal, the Tribunal considers that the basis for its view in this particular case merits setting out, including addressing the two potentially different categories of occupier.

169. The legal starting point is that there is, as Mr Morris also rightly conceded, and pursuant to section 260(1) of the 2004 Act, a rebuttable presumption that the sole use condition is satisfied. That is to the say that the Tribunal will take the use to be sole use unless the Respondent can sufficiently advance the contrary. If the Respondent can reach that point, then it falls to the Applicants to show that the sole use was indeed residential.

170. As referred to above, the bundle contains some 640 pages of Licence Agreements for the 29 Applicants. The Agreements are not in consistently the same terms.

171. However, it will have been seen that paragraph 10.1[62] of the Licence Agreement of Mr Stride states that the Property is to be used by the occupier as a place to live in. There is no provision for the Applicants to use to Property for any other purpose. Whilst the Tribunal has observed that the words used are not determinative of the actual legal position in terms of whether or not the occupiers were tenant, the Tribunal identifies no equivalent in relation to use of a building.

172. The Tribunal also notes that the Licence Agreements are the Respondent's documents and the Respondent is the provider of the ability to occupy the accommodation. Hence if there were any uncertainty as to the appropriate construction of the provisions of the agreement, that would be determined in the manner least beneficial to the Respondent. However, the Tribunal identifies no uncertainty: in contrast the use of the Property by the occupiers as provided for is clear.

173. In addition, the Tribunal has no doubt that the use to which the occupiers put the Property was as residential accommodation. They did not use it for anything else.

174. The occupier is required to inform the Respondent if they become aware of anyone attempting to gain access without permission (clause 10.1.10). However, [clause 16] the occupier has no security responsibility or authority and only the powers of a private citizen. Whilst the Tribunal accepts notification in the event of unauthorised access is one of the various matters listed under the heading "The Use of the Property", there are some 44 points under that heading of varying natures covering what the Applicants should or should not do, which are after 10.1.1 about use as

a place to live in are overwhelming about the manner in which the Property is used.

175. More fundamentally, the Applicants were not using the Property as a means to be able to inform the Respondent- that is not a listed use of the Property in the document drafted on behalf of the Respondent and supplied to the occupiers. They were using the Property to live in. It is simply a matter wholly ancillary to the occupier's residential use that the occupier may be present at the time of someone attempting to gain unauthorised access, in the event of that happening, and so is able to tell the Respondent in that event.

176. It was to that extent of use to the Respondent and the Council that there were occupiers of the Property. Or to put it another way, their occupation was useful. That is not the same as the how the occupiers use (a verb) the Property.

177. It can be added that the Applicants do not receive any payment for being Guardians- although see below for Head Guardians. Indeed, they pay for the accommodation that they are able to use. The accommodation is not used for any benefit other than having the benefit of somewhere to live.

178. The Respondent's case is that the purpose of the Applicants' occupation of the Property was protection of the Property. The Respondent uses the term purpose rather than the term use, although it is the latter not the former which is used by the drafter of the 2004 Act. The Tribunal perceives that if the 2004 Act had meant to refer to purpose, it would have used that term.

179. The Tribunal considers that there is a fundamental distinction between the purpose of the occupiers' occupation from the perspective of the Council and the Respondent on the one hand and the use of the Property by the occupier on the other hand.

180. There were specific purposes to the Council in having the Applicants in occupation and indeed to Oaksure in ensuring it could meet its obligations under the Contract, but those purposes were not directly relevant to the Applicants and were not shared purposes. The Applicants did not use the Property to achieve those purposes. They used the Property as accommodation. Their doing so helped to achieve the Council's purpose and the Respondent's but that is separate.

181. Purpose and use are not the same, whether as a matter of usual language or in this instance.

182. The Tribunal considers it plain that the Applicants used the Property solely for residential accommodation, although had it been relevant, such evidence as is available indicates that having residential accommodation was also the Applicants' purpose behind using it.

183. The Tribunal did note there to be two classes of occupier. In addition to Guardians generally, there were also occupiers termed Head Guardians. The Head Guardians were indicated to have been given additional responsibilities, although it was not clear exactly what those were.

184. The Tribunal identified the potential in principle for a different answer being arrived at for one class of occupier as compared to the other. The Tribunal noted that it may be that the Head Guardians receive some remuneration or other benefit and may be said use the accommodation to do whatever it is that they do as Head Guardians in order to receive whatever it is that they receive for performing that role. It may possibly be that by features of their particular position, the Head Guardians do use the Property other than as residential accommodation.

185. However, Mr Penny's instructions were that the Head Guardians and other Guardians had received the same Licence Agreement. In addition, the Respondent failed to provide evidence of any different nature of occupation of the Property by Head Guardians as compared to other Guardians. There was no evidence of anything which it might be said they use the Property for in undertaking that role beyond the residential use of the other occupiers. In the absence of evidence explaining the role and the financial or return on it, the Tribunal was unable to determine any relevant difference between the position of the Head Guardians as compared to the others.

186. The Tribunal determines that the Respondent has easily failed to rebut the presumption that the use of the accommodation was solely residential on the evidence provided and hence finds that the occupiers' occupation was solely residential.

Stay

187. The Respondent asked that if the Tribunal rejected the Respondent's arguments, it was invited either to stay the applications pending the determination of the sole use point by the Court of Appeal or, if that appeal settles, to grant permission to appeal to the Upper Tribunal in order that the Respondent can itself obtain an opportunity to argue the point and seek to obtain a different determination in respect of sole use. The Tribunal is not aware of the publication of the judgment of the Court of Appeal as yet, nor otherwise of the up- to- date position in the particular case.

188. The Tribunal does not stay the case at this stage. Neither does it issue further Directions for the further progress of the remainder of the case at this time. The Tribunal will issue Directions 28 days after the provision of this Preliminary Decision to the parties unless permission to appeal has by then been requested, in which event the Tribunal will consider further how to most appropriately proceed. The parties may request a stay at such time as seeking permission to appeal, if relevant.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

SCHEDULE OF APPLICANTS

1. Simon Stride
2. Rose Hegarty
3. Aaron Mouland
4. Wendy Paver
5. Katrina Tomlinson-Wrenn
6. Alice Manor
7. William Stedman
8. Jake Mayes
9. Phoebe Dunstan
10. Stephanie Sams
11. Nicole Francesca Maria Febbraio Saetta
12. Alexandra Michael
13. Pavel Slama
14. Ian Murphy
15. Luoise Heliczer
16. Garth Maxted
17. Francisco Pais
18. Jamie Edkins
19. Dominic Hammond
20. Ben Crosby
21. Jodie Day
22. Kieran O'Neill
23. Marina Rivers
24. Anna Young
25. Vida Edon
26. Kate Mager
27. Matthew Goddard
28. Kirsty Brown
29. India Magson