UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 50 (LC)
UTLC Case Number: LC-2021-452

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – RENT REPAYMENT ORDER – whether a redundant office building occupied by "property guardians" was an HMO – application of standard test – whether the guardians' occupation of the living accommodation constituted the only use of that accommodation – ss. 254(2) and 260, Housing Act 2004 – appeal dismissed

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

BETWEEN:

GLOBAL 100 LIMITED

Appellant

-and-

CARLOS JIMENEZ (1)
RUBEN SANCHEZ (2)
ALEJANDRO MORALES (3)

Respondents

Re: 35-37 William Road,
London NW1

Martin Rodger QC, Deputy Chamber President

2 February 2022

Royal Courts of Justice

Sean Pettit, instructed by Kelly Owen Ltd, for the appellant
Each respondent spoke on his own behalf

The following cases are referred to in this decision:

Brent London Borough Council v Reynolds [2002] HLR 15

Cardtronics Europe Ltd v Sykes [2020] UKSC 21, [2020] 1 WLR 2185

Global 100 Ltd v Laleva [2021] EWCA Civ 1835

John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344

London Borough of Southwark v Ludgate House Ltd [2020] EWCA Civ 1637

Rogers v Islington LBC [1999] 32 HLR 138

Introduction

1. The issue in this appeal is whether a former office building occupied by "property guardians" was a house in multiple occupation (HMO), applying the standard test in section 254(2), Housing Act 2004.

2. The First-tier Tribunal (Property Chamber) (the FTT) held that the building was an HMO, and that it should have been licensed under Part 2, 2004 Act. Because it was not licensed the conduct of the appellant, which the FTT found was the person managing the building, amounted to an offence to which the rent repayment regime in Chapter 4 of Part 2, Housing and Planning Act 2016 applied. On the application of three former guardians, who are now respondents to this appeal, the FTT imposed rent repayment orders on the appellant requiring it to repay £6,251.85 which it had received in rent from the respondents between June and December 2020.

3. The building in question was the former Addison Lee Building at 35-37 William Road in Euston. It was a five storey office building and although in its decision the FTT described the accommodation on the third floor occupied by the respondents as "a flat", in fact it comprised a suite of three offices with a communal bathroom on the adjoining landing. At least one of the rooms was crammed with racking and cabinets which had previously held computer servers and was unusable as living space throughout the respondents' occupation. Other guardians lived in different parts of the building. When Camden Council's housing officers inspected on 26 November 2020 they reported that between 10 and 12 individuals were in residence.

4. The FTT imposed rent repayment orders on 6 July 2021. It subsequently refused an application for permission to appeal its decision, but permission was granted by this Tribunal.

5. At the hearing of the appeal the appellant was represented by Mr Sean Pettit. The respondents all now live in Spain, but the hearing was conducted by remote video link and they were all able to attend and to represent themselves with the assistance of an interpreter. I am grateful to all who participated in the hearing for their assistance.

The Housing Act 2004 and the standard test for an HMO

6. Parliament has long recognised the risks to housing standards created by the conversion of property for multiple occupation and the sharing of essential living accommodation by separate, often vulnerable, households and has legislated to address those risks. Local housing authorities were first given significant regulatory powers over the ownership and management of houses in multiple occupation, HMOs, in Part IV of the Housing Act 1969, which was consolidated into Part XI of the Housing Act 1985. Part 2 of the Housing Act 2004 introduced a new scheme for licensing HMOs by local housing authorities.

7. An HMO is a building or part of a building which satisfies one of five alternative tests listed in section 254(1), 2004 Act. HMOs take different forms, and may comprise a house, a self-

contained flat, a converted building, a building in mixed use, or even, in certain circumstances, a block of flats. With immaterial exceptions every HMO to which Part 2 of the 2004 Act applies is required by section 61(1) to be licensed.

8. The typical or "standard" HMO is a building occupied by persons who do not form a single household but who share basic amenities. It is defined in section 254(2).

> 254 **Meaning of "house in multiple occupation"**
>
> (1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—
>
> (a) it meets the conditions in subsection (2) ("the standard test");
>
> (b) it meets the conditions in subsection (3) ("the self-contained flat test");
>
> (c) it meets the conditions in subsection (4) ("the converted building test");
>
> (d) an HMO declaration is in force in respect of it under section 255; or
>
> (e) it is a converted block of flats to which section 257 applies.
>
> (2) A building or a part of a building meets the standard test if—
>
> (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."

9. Section 260 introduces a number of evidential presumptions. In particular, it provides that where a question arises in any proceedings as to whether the "sole use condition" in section 254(2)(d) is satisfied for the purpose of the standard test, it is to be presumed for the purpose of the proceedings that the condition is met unless the contrary is shown.

10. If a local housing authority is satisfied that a building or part of a building meets the standard test as it applies without the sole use condition in 254(2)(d), it may declare the building or part to be an HMO by serving a notice under section 255 (referred to as an HMO declaration) on the relevant persons. A building in respect of which an HMO declaration is in force is an HMO (section 254(1)(d)). An authority's decision to serve an HMO declaration is subject to a right of appeal to the appropriate tribunal (in England, the FTT) (section 255(9)). No HMO declaration has ever been made in respect of the Addison Lee Building.

11. Although the FTT described the accommodation in this case as flats, it is not suggested that the guardians occupied self-contained flats within section 254(3), nor that the Addison Lee Building was a converted block of flats within section 257. The standard test in section 254(2) has rightly been treated as the only HMO test which is relevant to this appeal.

12. It is also relevant to refer to Part 1 of the 2004 Act, which concerns housing conditions generally. As section 1(1) explains, Part 1 provides a new system of assessing the condition of residential premises, and for the enforcement of housing standards. The new system operates by reference to the existence of category 1 or category 2 hazards on "residential accommodation", an expression defined in section 1(4) as meaning a dwelling, an HMO, unoccupied HMO accommodation, and the common parts of a building containing one or more flats. By section 1(5) a "dwelling" means "a building or part of a building occupied or intended to be occupied as a separate dwelling".

13. In interpreting these statutory provisions it is helpful to have in mind the purpose for which they were enacted. In *Brent London Borough Council v Reynolds* [2002] HLR 15, Buxton LJ explained the background to the regulation of HMOs, at [2]:

> "2. … HMOs are, or are usually, domestic premises originally designed for occupation by one family, which have been converted for occupation by a number of separate families or individuals. This process, which almost inevitably involves the sharing of bathing or kitchen facilities, and the use of parts of the premises for purposes for which they were not originally designed, raises obvious potential problems in terms not just of the amenity but also of the safety of the premises. In addition, government and Parliament have seen the need to make special provision in respect of HMOs because of the regrettable fact that it is often persons and families most in need of social protection, including families with young children, who find themselves obliged to occupy housing that, in the main, is likely to be much less adequate than purpose-built flats or houses.

14. In *Rogers v Islington LBC* [1999] 32 HLR 138, 140 Nourse LJ referred to research illustrating the poor quality of many HMOS: in 1993 four out of ten HMOs were found by the English House Condition Survey to be unfit for human habitation; other studies showed that residents of HMOs were at a far greater risk of death or injury from fire than residents of other dwellings. NorseLJ continued:

> "HMOs can also present a number of other risks to the health and safety of those who live in them, such as structural instability, disrepair, damp, inadequate heating, lighting or ventilation and unsatisfactory kitchen, washing and lavatory facilities. It is of the greatest importance to the good of the occupants that houses which ought to be treated as HMOs do not escape the statutory control."

15. These observations are equally applicable to the regulations of HMOs under the 2004 Act. Effective regulation and action by local housing authorities to reduce risks to the health and wellbeing of residents of repurposed or converted living accommodation is as important an objective as it has ever been. The limits of effective regulation are set by the definition of

"house in multiple occupation" in section 254 and it is important that this definition is not interpreted so narrowly as to frustrate the achievement of the statutory purpose.

Property guardians

16. In *London Borough of Southwark v Ludgate House Ltd* [2020] EWCA Civ 1637, at [7], Lewison LJ explained that a property guardian was:

> " … a private individual who, usually with others, occupies vacant premises under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters and with the prospect of mitigating liability for non-domestic rates."

17. The issue in *Ludgate House* was whether a guardianship scheme successfully relieved the owner of a substantial office building from liability for non-domestic rates. That depended on whether the property guardians were in rateable occupation of the of the building. The Court of Appeal held that they were not, and that the whole of the building remained in the rateable occupation of its owner. That was enough to dispose of the appeal and meant that the Court of Appeal did not consider another issue on which permission to appeal had been granted, identified at [86]-[89]. That issue was whether rateable occupation by the guardians should be ignored by the Court because the scheme under which they were permitted to occupy was an unlawful one. The suggested illegality was that the scheme involved the unlawful use of the building as an unlicensed HMO. Lewison LJ agreed that was an important issue, and in part at least the same issue now arises in this appeal.

18. Two important ingredients of rateable occupation are that there must be actual occupation, and that it must be "exclusive for the particular purpose of the possessor" (*Cardtronics Europe Ltd v Sykes* [2020] UKSC 21, at [13], approving the statement of Tucker LJ in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344).

19. In *Ludgate House*, at [70]-[71], Lewison LJ considered the purpose of the contractual arrangements between the owner of the building (LHL), the company which supplied the property guardians (VPS), and the guardians themselves, and said this:

> 70. … LHL had engaged VPS for the specific purpose of providing property guardian services; and the guardians were the very means by which those services were provided. They could not have performed those services without living in the building. The presence of the guardians on site was an essential component of that which LHL had bargained for. That is why the licence provided that it was a serious breach if a guardian did not make the property their abode.

> 71. At [99] the UT held that it was the particular purposes of the "possessor" that was of importance i.e. the purpose of the licensee. … In a case like this, in my judgment, the purpose of the guardian on the one hand and VPS/LHL on the other were complementary and mutually reinforcing. To borrow a phrase from Lord Carnwath in *Cardtronics SC* at [43], the purpose of the guardians in living in the building was "to facilitate" VPS' operation of providing property guardianship services to LHL. VPS needed the guardians to fulfil its obligation to provide property guardianship services to LHL; and the guardians knew (because the licence agreement told them) that that was so. They had also gone through an induction programme to ensure that they understood their responsibilities. Both the recitals, and the terms on which they were permitted to live in Ludgate House, were entirely consistent with and supportive of that mutual purpose."

20. The Court of Appeal has recently considered further issues raised by the property guardian model in a case involving the appellant, *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835. One such issue was whether on the proper interpretation of the appellant's standard form of agreement, the guardians it had installed at a different building had exclusive possession of their own living space so that they were entitled to security of tenure as assured shorthold tenants. I will return to the agreements themselves in more detail below. Lewison LJ described their nature at [44], as follows:

> "As I have said, the nature of the agreement was the provision of the guardian services. Occupation of the property by Ms Laleva and others was necessary in order for those services to be provided. That is reinforced by clauses 4.1 and 4.2 of the agreement which required Ms Laleva to sleep in the property for at least five nights out of seven; and to ensure that she or at least one other guardian was in the property at any given time. Those obligations were necessary in order to perform the guardian services."

21. Although guardians are not, strictly speaking, employees of the company providing guardian services to the building owner the nature of their occupation is analogous to that of a service occupier (*Ludgate House,* at [66]) which, as Lewison LJ explained in *Laleva* at [45]-[46] is one of the situations in which a person apparently in exclusive possession of residential property does not acquire exclusive possession in law:

> "A person who lives in a house will not have exclusive possession of it if either (a) it is essential to the performance of his duties that he should occupy the particular house or a house within a particular perimeter; or (b) he is required by contract to occupy the house and by so doing he can better perform his duties to a material degree: [authorities omitted]. The essential elements of service occupation were described in *Smith v Seghill Overseers* (1875) LR 10 QB 422, 428 (approved in *Street v Mountford*) by Mellor J:
>
> > "Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services,

> the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant."
>
> In this case it was necessary for the provision of the guardian services that Ms Laleva should occupy the Property."

22. The Court of Appeal's conclusion in *Ludgate House* was that guardians are not in rateable occupation of the building they live in, and in *Laleva* it was that guardians are licensees who are not entitled to exclusive possession of any part of the building. This appeal addresses a different question, which turns on the interpretation of the 2004 Act.

The terms of the respondents' occupation

23. Each of the respondents occupied part of the building under a separate document described as a Temporary Licence Agreement and bearing the Global Guardians branding. The agreement was of unspecified duration but was terminable by the appellant on 28 days' notice, or immediately for serious breach. I will refer to the document governing the occupation of Mr Morales, executed on 3 September 2020, but the others were in the same form. Each identified the appellant as "G100" and the relevant respondent as "The Guardian". The document began with the following recitals:

> "AGREED PURPOSE OF LICENSE [*sic*]
>
> G100 is an approved supplier of "Guardians" who, in order to perform their Guardian Functions to protect vacant properties from intruders, anti-social behaviour and metal theft, must occupy certain properties designated by G100.
>
> The Guardian is an individual who is willing to pay a weekly license fee for use and occupation of the designated space in order to perform the Guardian's Functions."

24. The "Functions" referred to in the recital were defined in general provisions found in clause 13 of the agreement, as follows:

> "Functions" means the functions a Guardian carries out to protect the property from intruders, anti-social behaviour and metal theft, in accordance with British Standard BS8584:2015."

The British Standard referred to in this definition was not annexed to the agreement and is not in evidence. It is described on the website of the British Standards Institution as a "vacant property protection services code of practice" and is available at a cost (to non-members of the Institution) of £192. An overview on the BSI website explains that the owners of unoccupied properties often turn to security companies to guard properties at risk from arson, burglary and vandalism and states that the code of practice will be valuable to both property owners and security companies. Owners can use it to assess the services offered and use it in tenders; while security companies can be certified against it. Whether it refers to guardians or explains their functions is unclear.

25. Clause 1.2 of the agreement provides for Guardians to "pay a weekly fee to G100 to act as Guardians" and explains that they "are allocated properties from which they perform those Guardian functions which necessarily require them to occupy their designated space with others for the period of the agreement." Clause 1.6 states that the agreement does not give the guardian the right to use any specific room as living space but that "Guardians will be allocated space within the property". The property itself is identified in a schedule as the former Addison Lee Building, and a definition of "The Living Space" is given in paragraph 13.4 as "such part or parts of the property as G100 may from time to time designate as being available for the shared use of the Licensee and other persons". Guardians were required to provide their own white goods (clause 4.6) and furniture and the respondents gave evidence to the FTT of the difficulty they had in carrying their washing machine, cooker, mattresses and other furniture up three flights of stairs because the lifts in the building had been decommissioned.

26. Clause 4 of the agreement is headed "Use of Property" and comprises a list of things which the guardian agreed to do, including: sleep at the property for at least five nights out of any seven, unless written consent to be away has been granted by G100 (clause 4.2); ensure that either they, or at least one other Guardian, is present in the property for at least one hour in every twenty-four hours, and ensure that at least one Guardian is in the property at any time (these requirements appear inconsistent) (clause 4.3); share the property amicably and peacefully in common with such other persons as G100 shall, from time to time, permit to make use it, and not interfere with such shared occupation in any way (clause 4.4); advise G100 immediately if they become aware of any damage, or risk of damage, to the property, or any person attempting to gain access to the property without the permission of G100 or the owner (clause 4.4).

27. Guardians were expressly prohibited by clauses 5.1 and 5.7 from conducting any business on the premises, or holding meetings, parties or other similar gatherings in the property. They were not permitted to use any part of the property other than the allocated space.

28. Clause 11 of the agreement is headed "Security Industry Act" and contains an acknowledgement by both parties that the guardian has "no security responsibility or authority as defined in The Private Security Industry Act 2001" and an acknowledgement by the guardian that they had "only the powers of an ordinary citizen" and would not "assume the powers of a security officer or the police or any governmental authority".

29. The reference in clause 11.1 to "security responsibility or authority as defined in The Private Security Industry Act 2001" is obscure, as a perusal of the Act does not reveal a definition of either term. Schedule 2 to the Act does contain a list of the activities of "security operatives" which it is an offence for a person to engage in in the course of any employment without first obtaining a licence under the Act. Those activities include guarding premises against unauthorised access and guarding property against destruction, damage or theft.

30. The agreement included a statement at clause 8.1 that it set out the entire understanding between the parties relating to the property and to all the matters dealt with by any of the provisions of the agreement. In summary, therefore, the duties of the guardian, so far as they can be ascertained from the documents supplied to them, were limited to sleeping on the

premises five nights out of seven, ensuring that the property was never left empty (or possibly that it was occupied by someone for at least one hour a day), and reporting damage to the property, or any unauthorised attempt to gain access to the property to the appellant. The guardian was specifically not given any security responsibilities for which a licence might be required.

The FTT's decision

31. The appellant's case before the FTT was that the Adison Lee Building was not an HMO, so it did not need a licence and no offence was committed by the appellant if it did not have one. Subsidiary points were also raised but none of these features in the appeal.

32. The basis of the appellant's submission that the building was not an HMO was the contention that it did not meet the standard test because the sole use condition in section 254(2)(d) was not satisfied. The appellant submitted that the guardian's occupation of the living accommodation in the building did not constitute the only use of that accommodation because it was also used to perform the guardians' duties under their terms of occupation.

33. The FTT dealt with that submission in paragraph 45 of its decision, as follows:

> "It is submitted that the Applicants were property guardians and their occupation was not to provide accommodation but rather to protect the property. The Tribunal rejects this contention as wrong. The Applicants were not service occupiers or otherwise employed to protect the building. A side effect of their presence may be to dissuade trespass or damage, but they were there in order to have a roof over their heads and only that."

34. The FTT went on to find that the building required an HMO licence and that the appellant did not have one. It proceeded to make rent repayment orders in favour of each of the respondents in sums which totalled £6,251.85.

The issue

35. Permission to appeal was granted by this Tribunal on the single issue of whether the sole use condition in section 254(2)(d) of the 2004 Act was satisfied in the case of a property occupied by property guardians.

The appeal

36. On behalf of the appellant Mr Pettit submitted correctly that satisfaction of the standard test in section 254 required that each of the cumulative criteria in subsection (2) be satisfied: the property must consist of one or more units of living accommodation which are not self-contained; the living accommodation must be occupied by persons who do not form a single household; it must be occupied by those persons as their main residence; their occupation of it must constitute the only use of that accommodation; they must pay a rent or provide other consideration; and at least two of the households must share basic amenities.

37. The only condition which it was suggested was not satisfied was the sole use requirement in section 254(2)(d) because, Mr Pettit submitted, the respondents' occupation of the living accommodation did not constitute the only use of that accommodation.

38. Mr Pettit referred to a definition of the noun "use" in The Oxford Dictionary as (inter alia) 'application to a purpose'. A 'use', he suggested, was a 'purpose' that was being applied. 'Use' and 'purpose' were therefore synonymous and, where an arrangement provides for more than one 'purpose', once the arrangement was applied, it would involve more than one 'use'.

39. It was true that as far as the guardians themselves were concerned, they considered that the use of the property was solely to put a roof over their heads, but in *Ludgate House* the Court of Appeal had made it clear, at [70]-[71], that (in the context of non-domestic rates) it was not only the purpose of the licensee which was relevant, and the issue had to be looked at from all sides. The guardians' purpose in residing in the premises and the purpose of the guardian company in placing them there were "complementary and mutually reinforcing"; the presence of the guardians, and their performance of their duties facilitated the company's performance of its contract with the building owner to provide guardianship services.

40. The terms of the agreement in this appeal are the same as those considered by the Court of Appeal in *Laleva* where it had been found unequivocally that Ms Laleva occupied the property in question in order to provide services as a guardian. That purpose was the very reason for her occupation and not, Mr Pettit submitted, merely a side-effect of it, and the same was true of the respondents' occupation of the Addison Lee Building.

41. Mr Pettit's objective in equating "use" with "purpose" was to enable him to appropriate dicta from Lewison LJ's judgments in *Ludgate House* and *Laleva* and to deploy them in support of his argument. I did not find these linguistic gymnastics persuasive. In ordinary parlance "use" and "purpose" may sometimes be synonyms but the question in this case is whether the respondents' occupation of their living accommodation at the property constituted its only "use". Reframing the question to ask whether the respondents' occupation of the living accommodation was the only "purpose" for which it was being used does not advance the appellant's argument.

42. Moreover, *Ludgate House* was concerned with the identification of the person who ought to be liable to a property tax, and the issue in *Laleva* was whether the guardian had a licence or a tenancy. Those contexts are quite different from that with which this appeal is concerned, namely, the identification of the sort of shared property to which the statutory regime for securing the maintenance of proper housing standards should be applied. Whether the guardians or the guardian company were in rateable occupation of the building, or whether the guardians were tenants or licensees, have no relevance to the question whether the living accommodation was being used for more than one purpose.

43. Mr Pettit acknowledged that section 260 of the 2004 Act required that it should be presumed that the sole use condition was satisfied unless the contrary was shown. The burden therefore fell on the appellant to establish that the Addison Lee Building was used for a purpose other than as living accommodation. Relying on *Ludgate House* and *Laleva* Mr Pettit submitted

that the express terms of the licence were enough to rebut the presumption of sole use. They showed that the respondents' occupation of the living accommodation as their main residence was not the only use of that accommodation. There was another, complimentary, use, which was the provision of property guardian services for the building.

44. I do not accept Mr Pettit's argument.

45. First, I am not persuaded that the terms of the agreement between the occupier of the property and the person who let them into occupation are as important to the resolution of the issue in this case as there was in *Ludgate House* and *Laleva*. Both of those cases were concerned with the legal status of the person in occupation. This case is concerned with the use of the property itself, rather than with the legal rights and obligations existing between the occupiers and their landlords. It would be anomalous if statutory protection from poor housing standards depended on the fine print in the contract between the person in control of the property and the occupier. There may of course be cases where the contract creates a different type of relationship, such as that of employer and employee, but for the purpose of the sole use condition the focus even then would be on the use which was actually being made of the living accommodation.

46. The statutory context is important in this regard. The purpose of the statute is to provide protection to the residents of converted buildings with shared facilities by bringing them within a scheme of local authority oversight of their housing conditions. That purpose is for the public good as well as for the protection of the individual occupiers and one would expect Parliament to have intended that the property sector to which Part 2 of the 2004 Act applies should be defined by the character and use of the property in question and not by the terms of the relationship between the parties to the relevant occupational contract. A policy of extending protection widely rather than confining it narrowly is also consistent with the statutory presumption that the sole use condition is to be taken to be satisfied unless the contrary is demonstrated.

47. Secondly, and in any event, I do not think it can be said that the licence agreement provides for more than one use of the living accommodation occupied by the respondents. As guardians, they were required to sleep on the premises for at least five out of seven nights, they were not permitted to leave the property empty, and they were to inform the appellant of any damage or unauthorised access. But they were not permitted to conduct a business or hold meetings on the premises, and the only thing the respondents were entitled to do with the living accommodation was to use it as their main residence. The agreement did not provide for anyone else to be able to do anything in the living accommodation, except that other guardians could be permitted to share its use for the same purpose.

48. Thirdly, I do not think the building itself can be said to have been put to more than one use. If the Addison Lee Building had been empty, and the question had been asked, what is the building's current use, the only possible answer would have been that it had no use, it was unused. If the building owner had contracted with a security company for them to supply a team of non-resident security guards at least one of whom would be present in the building at any one time, and who would patrol the premises and report anything untoward they discovered, and the question had again been asked, what is the building's use, the answer

would have been the same, it would remain unused. Nobody would say that the provision of a security service by the security company constituted a use of the building. The arrival of the property guardians in the building would prompt a different answer. The building would now have a use, but the answer to the question, what is the use of the building, would, I suggest, be the limited one that the use of the building is as living accommodation for the ten or twelve guardians. As a matter of ordinary language, one would not say that the function of the guardians in deterring damage or trespass was a second use, additional to their use of the building as living accommodation.

49. To a very large extent the services performed by the guardians were the consequence or by-product of their use of the building as living accommodation. It was their presence in the building which was intended to deter vandalism and theft, and which made it a criminal offence for squatters to enter. They were not expected to take any action to prevent entry, other than by their own or their fellow guardians' occupation of the living accommodation. They did have a responsibility to report damage, or risks of damage, and unauthorised entry, and to ensure that doors and windows were closed and any to which the guardian has keys were locked when the property was empty, but the requirement to perform those obligations was not a use of the property different from its use for residential occupation.

50. The statutory purpose underlying the sole use condition is not immediately obvious. The presumption of sole use in section 260 and the power of a local housing authority effectively to disapply the sole use condition by making an HMO declaration under section 255 suggest that a desire to limit the practical significance of the condition. I was not referred to any material which suggested an explanation of the policy underlying the condition.

51. The condition does not seem to be apt to exclude living accommodation from the protection of Part 2 simply because it is occupied by employees of the owner, as it has nothing to do with the legal status of the occupier. A shared house provided by an employer to a group of service occupiers, each of whom was required to live there and to share basic amenities with their co-workers, would not fail the sole use condition. The only use of the shared house would be as living accommodation, but the sole use condition depends on there not being different, concurrent uses of the living accommodation, such as there might be if the live-in staff in a hotel shared the use of the hotel kitchen as their only cooking facilities. If a house consisted of four rooms with shared kitchen and bathroom facilities, two of the rooms being let to residents for whom it was their only or main residence and the remaining rooms being used by the landlord for the provision of bed and breakfast accommodation, it would be likely that the living accommodation would properly be treated as having more than one use, and in consequence that the sole use condition would not be satisfied.

52. If the occupation of living accommodation as the main residence of the occupiers is not the only use of that living accommodation, because some additional and different use is also being made of it, then it is possible to see that policy reasons might justify excluding it from the scope of Part 2. But I do not consider that there is any reason to exclude such accommodation where the suggested additional use is, in substance, the same only or main residential use by the same persons but for a distinct purpose.

53. Mr Pettit suggested that a building such as the Addison Lee Building would not be immune from local housing authority attention simply because it failed the sole use condition in section 254 and could not therefore be an HMO. He submitted that such a building would fall within Part 1 of the 2004 Act and be subject to the same system for assessing housing conditions and enforcing housing standards as any other residential premises. But if the building is not an HMO it is not necessarily the case that it would fall within Part 1 of the Act. It would do so only if it constituted "residential premises" to which Part 1 applies, for which purpose it would have to be a "dwelling", i.e. a building or part of a building occupied or intended to be occupied as a separate dwelling. Whether a redundant office building with no cooking facilities except those provided by and shared between the occupiers, and no bathroom facilities other than those appropriate to an office and again shared by the occupiers, satisfies the requirements of being a "separate dwelling" was not a matter on which Mr Pettit made submissions, and I reach no conclusion on it. When used for residential purposes such a building is, it seems to me, very obviously the sort of premises which would benefit from the statutory control provided by Part 2 of the 2004 Act.

54. For these reasons I dismiss the appeal and confirm the rent repayment orders made by the FTT.

Martin Rodger QC,

Deputy Chamber President

25 February 2022

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.