UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 306 (LC) **UTLC Case Number: LC-2023-274**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – RENT REPAYMENT ORDER – statutory definitions of "person managing" and "person in control of" an HMO – effect of paragraphs 1 and 2 of Schedule 14 to the Housing Act 2004 when the person managing or in control of an HMO is a health service body within the meaning of section 9 of the National Health Service Act 2006

BETWEEN:

PHOEBE COTTAM AND SIX OTHERS

Appellant

-and-

LOWE MANAGEMENT LIMITED

Respondent

Re: The Gables, 2-4 Blackheath Park London SE3 9RR

Upper Tribunal Judge Elizabeth Cooke
Decision on written representations
Decision Date: 20 December 2023

Flat Justice for the appellant
Mr M Croskell for the respondent, instructed by Anthony Gold Solicitors LLP

The following cases are referred to in this decision:

Cabo v Dezotti [2022] UKUT 240 (LC)

Global 100 Limited v Jimenez and others [2023] EWCA Civ 1243

Hastings Borough Council v Braear Developments Limited [2015] UKUT 415 (LC)

Pollway Nominees Limited v Croydon London Borough Council [1987] 1 AC 79

R v London Borough of Lambeth ex p Clayhope Properties Limited [1988] QB 563

Truman, Hanbury, Buxton & Co. Ltd v Kerslake [1894] 2 Q.B. 774

1.

Introduction

1. This is an appeal on a point of law from a decision of the First-tier Tribunal ("the FTT") on an application for a rent repayment order arising from the licensing regime for houses in multiple occupation. The point arises because the freeholder of the property is a health service body within the meaning of section 9 of the National Health Service Act 2006; the Housing Act 2004 makes special provision for circumstances where a building is controlled or managed by such a body. The appeal also raises the question of who is the "person having control" of premises as defined in section 263(1) of the 2004 Act.

2. The appeal has been decided under the Tribunal's written representations procedure. The appellants have been represented by Flat Justice, and the respondent by Mr Croskell of counsel, and I am grateful to them both.

The legal background

3. The legal regime that regulates houses in multiple occupation ("HMOs") is contained in the Housing Act 2004. Certain houses are defined as HMOs – typically those where a number of unrelated individuals share facilities such as a bathroom and kitchen, but also for example where a house has been converted into self-contained flats without complying with building regulations. Some but not all HMOs have to be licensed; those that require a licence are specified in the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018.

4. Section 72 of the Housing Act 2004 says this:

> "(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1) but is not so licensed."

5. Section 263 of the 2004 Act defines a person "having control of", or "managing" an HMO, and we shall have to look in detail at what it says. It suffices for introductory purposes to note that if A owns a house and lets it to people who occupy it in circumstances where the statutory definition of an HMO is met and who pay a market rent to A, A will be the person having control of and the person managing that HMO.

6. However, paragraphs 1 and 2(1) of Schedule 14 to the 2004 Act provide:

> "1 (1) The following paragraphs list buildings which are not houses in multiple occupation for any purposes of this Act other than those of Part 1."
> …
> 2 Buildings controlled or managed by public sector bodies etc
> (1) A building where the person managing or having control of it is–
> …

(f) a health service body within the meaning of section 9 of the National Health Service Act 2006.

7. So in the simple case described in paragraph 5, if A is a health service body within the meaning of section 9 of the National Health Service Act 2006 then the house is not an HMO for any purposes under the Housing Act 2004 (except those of Part 1 which relates to housing conditions). Therefore no HMO licence is required if it is let and managed by that freeholder.

8. The present case is not so simple.

The factual background and the FTT's decision

9. The facts as found by the FTT, in outline, are as follows.

10. The Gables is a large property formerly operated by NHS South East London Clinical Commissioning Group ("CCG") as a residential home. CCG was the freeholder at all times relevant to these proceedings, although it has since disposed of the freehold. It is a health service body within the meaning of section 9 of the National Health Service Act 2008.

11. In 2020 CCG wanted to dispose of The Gables and appointed NHS Greenwich Charitable Trust ("the Charitable Trust") as its agent in relation to the sale of the property. The Charitable Trust is not a health service body within the meaning of section 9 of the National Health Service Act 2008. As agent for CCG the Charitable Trust entered into an agreement with Lowe Guardians Limited ("Lowe"); the purpose of the agreement was for Lowe to take on the care of the property and to arrange for guardians to occupy it.

12. As is well known, the introduction of guardians to live in a property has been devised as a way of securing large buildings designed as offices or other non-residential premises, with the aim of preventing squatting or vandalism. The guardians typically have some obligations relating to the security of the property, but the nature of their occupation and contractual arrangements does not prevent the building from being an HMO (*Global 100 Limited v Jimenez and others* [2023] EWCA Civ 1243).

13. The agreement between the Charitable Trust and Lowe was found by the FTT to be a lease. Because the Charitable Trust entered the agreement as agent for CCG, the consequence of that finding was that CCG had leased the property to Lowe, in return for some services but no rent.

14. The agreement between CCG and Lowe made provision for Lowe to appoint an agent, the respondent, for example at clauses 3.1 – 3.3 (where "LM" refers to the respondent):

> "3.1 The Owner appoints LG as the sole and exclusive provider of the Services at the Property and grants possession of the Property to LG.

> 3.2 To enable LG to provide these services, the Owner agrees that LG may grant permission to LM to provide the Services.
>
> 3.3 The Owner acknowledges and accepts that in order to facilitate the provision of the Services, LM is permitted to grant Licences to Guardians selected to share occupation of such part or parts of the Property as LM may designate from time to time."

15. In accordance with that agreement the respondent made agreements with guardians, and hence was the respondent in the FTT and is the respondent to this appeal.

16. In January 2022 the appellants applied to the FTT for a rent repayment order against the respondent. Their case was that The Gables should have been licenced as an HMO from 25 September 2020 to 14 January 2021 but was not so licensed; the respondent had therefore committed the offence created by section 72(1) of the 2004 Act. A rent repayment order was sought in the sum of £11,003.67.

17. In response it was argued for the respondent that the provisions of paragraphs 1 and 2 of Schedule 14 to the 2004 Act meant that the property was not an HMO because CCG was the person having control of or managing the property.

18. Mr Penny for the appellants argued that that was not the effect of Schedule 14 but that (paragraph 34 of the FTT's decision):

> " a building could be an HMO in relation to one person, and at the same time, not another person. As a result, he argued, it was immaterial whether CCG satisfied one of the tests for control or management. What mattered was whether the Respondent did (and it did), so the building was an HMO in respect of the Respondent."

19. The FTT accepted the respondent's argument. It found that CCG was a person in control of the building and that the effect of paragraphs 1 and 2 of Schedule 14 to the 2004 Act was that the building was not an HMO; therefore no offence had been committed and no rent repayment order could be made. At paragraph 72 of its decision it said:

> "This outcome could be described as infelicitous, in that, purely from the point of view of effective regulation of shared housing accommodation, it is difficult to see why an empty property that happens to be owned by a health service body (or any of the other categories of owner in paragraph 2 of schedule 14) should be wholly exempted from the legislation controlling HMOs for that reason alone. That, however, is the law as it seems to us to be. And it is not an outcome that we could characterise as absurd or irrational. It is understandable that the Government department responsible for the legislation would have sought to have over-determined the exemption of buildings relating to other government departments' concerns as a matter of policy, in principle leaving their regulation to other structures."

20. The FTT gave permission to appeal on the ground that it was arguable that the FTT had misconstrued paragraphs 1 and 2 of Schedule 14.

The first ground of appeal: did the FTT misconstrue paragraphs 1 and 2 of Schedule 14?

21. In the grounds of appeal Mr Penny argued that "Schedule 14 is to be considered with reference to each individual person rather than in relation to the particular building." He sought support from the policy of the Act, and said:

> "The application of Sch. 14 must also be considered in the light of the purpose to which the 2004 Act is put within the context of the Housing and Planning Act 2016; the question of whether a Rent Repayment Order is available for a licensing offence is a question which can only be answered by an analysis of whether the licensing offence has been committed by a particular person."

22. The premise of that argument is of course that more than one person can be "the person in control". Mr Penny argued that CCG was not in fact the person in control; but if it was, then Schedule 14 meant that the building was not an HMO so far as CCG was concerned but had no effect so far as the respondent was concerned.

23. In response the respondent argued that Schedule 14 means exactly what it says. If the person in control is one of the bodies listed in paragraph 2(1) of Schedule 14 then the building is not an HMO for any purposes of the Act (other than Part 1).

24. In my judgment the respondent's argument is straightforward and manifestly correct, in contrast to the appellants' construction of Schedule 14 which is strained and runs counter to the plain words of the statute. If (and I stress the "if" for reasons that will appear) CCG satisfied the definition of "person having control" in section 263(1) then the building was not an HMO for any purpose under the 2004 (apart from Part 1) and therefore was not an HMO so far as any other person was concerned either.

Permission to appeal on a further ground

25. It became apparent to the Tribunal in considering the FTT's decision and the parties' representations that whilst the FTT had correctly construed Schedule 14, it had gone astray in deciding that CCG was a "person in control" of the premises, so that in fact Schedule 14 was not relevant. This appeal was decided under the Tribunal's written representations procedure, and having reached that provisional conclusion I asked the parties for their views as to whether the existing ground of appeal was wide enough to cover the point, and as to whether the Tribunal should grant permission to appeal on this further point if the appellants chose to apply for permission to appeal on it at this late stage.

26. The parties in their written representations agreed that the existing grounds of appeal were not wide enough to encompass the point, and the appellants sought permission to appeal on the further ground that the FTT erred in deciding that CCG was the person in control of

the premises. Mr Penny of Flat Justice observed that he had made an argument to that effect before the FTT.

27. The respondent argued that I should not grant permission to appeal on this additional ground. The appellants chose, with legal advice, to appeal on one particular ground and it would be unfair to the respondent to allow them to extend the appeal, so many months down the line, to another ground. There is force in that argument. However, the FTT's error occurred because the appropriate authorities were not drawn to its attention by either party, and if left uncorrected there is a risk that it will be relied upon in the future (despite the FTT's decisions having no precedent value) to the detriment of tenants for whose protection the HMO licensing regime was enacted. The error is too important to be left uncorrected and so on 15 November 2023 I granted permission to appeal on the additional ground.

28. The respondent made further submissions on 4 December 2023 after I granted permission, and I have taken those submissions into account.

The second ground of appeal: was CCG the person in control of the premises?

29. The offence created by section 72(1) of the 2004 Act is of managing or having control of an HMO that is required to be licensed and is not. Only a person managing or having control of the premises can commit it. The definitions of a person "having control of" and "managing" a property are set out in section 263 of the 2004 Act:

> "(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.
>
> (3) 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; and
> >
> > > (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
> >
> > (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise)

> with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

30. At paragraph 5 above I set out a simple example. The freeholder, A, in that case was the "person having control" of the premises because A received the rack-rent from the occupiers and so fitted squarely within section 263(1). Section 263(1) is also apt to describe a managing agent who receives the rack-rent. For that reason the Tribunal (the Deputy Chamber President, Martin Rodger KC) in *Cabo v Dezotti* [2022] UKUT 240 (LC) at paragraph 44 said:

> "To be a person having control, the person receiving the rent need not be entitled to keep it for their own benefit: an agent or trustee who receives rent will be a person having control. In short, the person having control is the rent collector, whether they are collecting on their own account or on behalf of someone else."

31. The rent in question so far as section 263(1) is concerned is a rack-rent. Although the appellants say that they were paying a rack-rent the FTT made no finding to that effect. The respondent's representatives in written submissions argued that the appellants were not paying a rack-rent and indeed that the payments made by the appellants were a licence fee and therefore could not have been a rack-rent. I make no comment on that argument and I approach the appeal on the basis that it is not known whether or not the appellants were paying a rack-rent. As will be seen, it does not matter.

32. Section 263(3) defines a person managing the property, and in the context of section 263(3) the rent need not be a rack-rent. Although the opening words seem to indicate that the person managing the premises will always be an owner or lessee of the property, the final proviso (beginning "and includes" after sub-paragraph (b)) indicates that they may be an agent or trustee receiving rent and passing it on to an owner or lessee.

33. The FTT considered first whether CCG was the person managing the property. It is the freeholder, and it would have received the rent or other payments from the guardians had it not entered into an agreement with Lowe, and Lowe received the guardians' payments by virtue of that agreement (paragraph 55 of the FTT's decision).[1] But Lowe was found by the FTT to have been a lessee of the property (and there is no cross-appeal from that finding) and therefore that element in the requirements of section 263(3)(b) was not satisfied. CCG was not a person managing the premises.

34. However, the FTT found that CCG was a person in control of the premises.

35. The FTT was referred to the Explanatory Notes to the legislation, which include the following comment on section 263(1):

[1] I take that as a finding that the payments made by the appellants to the respondent were passed on to Lowe. That is consistent with the written submissions made on the respondent's behalf on 4 December 2022 which refer both to the payments that the respondent received (paragraph 2(e) of those submissions) and to "the payments made by the occupiers to Lowe Guardians" (paragraph 3).

> ""Section 263 defines for the purpose of the Act that "person having control" is the person who receives (directly or as an agency or trustee) the market rents from the tenants for a given premises or is otherwise entitled to receive the rents if the premises were let (i.e. an owner) "Person Managing" is someone who receives the rents directly from the occupier (but "rent" includes ground rent), so such a person could be a managing agent."

36. The FTT said:

> "67… As we have found, the CCG let the property to Lowe on a lease; but it clearly did so not at a rack-rent (indeed, we think, not at a rent at all). That then raises the hypothetical proposition in the second part of section 263(1). Where a property is let, but not let at a rack-rent, the (or a) person having control is the person "who would so receive [the rack-rent] if the premises were let at a rack-rent". 68. In our view, the person who would have received the rack-rent, had the property been let at a rack-rent, is the CCG. This conclusion, which seem clear to us on the words of the statute, is supported by the explanatory note we quote at paragraph [21] above. That describes the hypothetical proposition as applying to a person who "is otherwise entitled to receive the rents if the premises were let (i.e. as an owner)." It uses the term "entitled", which we think is what the drafter means by referring to the person "who would so receive"; and the note says "i.e." the owner, not "e.g." the owner. The note suggests to us that the very point of the hypothetical proposition is to include an owner who could let premises at a rack-rent, but does not. 69. It follows that the CCG was a person in control of the property, and that, as a result the building is not an HMO."

37. That is a misconstruction of section 263(1).

38. The definition of a "person in control" in section 263(1) of the Housing Act 2004 is relevant not only to rent repayment orders but in a number of other contexts, for example in defining the correct recipient of an improvement notice under Chapter 2 of Part 1 of the 2004 Act. The definition has long roots; the same words, with very minor and immaterial variations, have been used in a number of statutory provisions beginning with the Towns Improvement Clauses 1847 which provided in s 3:

> "The word *"owner,"* used with reference to any lands or buildings in respect of which any work is required to be done, or any rate to be paid, under this or the special Act shall mean the person for the time being entitled to receive, or who, if such lands or buildings were let to a tenant at rackrent, would be entitled to receive, the rackrent from the occupier thereof"

39. The defined term in the 1847 Act and other early provisions is "owner", but in later statutes the defined term is "person in control", but the defining words are the same. They are consistently used to identify a person responsible for complying with statutory obligations and occasionally to identify the recipient of a statutory benefit. In *Pollway Nominees Limited v Croydon London Borough Council* [1987] 1 AC 79 the House of Lords had to identify the "person having control" of a building, such a person being the correct recipient of a notice served by the local authority under section 9(1A) of the

Housing Act 1957 requiring them to carry out repairs. Section 39(2) of the Housing Act 1957 defined the person "having control of the house" in terms identical to those found in section 263(1) of the 2004 Act. Lord Bridge of Harwich referred to a number of provisions that had used the definition since 1847 and observed:

> "In all these cases the rationale of the use of the formula to designate the person upon whom the relevant obligation is cast is surely plain. The owner of that interest in premises which carries with it the right, actual or potential, to receive the rack rent, as the measure of the value of the premises to an occupier, is the person who ought in justice to be responsible for the discharge of the liabilities to which the premises by reason of their situation or condition give rise."

40. In *Pollway Nominees* the building in question comprised a number of flats let on long leases at ground rents, some but not all of them being sub-let to tenants paying a rack-rent. It was argued that the person in control in those circumstances was the freeholder because the freeholder alone was in a position to let the whole building at a rack-rent although in reality it had not done so. Lord Bridge referred to *Truman, Hanbury, Buxton & Co. Ltd v Kerslake* [1894] 2 Q.B. 774, where the issue was liability to remedy a statutory nuisance. The premises were let on a long lease and sub-let at less than a rack-rent. The case was an appeal from a criminal conviction by the head-lessees against a conviction for failing to comply with a notice requiring them to remedy a nuisance (pursuant to the Public Health (London) Act 1891); liability to comply fell upon the "owner", defined as the person receiving the rack-rent or who would receive it if the premises were let at a rack-rent. Kennedy J, giving the judgment of the Divisional Court allowing the appeal said this:

> "It appears to us to be impossible to treat as the person who would receive the rack rent, if the premises were let at a rack rent, persons who, at the time when the 'owner' of premises, as defined by section 141, has to be found, have not such an interest in the property that, if it was let at a rack rent, they would receive such rack rent. The words of the section in our judgment, in the case of there being no one who in fact receives a rack rent from the actual occupier, designate as 'owner' the person who 'rebus sic stantibus,' that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rack rent, receive that rack rent." In this case, whilst the sub-lease to Aslett subsists, that is to say, for the next 30½ years and until a date only 11 days anterior to the expiring of the appellants' own interests, the appellants could not let to any one. The only person who could let the premises at a rack rent, the only person whose interest in the premises places him in a position to receive a rack rent, is Bishop, the assignee of the sub-lease to Aslett. His interest as assignee of that sub-lease gives him the power of so letting; and if the premises were so let, he is the person who would receive the rack rent. He chooses, it is true, to occupy the premises himself; but we see nothing to prevent the same person being both occupier of the premises and the 'owner' within the meaning of this section."

41. To summarise Kennedy J's explanation: there was no rack-rent being paid. As things stood, neither the freeholder nor the long-lessee had the power to let the premises at a rack-rent because the premises were sublet to Mr Bishop. Only Mr Bishop satisfied the definition because he was the only one who could, as things stood, let the premises at a rack-rent.

42. To continue with Lord Bridge's analysis in *Pollway Nominees*: he also referred to *London Corporation v. Cusack-Smith* [1955] A.C. 337 which unusually conferred a benefit on the person who received the rack-rent, or would receive it if the premises were let at a rack-rent, namely the right to serve a purchase notice on a local authority under the Town and Country Planning Act 1947. Lord Keith of Avonholme said:

> ""I cannot accept …that the definition can be divorced so far from actuality as to cover the case of a person who could have let the land in the past at a rack rent, if he had not chosen to let it at less than a rack rent. The natural way to construe the definition in its application to an actual case is, in my opinion, to ask, who is entitled to let the land at a rack rent as things are today?"

43. Lord Reid said, at p. 360:

> "one looks for the person who at the relevant date would be entitled to make a new lease at a rack rent and supposes that he does so, and the only person entitled to make a new lease is the person in possession, in this case the appellants."

44. Accordingly, in *Pollway Nominees* the House of Lords held that the expression "person having control" applied collectively to all the long lessee - because they either received the rack-rent or would receive the rack-rent if they chose to sub-let their units. Their lordships rejected the argument that the person in control was the freeholder, as the only person able to let the whole building at a rack-rent. It had chosen to let the premises at less than a rack-rent and the court was not required to move into the imaginary world where it had let the premises at a rack-rent.

45. It is important to note that although more than one person comprised "the person in control" in *Pollway,* those persons were the group of people who were each either receiving the rack-rent or were (as things stood) entitled to let the premises for a rack-rent. The freeholder was not among that group since it could not let any of the flats at a rack-rent. It did retain the common parts but that was not relevant since, as Lord Bridge put it a 95A-C, the freeholder "thus retains only a reversionary interest which confers no right of occupation which he can either enjoy for himself or let to anyone else".

46. *R v London Borough of Lambeth ex p Clayhope Properties Limited* [1988] QB 563 was a decision of the Court of Appeal, again about section 9 of the Housing Act 1957. It concerned a building comprising flats all let on long leases, some but not all being sub-let at rack-rents. At 568H Glidewell LJ said:

> "In the present case it is common ground that the 14 flats the subject of long leases, were not, and are not, let at rack-rents but if they were to be let at rents exceeding two-thirds of the full net annual value of the house, the person who would be entitled to receive that rent would in each case be the leaseholder. The person having control of the house is thus, as far as the leasehold flats are concerned, the leaseholder. In respect of the six other flats, the subject of the controlled tenancies, it is the applicants [the long lessees of those flats], because they do, or they did at the material time, receive rack-rents from their tenants."

47. The decisions in *Pollway Nominees* and *Clayhope* were referred to by the Tribunal (the Deputy President, Martin Rodger QC) in *Hastings Borough Council v Braear Developments Limited* [2015] UKUT 415 (LC) where the issue was who was the "person in control" of a building comprising five flats, all let on long leases and some of them sub-let, where the freeholder's reversion included the common parts. At paragraph 44 the Deputy President said:

> "Four of the five flats in the Building are let on assured tenancies by the lessees. Although there is no specific evidence on the point there seems no reason to doubt that the tenancies are at market rents and that, in aggregate, the rents received for the units which are let exceeds two thirds of the annual value of the units as a whole. A fifth flat is not let, but if it were, the recipient of the rack-rent would be the lessee. Looking at the Building as a whole, the person in control in the sense of the person(s) in receipt of the rack rents are the lessees. It seems to me wrong in principle to ascribe a notional rack-rent to the common parts of the Building, when there is no realistic possibility of such a rent being received. That is consistent with the approach taken in *Clayhope* and in *Pollway* …
>
> 45. It seems to me to be clear that the persons in control of the Building are the lessees of the five flats."

48. Two propositions are therefore clear from the authorities. One is that if the premises are currently let at a rack-rent then the person in control is the person who receives that rack-rent. The second is that the person "who would so receive it if the premises were let at a rack-rent" is not a person who might have let at a rack-rent but has in fact let the property (or part of it) for less than a rack-rent; it is the person who as things stand at present, with all the current lettings in place, could if they chose grant a lease at a rack-rent. It is therefore not the freeholder if the freeholder has already let the property, or parts of it, at less than a rack-rent, even if the freeholder retains common parts. The FTT's construction of section 263(1), and its reading of the explanatory notes, was incorrect on this point.

49. Therefore in the present case CCG cannot be the "person in control" for the purposes of section 263(1) of the Housing Act 2004. If the appellants were in fact paying a rack-rent, CCG was not receiving it; if the appellants were not paying a rack-rent then because CCG had granted a lease of the property to Lowe it was not in a position to grant a lease of the property at a rack-rent, and so was not the person "who would so receive it if the premises were let at a rack-rent."

50. And as the FTT found, CCG was not the person managing the property because it had let the building to Lowe, so that the condition in section 263(3)(b) failed; Lowe is a lessee so it is not the case that CCG "would have received the rents or other payments [from the guardians] but for having entered into an arrangement … with another person who is *not* an owner or lessee of the premises by virtue of which that other person receives the rents or other payments" (emphasis added).

51. So although the FTT's interpretation of Schedule 14 paragraphs 1 and 2 to the 2004 Act was correct, in fact those paragraphs were not relevant because CCG was neither in

control of the premises nor managing them. That is the case whether or not the appellants were paying a rack-rent.

52. The appeal succeeds therefore on the second ground.

Disposal

53. No express finding was made by the FTT as to whether the respondent, or Lowe, was a person managing or in control of the property. But clearly the FTT took the view that if it was wrong about the construction of Schedule 14 then a rent repayment order should be made against the respondent, because it gave some indications, at paragraphs 87 to 91, about the matters that it would have taken into account in considering the amount of rent to be repaid had it made an order, for the assistance of the Upper Tribunal in case its finding about CCG and the effect of Schedule 14 to the 2004 Act was found to be wrong. In view of what was said in the agreement between CCG and Lowe about the status of the respondent it is likely that the FTT regarded the respondent as falling within the final words of section 263(3) ("includes, where those rents or other payments are received through another person as agent or trustee, that other person" see paragraph 29 above), but it is right that the FTT should set out its finding in full.

54. In any event the comments made in paragraphs 87 to 91 do not provide enough information on the basis of which I could quantify a rent repayment order. The FTT noted that there was no adverse conduct on the part of the applicants that might reduce the award. It noted that no complaints about the condition of the property or services had been made out. But it accepted an allegation of "bullying or inappropriate behaviour by the head guardian". The head guardian was appointed by Lowe and the FTT said that it regarded that behaviour as serious. But it did not say what was the "bullying or inappropriate behaviour" found to have taken place. Nor do I have any information about the respondent's financial circumstances.

55. Accordingly, the matter is remitted to the FTT (the same panel, if at all possible) for it to set out the basis on which a rent repayment order should be made and to determine the amount that should be paid.

Upper Tribunal Judge Elizabeth Cooke

20 December 2023

Right of appeal

Any party 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.