Property Guardianship: re-visiting the lease/licence distinction and re-shaping the regulatory landscape of occupational rights in English Property Law

Chris Bevan*

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I. Introduction

This article examines the growing phenomenon of property guardianship in England and Wales and argues that it has breathed new life into and raises novel questions as to the regulation of the relationship between landowners and occupiers, the protections available to such occupiers and the long-standing and crucial, property law distinction between leases and licences.

Property guardianship describes the situation in which people move into vacant commercial or residential property to live as occupiers in return for a fee, thus providing security to the landowner of the property against squatters whilst paying less than standard market rent in an otherwise crowded and expensive rental sector. Relatively little is known about property guardianship in the UK and scholarship is limited. This article fills that gap and explores how the courts are responding to this relatively new form of occupation right; what this can tell us about our traditional property law understanding of the dividing line between leases and licences and how this new form of occupation has the potential to reshape the legal landscape in the lease/licence arena by making the case for reform to the regulation of occupational rights and the protections occupiers enjoy. The article proceeds in 4 parts. Part I briefly introduces the idea of property guardianship, its nature and scope before Part II explores the relationship between property guardianship and the much-contested lease/licence distinction. Part III examines how the courts are grappling often inconsistently and incoherently in decided case law to make sense of property guardianship and examines what this treatment can tell us of our understanding of the lease/licence divide and the protections occupiers of land currently enjoy. A final Part IV reflects on the potential of property

* Associate Professor in Property Law, Durham Law School.

guardianship to re-shape the legal landscape. It argues that property guardianship lays bare the need for reform to regulation of occupational rights in English property law to ensure greater protections for those occupying land. It makes the case that analysis of property guardianship reveals how our time-honoured fixation on the vexed lease/licence distinction so long regarded as the foundation and determinant of rights for occupiers should actually be seen as obscuring the core issue - namely, how best we can offer protections for those occupying land rather than falling back on well-worn labels such as 'tenant' or 'licensee.' In so doing, this article asserts that property guardianship provides the impetus for moving away from the lease/licence distinction and uncoupling the degree of occupiers' protections from this problematic lease/licence binary. In this way, clarity in the law as well as security and stability to those occupying land can be achieved. The article concludes by advocating a new model for occupational rights in England drawing on the work of the Law Commission and the position in Wales.

Property guardianship[1] found provenance in the Netherlands where the practice of 'antikraak' ('anti-squatting') developed in the 1980s but saw a sizeable step up in popularity in light of the criminalisation of squatting in the country in 2010.[2] Property guardianship arrived in the UK just over a decade ago as a Dutch import with Dutch companies the first to set up in London. Since its arrival, property guardianship has been noted as a 'growing sector' (especially in urban centres of London, Bristol, Manchester and Brighton) but is now

[1] On which see generally M. Ferreri., G. Dawson., and A., Vasudevan, 'Living precariously: Property guardianship and the flexible city' (2017) 42(2) *Transactions of the Institute of British Geographers* 246-259; M. Ferreri., G. and Dawson,'Self-precarization and the spatial imaginaries of property guardianship' (2018) 25(3) *Cultural Geographies* 425-440; London Assembly Housing Committee (2018) *Protecting London's property guardians.* London Assembly. Available at: https://www.london.gov.uk/sites/default/files/plpg.pdf [Accessed: 01/2022].

[2] On the Dutch practice of antikraak, see T. Buchholz *Struggling for recognition and affordable housing in Amsterdamand Hamburg: resignation, resistance, relocation.* PhD Thesis: University of Groningen (2016); and C. Huisman, 'A silent shift? The precarisation of the Dutch rental housing market' (2016) *Journal of Housing and the Built Environment* 31, 93-106.

expanding across all parts of the UK with new guardianship providers joining the market every year.[3] Property guardianship[4] reflects a simple proposition and is often presented as a win-win scenario for all concerned: landowners with empty properties (generally awaiting re-development) permit people to occupy those premises for a fee and the 'guardians' guarantee the security of the buildings. In return, these occupying 'guardians' benefit from below market value living costs in otherwise unaffordable urban locations. Property guardianship is especially attractive to commercial landowners who seek to escape large business rates tax bills by designating the land as 'residential' to which the same fiscal liability does not attach. By installing basic facilities such as temporary shower rooms and kitchens and inviting property guardians to occupy the land, commercial landowners can reclassify their property as domestic or residential and thereby significantly cut the business rates owed. It is said that around 70% of all properties seeking guardians are commercial in nature.[5] For many guardians, the cheaper accommodation and flexibility of the guardianship arrangement works well. Certainly, a whole industry has been born out of the phenomenon and is developing exponentially across the UK as a new form of occupational right. For over a decade now, property guardianship has been surging in popularity here in the UK and the sector is maturing. Largely fuelled by housing shortages, the unaffordability of the housing available in the private rental market and particularly acute housing pressures in large

[3] This growth has been tracked by Ferreri et al: M. Ferreri., G. Dawson., and A., Vasudevan, 'Living precariously: Property guardianship and the flexible city' (2017) 42(2) *Transactions of the Institute of British Geographers* 246-259.

[4] On which see C. Hunter., J. Meers, 'The 'Affordable Alternative to Renting': Property Guardians and Legal Dimensions of Housing Precariousness' In: H. Carr, B. Edgeworth, and C. Hunter (eds) *Law and the Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (2018, Oxford: Hart), 65-86.; C. Hunter, and J. Meers (2018) *Property Guardianship in London: A report produced on behalf of the London Assembly* [Online]. Available at: https://www.london.gov.uk/sites/default/files/uni_of_york_-_london_assembly_-_property_guardians.pdf [Accessed: 01/2022].

[5] G. Norwood, 'Property guardian schemes offer quirky homes at low rents. But not for long' *The Guardian Newspaper*, 10th January 2010: https://www.theguardian.com/money/2010/jan/10/property-guardian-schemes.

metropolitan centres,[6] for many young professionals and those starting out in the world of work, the promise of property guardianship is an alluring one. The rise in property guardianship has also coincided with a sustained fall in the rates of homeownership in the UK over the last 5 decades from 70% in the 1970s and 1980s to 63% on the latest data.[7] Those aged 35-45 (adults in the so-called 'prime of their working lives') are now three times more likely to rent as opposed to owning a property as compared with 20 years ago.[8] Isolating precise numbers of property guardians is challenging, in part due to the lack of meaningful, independent regulation of the sector,[9] but it is estimated that there are 35,000 guardians living in properties across the UK and in excess of 50 companies ('Guardian Agencies') whose job is to advertise properties, vet potential occupiers, maximise profit generation and expand the sector.[10] Property guardianship has received a mostly 'uncritical press'[11] and, intriguingly, has been portrayed in the media largely as the domain of 'quirky', idiosyncratic, adventure-seeking twenty-something urban-types as depicted powerfully in the 2016 Channel 4 sitcom,

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[6] See, for example, *Shelter* (2020), 'The Housing Emergency: Denied the Right to a Safe Home' available at: https://assets.ctfassets.net/6sxvmndnpn0s/415ro3YWRxffE7sXqWI1bO/a1a94184ab52ed3b5a800ab60603bc60/Shelter_Denied_the_right_to_a_safe_home_Report.pdf

[7] Https://www.ethnicity-facts-figures.service.gov.uk/housing/owning-and-renting/home-ownership/latest

[8]Https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglonger/changesinhousingtenureovertime#what-would-be-the-implications-of-an-increase-in-older-people-renting-privately.

[9] There is an industry trade body set up to promote best practice, standards and safety, The Property Guardian Providers Association; additionally the UK Government has produced non-statutory 'guidance … for current and potential property guardians' available here: https://www.gov.uk/government/publications/property-guardians-fact-sheet/property-guardians-a-fact-sheet-for-current-and-potential-property-guardians.

[10] Property Guardian Providers Association, Annual Report 2019 available at: https://www.propertyguardianproviders.com/annual-review-2019.

[11] As noted by C. Hunter., G. Peaker, 'Who Guards the Guardians?' (2012) *Journal of Housing Law* 297.

Crashing by Phoebe Waller-Bridge[12] in which 6 graduate 'guardians' (self-styled as a "motley crew") live for around £25 per week in a disused London hospital. As Ferreri et al have identified, this image of 'carefree, young … university-educated'[13] guardians has become the dominant narrative of the property guardianship sector, though, in fact guardians range from professionals, key workers to students. Behind this apparently cheery narrative of eccentricity and youthful abandon, however, key legal issues are emerging. These issues include the application of fire regulations, the (in)applicability of the regulations on Houses of Multiple Occupancy (HMO)[14] and questions around notice periods for eviction of guardians and repairing obligations. Reports are beginning to surface that shatter the illusion of the property guardianship 'dream' with accounts of poor accommodation conditions, rising living costs despite the guardianship promise of cheap living, of last-minute, forced eviction by landowners and overcrowding of ever smaller living spaces.[15] There is now a developing body of work investigating the precarity of the guardianship sector, apparent abuses by guardian agencies and exposing the reality of life as a guardian as juxtaposed with the glossy, media representations.[16] The focus of this article, however, is not on the lived experience of guardians[17] but on the precise legal arrangement that governs the guardianship relationship.

[12] Big Talk Productions, 2016.

[13] M. Ferreri., G. Dawson., and A., Vasudevan, 'Living precariously: Property guardianship and the flexible city' (2017) 42(2) *Transactions of the Institute of British Geographers* 246-259.

[14] In 2020, a guardian agency, Camelot Guardian Management Company Ltd (Camelot Europe), pleaded guilty to 15 charges of not obtaining an HMO licence and other breaches of HMO regulations in an action brought by Colchester Borough Council.

[15] See the investigation carried out by *The Guardian* newspaper: https://www.theguardian.com/society/2015/dec/24/the-high-price-of-cheap-living-how-the-property-guardianship-dream-soured

[16] See, for example, J. Meers., C. Hunter, 'The face of Property Guardianship: online property advertisements, categorical identity and googling your next home' (2020) 14(2) *People, Place and Policy* 142-156.

[17] On which see C. Hunter., J. Meers, J, 'The 'Affordable Alternative to Renting': Property Guardians and Legal Dimensions of Housing Precariousness' in H. Carr, B. Edgeworth, and C.

Put simply, are property guardians occupying as licensees or as tenants and what protections do they enjoy? This essentially land or property law question may be simple but the court's determination has proved to be anything but and the implications of this inquiry are highly significant for the rights owed to guardians and for the potential expansion of property guardianship as an occupation model more broadly. The lease/licence distinction has long been a key battleground in property law (as the next section explores) but, as this article argues, the phenomenon of property guardianship is casting a new spotlight on this well-trodden yet fascinating property law distinction between the powerful, proprietary lease and the less-powerful, personal licence. This article's contribution is to explore how this lease/licence divide plays out in the property guardianship arena and what this might tell us about the future of the sector and potential reform to the regulation of the relationship between landowners and occupiers in the arena of occupational rights.

II. Property Guardianship and the Lease/Licence Distinction

One core legal issue at play in relation to property guardianship will be a familiar to most readers of this journal: the lease/licence distinction which, in the modern law, stems from the seminal judgment of *Street v Mountford*.[18] It is worth briefly reviewing the nature of this crucial distinction. In *Street*, Lord Templeman laid down what is today regarded as the contemporary statement of the elements necessary for the existence of a lease; namely: an agreement that (i) confers exclusive possession of land; (ii) for a certain period or term; (iii) with payment of a rent. If satisfied, in almost every case,[19] a tenancy will arise. Despite articulating three requirements for a lease, in reality, the true essence of the relationship of

Hunter (eds) *Law and the Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (2018, Oxford: Hart), 65-86.

[18] *Street v Mountford* [1985] A.C. 809; [1985] 2 All E.R. 289 on which see A.J. Waite, 'Leases and Licences: The True Distinguishing Test' (1987) 50(2) M.L.R. 226-231; J. Hill, 'Shared Accommodation and Exclusive Possession' (1989) 52(3) M.L.R. 408-419; R. Thornton, 'Shams, Pretences, Subterfuges and Devices' (2001) 60(3) C.L.J. 474 – 477.

[19] There are exceptions where no lease will be found even where these 3 conditions are met: Lord Templeman in *Street* at 821.

landlord and tenant and the key determining feature of a lease distinguishing it from a licence, is the granting of exclusive possession. Thus, under the statutory definition in s.205(1)(xxvii) as confirmed in the Court of Appeal in *Ashburn Anstalt v Arnold*,[20] the payment of a rent was held not to be strictly necessary, and the certainty of term requirement while not removed has been heavily criticised[21] and is generally easily satisfied in most cases thus becoming a largely moot point.[22] Exclusive possession, then, is the critical ingredient of a tenancy which elevates it into an estate in land and thereby differentiates it from a licence which, at best, confers only exclusive occupation and is a personal right. As Millett L.J. noted in *Bruton v London & Quadrant Housing Trust,*[23] *"*the essence of a legal estate is that it binds the whole world, not just the parties to the grant and their successors."[24] Put differently, as Gray and Gray explain, it is the "the twin indicia of assignability of benefit and enforceability of burden"[25] that capture the classic conception of English property law. The most difficult question in the law of leasehold has, however, long been: what does a legal right to exclusive possession actually mean? Most commentators would agree that it is the right to exclude the world at large (including the landlord) from the land which sets apart exclusive *possession* from exclusive *occupation*. Exclusive possession endows the occupier with 'territorial control' or dominion over the land thus conferring the authority to exercise "the rights of an owner

[20] [1989] Ch. 1; [1988]; [1988] 2 All E.R. 147 on which see A.J. Oakley (1988), 'Licences and leases - a return to orthodoxy' [1988] C.L.J. 353-355.

[21] See trenchant criticisms of the rule by the Supreme Court in *Berrisford v Mexfield* [2011] UKSC 52; [2012] 1 A.C. 955; on which see: S. Bright, 'The uncertainty of certainty in leases' (2012) 128 L.Q.R. 337-340; I. Williams, 'The certainty of term requirement in leases: nothing lasts forever' (2015) 74(3) C.L.J. 592-609.

[22] Most agreements contain reference to a fixed period or, at least, a mechanism by which such a period may be calculated.

[23] [2000] 1 A.C. 406; [1999] 3 All E.R. 481.

[24] [1998] Q.B. 834; [1997] 4 All E.R. 970, at 845 per Millett L.J. commenting in the Court of Appeal prior to the case reaching the House of Lords.

[25] K. Gray., S.F. Gray, *Elements of Land Law,* (5th edn, 2008; Oxford), at 108; making reference to the words of Lord Wilberforce in *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175, 1247-1248, HL.

of the land" for the duration of the lease including the right to "keep out strangers and keep out the landlord."[26] The potency of the proprietary lease versus the personal licence derives from its capacity to bind third parties acquiring the land but, crucially, also for its role in determining the extent of protections that occupiers enjoy, with tenants placed in a far more protected position than mere licensees. For the purposes of this article, the lease/licence distinction plays an especially important gatekeeping role in terms of the statutory protections and regulations available to an occupier with, for example, the protections of *inter alia* the Landlord and Tenant Act 1985 applying to leases but not to licences.

In traversing the thorny lease/licence dividing line, since the judgment in *Street*, the court has been alive and astute to detect and frustrate the real possibility of 'shams' or 'pretences' whereby agreements are artificially drafted or expressed to be 'licences' to avoid the trapping of leasehold. As the court explained in *AG Securities v Vaughan*,[27] the court should be on the look-out for dishonest agreements, "whose object is to disguise the grant of a tenancy."[28] The court is prepared to look beyond the labels given to agreements and even behind express terms denouncing tenancy status or actively denying the conferral of exclusive possession.[29] Thus, courts engage in a close examination and construction of any agreement before it to ascertain the 'true bargain' reached between the parties and to assess whether exclusive possession has been granted. As Lord Oliver of Aylmerton explained in *AG Securities v. Vaughan*, the court interrogates "not simply how the arrangement is presented to the outside world in the relevant documentation, but what is the true nature of the arrangement."[30] This is a question of fact which is to be decided in each individual case by reference to all the surrounding circumstances, any negotiations undertaken prior to the grant of the right to occupy the premises, the nature of the land and the mode of occupation by the occupier. Fascinating here is the change in emphasis in the approach the court taken as to

[26] *Street v. Mountford* [1985] A.C. 809 at 816 per Lord Templeman.

[27] *AG Securities v Vaughan* [1990] 1 A.C. 417; [1988] 3 All E.R. 1058.

[28] *AG Securities* at 462.

[29] See, for example, *Aslan v Murphy* [1989] EWCA Civ 2; [1990] 1 W.L.R. 766; S. Bright, 'Beyond Sham and into Pretence' (1991) 11 O.J.L.S. 138.

[30] *AG Securities* at 466.

interpretation of occupation agreements over the last decades. Thus, there has been a shift from a stricter adherence to what the parties expressly agreed (a contract-based approach)[31] to regarding the leases as a status (and favouring a status-based approach to determination); this more status-driven analysis advocated strongly in *Street v Mountford.*[32] The status-based approach perhaps reached it highwater mark in the infamous House of Lords judgment in *Bruton v London & Quadrant Housing Trust*[33] where, a lease was found to exist, based not on how the parties had contracted but after a close examination of the substance of the relationship between the occupier, Mr Bruton, and his 'landlord', London & Quadrant Housing Trust. Thus, despite Quadrant itself only enjoying a licence over the land (and despite the *nemo dat* principle[34]), on the basis of a status approach, the court found exclusive possession to have been granted and Mr Bruton be a tenant (despite Quadrant being itself only a licensee of the property). This lease, since termed the 'non-proprietary' or 'contractual lease', has proved controversial, not least because it appears to be hybrid in nature in that it was held to bind only the immediate landlord and not others such as those with a superior title. In this way, this *Bruton* tenancy lacks the full potency of the classically-conceived leasehold estate; exuding a more contractual flavour. *Bruton* underscores not just the importance of the lease/licence distinction and the prevalence of a status-based approach, but of the continued contestation in the law in this area.

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[31] As engaged in the case of *Somma v Hazelhurst* [1978] 1 W.L.R. 1014; [1978] 2 All E.R. 1011.

[32] On this change of emphasis from contract to status-based approach, see R. Street, 'Coach and Horses Trip Cancelled?: Rent Act Avoidance After Street v Mountford' (1985) 49 Conv. 328.

[33] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406 on which see, amongst others, M. Dixon, 'The non-proprietary lease: the rise of the feudal phoenix,' (2000) 59(1) C.L.J. 25-28; M. Lower, 'The Bruton Tenancy' [2010] Conv. 38; M. Pawlowski, 'The Bruton Tenancy: Clarity or More Confusion?' [2005] Conv 262.; N. Roberts, 'The Bruton Tenancy: A Matter of Relativity' [2012] Conv 87.

[34] The Latin maxim *nemo dat quod non habet* ('no one gives that which he does not have') is traditionally taken to mean that a lease cannot be granted unless the grantor itself holds an estate in land from which to carve out the lease. In Bruton, a lease was found despite the grantor, Quadrant, not enjoying any estate in the land.

With the end of widespread secure tenancies and the demise of the broad rent control regime,[35] it might have been assumed that the significance of the lease/licence distinction had all but vanished as the central controversy (which had nourished the leading cases such as *Street*) – namely dispute as to the application of the Rent Acts which applied only to leases and not licences – was no longer operative. Cases exploring this distinction therefore appeared to peter out in the 1990s. Nevertheless, as cases such as *Bruton* demonstrate, in key respects, the lease/licence divide remains as fundamental as ever.[36] This is especially so as the status of 'lease' brings with it crucial advantages for those found to be tenants including statutory control of the circumstances in which eviction can take place, guaranteed notice periods before eviction is permissible[37] and, vitally, the extent of repairing obligations in particular statutory repair obligations which are owed only to tenants and not to licensees.[38] Equally, deposits provided by occupiers as part of licence agreements are not required to be protected. By contrast, for leases, statutory deposit protection schemes are in place with which landlords must comply.[39]

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[35] Under the Rent Act 1977, all protected tenants had a right to apply for a 'fair rent' to be registered. Once registered, this rent was the only rent that could be charged. The landlord could, however, apply to have it reviewed every two years.

[36] The lease/licence distinction remains crucial in the commercial world where business tenancies attract protection under the Landlord and Tenant Act 1954.

[37] See, for example, the Housing Act 1998 s.21 and the Protection from Eviction Act 1977 ss.3-5.

[38] For example, the obligations on landlords under the Landlord and Tenant Act 1985 ss.11-14 which apply to leases of less than 7 years' duration.

[39] The courts have rejected attempts (for example, by Lord Denning) to elevate the contractual licence to the level of a property interest. That said, licences can, in limited circumstances, enjoy certain extra-contractual significance – though not without controversy. See the right to protect possession in the tort of trespass afforded to licensees in *Manchester Airport plc v Dutton* [2000] Q.B. 133; [1999] 2 All E.R. 675; J. Hill, 'The Proprietary Character of Possession' in E. Cooke (ed.), *Modern Studies in Property Law*, Vol. 1 (Oxford: Hart, 2011).

How, then, does this new emerging phenomenon of property guardianship function legally; and how does it fit into our traditional understanding of the lease/licence divide? In legal terms, property guardianship schemes operate according to a standard pattern. A guardian agency takes a licence from the landowner under which the agency agrees to vet prospective occupiers and selects guardians to live in the empty premises. These guardians occupy the land under what are termed, on their face, temporary 'licence' or 'occupation agreements' and which are expressly drafted so as not to give rise to tenancies. Many guardianship agreements go even further including explicit clauses such as 'This is not a tenancy.' Guardians pay a below average market fee[40] for their occupation; agree to certain occupation conditions set out in their agreements which commonly include references to non-exclusive occupation, permitting unannounced inspections by the agency and giving the guardian agency the right to introduce new guardians to the living space at its own discretion. The precise terms vary from agency to agency but guardians can even be expected to buy their own fire extinguishers, fire blankets, beds and contribute to insurance. The agency ensures the most basic living facilities (bathroom, kitchen) are in place. There is no meaningful security of tenure as in conventional private or social rented leases. Guardian agencies reserve the right to evict guardians on very little notice – often just days or a few weeks' notice. Legally, the guardian's status is precarious. Getting the agency to undertake repairs of the land is often futile and there are severe restrictions on guardians' behaviour such as prohibitions on group gatherings, parties and allowing dependants onto the land.

In short, what we see is that guardianship agreements are constructed and drafted so as to expressly avoid the trappings of leasehold and the advantages that leases bring to tenants and, concomitantly, the obligations and responsibilities that a lease confers on landlords. Today, and despite the seeming unassailability of the authority of *Street v Mountford*, the distinction between leases and licences remains as blurred, contentious and significant as

[40] Leases not made by deed must, of course, under s52(4) LPA 1925 be at a 'at the best rent which can be reasonably obtained without taking a fine' interpreted to mean 'market rent': *Fitzkriston LLP* v *Panayi* [2008] EWCA Civ 283; [2008] 2 WLUK 263. There has been little judicial discussion of 52(4), and equally this issue has yet to be raised as a challenge to property guardianship creating a lease.

ever.[41] The property guardianship sector has breathed new life into the long-standing tussle and dispute as to whether an occupation relationship gives rise to a lease or a licence. In this way, property guardianship shines a new searching spotlight on and provides a new impetus for investigating and assessing the law that governs this dividing line and the resulting protections (or lack thereof) that occupiers enjoy. The next part explores how the courts have engaged this lease/licence analysis in the property guardian context.

III. Property Guardianship: the Approach of the Court

This part explores how the courts have approached the lease/licence distinction in the context of property guardianship. It does so by analysing a quadriptych of recent key cases: *Camelot Guardian Management Ltd v Roynon*;[42] *Camelot Guardian Management Ltd v Khoo;*[43] and the Court of Appeal decisions of *Southwark LBC v Ludgate House Ltd*[44] and most recently *Global 100 Ltd v Laleva.*[45] In all four cases, property guardians occupied land under apparent 'licence agreements' which were expressly drafted to avoid the consequences of creating leases. What this case law examination reveals is an inconsistent, artificial and not altogether convincing or rational approach by the court in navigating the fine lease/licence divide in this context which, as will be argued later, provides the basis for advocating radical reform to occupational rights in English property law.

[41] For a further example, see the recent examination of almshouses and the status of occupational rights: *Watts v Stewart* [2016] EWCA Civ 1247; [2018] Ch. 423.

[42] *Camelot Property Management Ltd v Roynon* unreported 24 February 2017 (CC (Bristol)); a copy of the judgement available here: https://431bj62hscf91kqmgj258yg6-wpengine.netdna-ssl.com/wp-content/uploads/2017/02/CamelotvRoyon.pdf

[43] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB); [2018] 7 WLUK 776 (QBD).

[44] *Southwark LBC v Ludgate House Ltd* [2020] EWCA Civ 1637; [2021] 1 W.L.R. 1750.

[45] *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835; [2021] 12 WLUK 61.

(1) *Camelot Management Ltd v Roynon*[46]

Mr Roynon occupied two rooms in a former, council-owned, elderly persons home in Bristol under what was labelled a 'licence agreement' with Camelot Guardian Management Ltd ('Camelot'). Camelot had itself entered an agreement with Bristol City Council to allow it to place guardians in the empty property. Mr Roynon shared a kitchen, washing and living areas with other guardians. In 2016, Mr Roynon was given notice to quit which would have been valid for a licence but not if the agreement amounted to a lease. Camelot brought possession proceedings to evict Mr Roynon which he resisted. It was accepted between the parties that Mr Roynon's occupation was for a certain period and for a rent thus satisfying two of the three *Street v Mountford* criteria. The central question in issue was, therefore, whether Mr Roynon enjoyed exclusive possession of the land such that he was properly to be regarded as a tenant and not a licensee. Mr Roynon had been provided with keys to two rooms; both of which were lockable (no other guardians had a key) and had his name emblazoned on them. He stayed in these two rooms throughout and did not move. The agreement expressly stated that the agreement was a licence and referred to Camelot's "permission to [allow] share living space." Mr Roynon had chosen the two rooms on his arrival at the property and Camelot emailed the other guardians to inform them of Mr Roynon's occupation. Camelot confirmed in evidence that if any guardian wished to move room, they could facilitate this. The court found that there was a clear understanding that, once a room was chosen by a guardian, it was regarded as 'their room' and a room to which no other guardian had keys or access. Thus, the reality of occupation was quite in contrast to the terms of the "licence agreement" which noted that the guardian had only a shared right, along with the other guardians, to occupy the land. The court noted the express terms in the agreement that sought to limit use of the rooms including a clause requiring the guardians to agree sleeping arrangements between themselves and clauses prohibiting the presence of more than two visitors at any one time, banning overnight guests and any unsupervised visitors. Camelot reserved for itself a right to inspect the property at any time and without giving notice. The evidence before the court was that, in fact, inspections had been largely on 24 hours' notice but occasionally 'without

[46] On which, see D. Whayman, 'Old issues, new incentives, new approach? Property guardians and the lease/licence distinction' (2019) 1 Conv. 47-54.

notice' inspections had taken place albeit with inspectors merely standing in the doorway observing rooms. This inspections regime was not, of itself, incompatible with the finding of exclusive possession. Indeed, in the case of *Street*, occupation of land on terms that "the owner has the right at all times to enter the room to inspect" did not prevent the finding of exclusive possession and ultimately a lease. Again, in *Bruton v London & Quadrant Housing Trust*, similar access was reserved to Quadrant Housing Trusts and was held not to be incompatible with exclusive possession. In *Roynon*, monthly inspections, largely on notice and conducted from the door would not therefore alone negate exclusive possession. Camelot provided no services ('attendances' as they are known such as changing bed linens or emptying bins and historically are an indicator of an absence of exclusive possession),[47] and no Camelot staff were present on the premises. The court concluded that Mr Roynon had been granted exclusive possession of the two rooms though not of the communal areas thus addressing a lacuna in the law left unresolved by the case of *AG Securities v Vaughan* where a question remained as to whether it was possible to have exclusive possession of a single room but not of wider communal areas.[48] The court in *Roynon* answered this question resoundingly in the affirmative. Mr Roynon therefore occupied the two rooms as a tenant under an assured shorthold tenancy.[49]

The court's determination on exclusive possession is extremely benevolent to Mr Roynon and a generous reading and application of the law on exclusive possession. The express clauses of the agreement limiting use of the rooms seemingly strike at the heart of (and arguably defeat) the exclusionary power and territorial control that, traditionally, we are told are the bedrocks of exclusive possession and of a lease. The inability of occupiers to control access to a space (including who visits and when) and, additionally, the right Camelot reserved for itself to inspect without notice, on an orthodox construction of the lease/licence test, should have

[47] For example, *Markou v De Silvaesa* [1986] 2 WLUK 261; (1986) 18 H.L.R. 265 and *Huwyler v Ruddy* [1996] 1 WLUK 221; (1996) 28 H.L.R. 550.

[48] Four occupiers in *AG Securities v Vaughan* were found to be licensees and so the question remained unaddressed until *Roynon*. On *AG Securities*, see C. Harpum, 'Leases, licences, sharing and shams' (1989) 48(1) C.L.J. 19-21.

[49] Assured shorthold tenancies are governed by the Housing Act 1988.

negatived any possibility of exclusive possession arising on the facts. There was, furthermore, no discussion in the judgment of pretences, no insinuation that Camelot had in any way "disguised" a tenancy as a lease and, perhaps strikingly no engagement with the controversial issue of how Camelot (itself a licensee of Bristol City Council) could grant a lease to Mr Roynon when it itself lacked an estate in the land.[50] Despite one's instinctive support for Mr Roynon as the weaker party in the relationship, the findings and approach of the court can be challenged as contrary to orthodoxy. The case sends a warning to guardian agencies and land owners wishing to avail themselves of such a scheme of the risks of walking the narrow dividing line between lease and licence. This narrow line again came before the court in *Camelot Management Ltd v Khoo*.

(2) *Camelot Management Ltd v Khoo*[51]

In a significant judgment, the High Court in *Khoo* was asked to consider an appeal by Mr Khoo of a first instance possession decision that had found his occupation as a property guardian to be under a licence and not under a lease. In 2015, Mr Khoo entered an apparent "licence agreement" with Camelot for occupation of one room (plus use of two storage rooms) in an office building owned by Westminster City Council. There were between 6 and 11 other guardians occupying the remaining space. In September 2017, Camelot served notice to determine Mr Khoo's agreement with just one month's notice. Mr Khoo resisted this arguing he was not a licensee but a tenant and thus entitled to greater protections from eviction. The agreement between Mr Khoo and Camelot had clearly been drafted with a keen eye on avoiding the creation of a lease and in an attempt to see off any future legal challenges.

[50] These issues may not have been raised given the case was heard in the County Court though this alone is no impediment to the arguments being mounted. It is to be assumed that *Roynon* follows the *Bruton* line of reasoning but this was not explored in the judgment.

[51] On which, see J. Meers, 'Khoo do you think you are? Licensees v tenants in the property guardianship sector' (2019) 22(2) *Journal of Housing Law* 24-27; D. Whayman, 'Old issues, new incentives, new approach? Property guardians and the lease/licence distinction' (2019) 1 Conv. 47-54.

Lengthy clauses in the agreement signed by Mr Khoo referred repeatedly to the "licence agreement", to "permission to share living space;" that Mr Khoo, "will not get a right to exclusive possession of any part of the living space," that, "this is not a tenancy," that, "the space will be shared with other individuals who Camelot permits to share," and even included allusion to decided case law: "the House of Lords [in *AG Securities*] has held that this sort of sharing agreement does not create a tenancy." Mr Khoo was prohibited from holding meetings, parties, from permitting anyone to stay overnight, from having more than 2 guests or any unsupervised visitors. Finally, the agreement provided that Mr Khoo must not sleep away from the property for more than 2 nights out of 7 and, should he wish to leave for longer periods, he must seek Camelot's written consent.

Formalistically, it could not have been expressed more plainly that Camelot intended to grant a licence and not a lease. Mr Khoo, however, underscoring that the lease/licence distinction is determined by substance and not simply the form an agreement takes, argued that the reality of his occupation reflected a lease and was counter to the express terms of the agreement. At first instance, the judge found that Mr Khoo did enjoy not just de facto possession but a right to exclusive possession because the agreement provided that he would always have a room available to him that was exclusively his own. Ultimately, however, based on the terms of the agreement pertaining to prohibitions on the use of the space and the requirement to sleep on site, the agreement was held to be a licence. Mr Khoo appealed and Camelot cross-appealed challenging the initial findings on exclusive possession. Butcher J. in the High Court set out, at length, the relevant tests for navigating the lease/licence distinction as expressed in *Street* and interpreted in subsequent case law,[52] noting that the words of the agreement and surrounding circumstances should be construed in a manner "not that different from that of other contracts and the proper approach is that which has been considered by the Supreme Court in *inter alia Arnold v Britton* (2015) UKSC 36…"[53] and that the court would consider whether the agreement amounted to a sham or pretence disguising

[52] *Camelot Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [19] per Butcher J.

[53] *Khoo* at [19] per Butcher J.

the true bargain. Butcher J. noted that a sham device involved a degree of dishonesty and the court should be "slow, but not naively or unrealistically slow, to find dishonesty."[54]

Applying this to Mr Khoo's case, the High Court held that the natural meaning to be given to the terms of the agreement was that it did not grant exclusive possession. This was not a case (such as *Roynon*) where there was exclusive possession of a room but not of the broader communal areas. The agreement conferred shared rights over the whole property and not exclusively to Mr Khoo. All other guardians in the property enjoyed the same terms. The right to share the space with other guardians prevented a finding of tenancy. Equally, the degree of control retained by Camelot as to what Mr Khoo should and should not do were consistent with the agreement being a licence. The agreement contained a clause that "Camelot gives the Guardian permission to share the occupation of the Living Space with such other persons as Camelot may from time to time designate, provided that there is always enough Living Space to provide at least one room for each of the Guardians who are authorised to share the Living Space." The judge at first instance had relied on this to suggest Mr Khoo would have a room exclusively for himself. Butcher J. disagreed, finding that the clause did not grant exclusive possession but simply indicated that Camelot would not place more guardians in the property than there were rooms.[55] Moving beyond construction of the words of the agreement, Butcher J. considered Camelot's website which had used the word "let" (suggesting a lease) but so too did it refer to "property guardianship" as an "alternative, and a more social one, to private rental."[56] Yes, Mr Khoo had indeed been shown a particular room and asked to occupy it but this did not negate the terms of the agreement. Butcher J. went on to consider the nature of property guardianship schemes; noting it was essential to the operation of property guardianship and their commercial purpose that premises are able to be returned to the landowner perhaps at short notice with vacant possession. This commercial purpose and even the continued existence of such schemes, said Butcher J., "depends upon the terms of the contract meaning what they say and not creating a

[54] Butcher J. referencing the words of Neuberger J. in *National Westminster Bank Plc v Jones* [2001] EWCA Civ 1541; [2001] 10 WLUK 612 at [46].

[55] *Khoo* at [24] per Butcher J.

[56] *Khoo* at [26] per Butcher J.

tenancy."[57] This purpose would be undermined by straining construction of the agreement beyond their natural meaning. Despite the judge below suggesting certain clauses in the agreement were "misleading," no findings were made as to sham or pretence. In the High Court, Mr Khoo's case that the agreement was a sham was not made out. Butcher J. found that both parties knew what they were entering into and that the basis for occupation was temporary to protect otherwise vacant premises. This was not a case involving "an air of total unreality"[58] and there was no evidence of dishonesty. Taking both textual and contextual factors into account, the agreement was found not to grant Mr Khoo exclusive possession. The agreement created a licence. The appeal was dismissed.

In certain respects, the decision in *Khoo* might be regarded as a statement of lease/licence orthodoxy. Certainly, Butcher J. found it relatively straightforward to determine that explicitly, temporary occupation of non-residential property under a tightly-drafted agreement amounted to a licence. That said, there is much that is new and interesting in terms of approach to property guardianship in this judgment. What *Khoo* reflects is a far stricter and less generous application of the *Street* criteria than seen in *Roynon* and one which fixates on and champions the parties' freedom to contract as the predominant influencing factor over and above a more status-based approach as seen in *Roynon* and in other case law such as *Bruton*. The pervading sense from the judgment is that Mr Khoo knew or ought to have known into what he was getting himself. In other words, the textual analysis and the agreement itself were given primacy over the discussed, yes, yet quickly dismissed, broader contextual factors. Looking more closely at how the court engaged in contextual analysis in *Khoo*, it is fascinating to see the court underscore the purpose of guardian schemes, their commercial motivation and how this is seen to influence the reading of the agreement and ultimate determination of the lease/licence question. The explicitness of this inquiry is novel and noteworthy to see in the property guardianship jurisprudence. Moreover, the substantial weight the court attached to the need and concern of guardian agencies to ensure they contracted for a licence (and not a tenancy) if only to guarantee the "continued existence" of

[57] *Khoo* at [28] per Butcher J.

[58] *Khoo* at [36] per Butcher J. using the expression of Lord Oliver of Aylmerton in *AG Securities v Vaughan* at 467H.

the sector is stark. Crucially, no equivalent or parallel analysis of Mr Khoo's contextual circumstances, his purpose and reasoning for making use of the property guardianship sector was engaged. Again, this reasoning feeds into and evidences the contract-focused nature of the analysis in this case; the needs of the sector used as a further point to buttress the argument for holding the parties to the precise terms of their agreement. As an example of navigating the lease/licence distinction (post-*Roynon* which adopted a more guardian-friendly approach) *Khoo* swings the pendulum firmly back in favour of guardian agencies.

(3) *Southwark LBC v Ludgate House Ltd*[59]

In *Southwark LBC v Ludgate House Ltd*, the Court of Appeal was called upon to consider an issue pertaining to property guardianship that was discrete from that tackled in *Roynon* and *Khoo* but nonetheless represents a significant judgment on the legal framework of the guardianship business model and operation of the lease/licence distinction in this context. The case concerned a long-running dispute between Southwark LBC and Ludgate Ltd as to the tax bill payable on Ludgate House, a large office block in London. This case tackled head-on a core component of the 'win-win' proposition of property guardianship; namely that installing guardians in a commercial property has the potential to take that property out of non-domestic (commercial) tax rates that would otherwise be levied on the premises.[60] Many guardian agencies use these savings as the central marketing tool to lure landowners to their services. For the owners of Ludgate House, the potential savings were enormous; seeing their tax bill reduced from £2.25million under non-domestic (commercial) rates to just a £60,000 council tax bill with continuous guardian occupation. Ludgate House, a 9 storey office building in London, was occupied by 40-50 guardians while the building awaited redevelopment. The building owner applied to be removed from the non-domestic rates register. Initially successful, Southwark later challenged this and the legal dispute between the parties began.

[59] See J. Meers, 'The "win-win" property guardianship proposition: non-domestic rates liability and the property guardianship model' (2021) 24(2) *Journal of Housing Law*, 36-40.

[60] See J. Meers, 'The "win-win" property guardianship proposition: non-domestic rates liability and the property guardianship model' (2021) 24(2) *Journal of Housing Law*, 36-40.

In short, in *Ludgate*, the Court of Appeal was asked to explore the boundaries of the guardianship business model by interrogating whether the guardians were occupying individual "hereditaments"[61] for rating purposes or whether their occupation did not create individual hereditaments whereupon the building's owners would be liable for the substantial non-domestic rates bill. This decision may sound technical and, in some ways, uninspiring but far from it. Instead, this decision strikes at the very heart of property guardianship schemes and goes to the key question of the legal status of guardian's occupation of land and how the courts navigate this new landscape at the boundaries of landlord and tenant law.

The first instance Valuation Tribunal found in favour of Southwark LBC; holding that it was entitled to charge the building's owners non-domestic (commercial) rates. The Upper Tribunal allowed the building owner's appeal and the matter subsequently reached the Court of Appeal. Determining whether the guardians were occupying on an individual rateable basis required the Court of Appeal to engage in a close analysis and examination of the nature of the guardians' occupation of the land. The classic statement of the ingredients of rateable occupation were laid down by Tucker L.J. in the leading case of *John Laing & Son* [1949] who noted, drawing on dicta of Lord Russell of Killowen in *Westminster City Council v Southern Railway Co Ltd* [1936],[62] that this inquiry turns on the degree of control exercised over the premises by the parties. More precisely, certain requirement must be met:

"First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period."[63]

In the Court of Appeal, assessing whether the guardians occupied on individual rateable basis boiled down to one central issue: "The primary question here is whether the [guardians] are

[61] For rates purposes, hereditament is defined in s64 of the Local Government Finance Act 1988.

[62] [1936] A.C. 511; [1936] 2 All E.R. 322.

[63] *John Laing & Son Ltd v Kingswood Assessment Committee* [1949] 1 K.B. 344; [1949] 1 All E.R. 224.

in actual occupation and exclusive occupation of these particular hereditaments."[64] As to whether the guardians were in "actual occupation and exclusive occupation," the Court of Appeal, drawing on dicta in *Westminster Council v Southern Railway Co* [1936],[65] explored both the purpose of the occupation and the contractual agreement between the parties. While the court in Ludgate was focused chiefly on exploring the question of "exclusive occupation", for present purposes, the proximity of this analysis to the lease/licence test is all too apparent hence the relevance of the court's decision making in *Ludgate* when set in the context of *Roynon* and *Khoo*. Judges have in several decisions used the terms *exclusive occupation* and *exclusive possession* interchangeably.[66] While for a lease to exist under our traditional conception there must be exclusive possession (exclusive occupation alone will not suffice), the boundary between exclusive occupation and exclusive possession can sometimes be a narrow one. This was confirmed recently in *Watts v Stewart:*

"[T]here is a distinction between legal exclusive possession or a legal right of exclusive possession, on the one hand, and a personal right of exclusive occupation, on the other hand … Legal exclusive possession entitles the occupier to exclude all others, including the legal owner, from the property. Exclusive occupation may, or may not, amount to legal possession. If it does, the occupier is a tenant. If it does not, the occupier is not a tenant and occupies in some different capacity."[67]

With this in mind, and the focus of the court in *Ludgate* on exclusive occupation, one may question the relevance of the case to the current discussion. The relevance, it is argued, is two-fold. First, as a leading decision on property guardianship, *Ludgate* provides essential context and insights into how the courts interpret and engage with this novel form of occupational right. Secondly, the discussion of the court as to the guardians' exclusive occupation examines and interrogates many if not all of the very issues that would be

[64] Tucker L.J.'s test replicated in *Ludgate* at [32].

[65] *Westminster Council v Southern Railway Co* [1936] A.C. 511; [1936] 2 All E.R. 322.

[66] See for example *AG Securities v Vaughan; Antoniades v Villiers* [1990] 1 A.C. 417 at 455, 459 per Lord Templeman.

[67] *Watts v Stewart* [2016] EWCA Civ 1247 at [31] per Sir Terence Etherton.

engaged in a discussion of exclusive possession for the purposes of determining the lease/licence divide. The court's approach is therefore both proximate to the lease/licence distinction and, it is contended, informed by it.

Key to the court's approach in *Ludgate* was its focus on examining the purpose of the occupation. The Court of Appeal centred on the nature of property guardianship i.e. that the occupiers' role was expressly to protect and 'guard' the property by offering security to the landowner. Labels such as 'guardian,' "were not chosen at random," noted the court, and reflected the synergetic relationship of guardian and building owner.[68] This view was bolstered by the terms of the licence agreement itself which expressly provided for this 'guardian' function and included a compulsory induction, training programme for occupiers ensuring guardians "understood their responsibilities" to the building owner.[69] On the question of exclusive occupation, the court noted that all guardians had sole access to individual rooms with their own keys. Interestingly, the Upper Tribunal had found, on this basis, that not just exclusive occupation but also exclusive ***possession*** existed in favour of the guardians.[70] This was rejected by the Court of Appeal which noted that routinely licensees such as lodgers or hotel guests are provided with access to a specific room with key but this does not confer exclusive possession.[71] Rather, the court concentrated on the terms of the licence agreement which noted, "several times that a guardian is not being granted exclusive occupation of any part of the building."[72] The agreement contained terms reserving to the guardian agency the right to vary the size and extent of the living space at any time and move guardians to different living spaces. There was also a term stating that, "guardians had no right to occupy any particular room at the Property."[73] This agreement, held the court, could not be read as conferring either exclusive occupation or exclusive possession on the guardians given the clear restrictions placed on the occupation and the control retained by the agency.

[68] *Ludgate* [2020] EWCA Civ 1637 at [71].

[69] *Ludgate* at [71].

[70] *Ludgate House Ltd v Ricketts (VO) & Anor* (RATING – HEREDITAMENT) (2019) UKUT 278 (LC).

[71] *Ludgate* [2020] EWCA Civ 1637 at [72].

[72] *Ludgate* at [73].

[73] *Ludgate* at [18].

The clear purpose of the occupation coupled with the lack of exclusive occupation meant the guardians were not to be regarded as being in individual rateable occupation. The appeal was therefore allowed and the building owner was liable under the more substantial non-domestic (commercial) tax rate.

What, then, is the significance of the decision in *Ludgate*? In so far as the decision indicates a challenge to the practice of avoiding non-domestic (commercial) tax rates, the Court of Appeal in *Ludgate* has undermined a core component of the property guardianship business model. This will be costly especially for larger guardian agencies operating in city-centre buildings and we wait to see how the sector will respond. Beyond the financial ramifications of the judgment, *Ludgate* has something to tell us about the court's treatment of the lease/licence distinction. Both the Upper Tribunal and Court of Appeal engaged closely in an analysis of the nature of the guardians' occupation. The Court of Appeal, echoing the approach taken in *Khoo*, explored the purpose of the guardianship scheme before engaging in a close textual analysis of the "licence agreement". In so doing, *Ludgate* provides another example of the court affording primacy to the terms of the agreement, adopting a largely contract-based approach with emphasis placed on the control retained by the guardian agency. The Court of Appeal rejected the Upper Tribunal's conclusion that the guardians enjoyed exclusive possession; dismissing the important point that guardians enjoyed sole access with a key to particular living spaces in the property; preferring to stick rigidly to the drafted terms of the agreement even if these terms did not match the reality of occupation on the ground. The approach of the Court of Appeal is noteworthy in so far as it contrasts wildly from that of the Upper Tribunal where emphasis was indeed placed on the reality of Mr Khoo's day-to-day occupation (beyond the licence agreement) and mirrored that taken in *Roynon*. Of course, this was an approach from which the Court of Appeal departed. Perhaps more importantly, it can be argued that the decision in *Ludgate* renders visible, "the inherent irony in the Janus-face representation of guardianship occupation."[74] In other words, this case demonstrates how land owners and guardian agencies are trying to 'have it both ways' in arguing, on the one hand, that guardians are licensees only with limited rights and no

[74] J. Meers, 'The "win-win" property guardianship proposition: non-domestic rates liability and the property guardianship model' (2021) 24(2) *Journal of Housing Law* 36.

exclusive possession over their assigned rooms (as also argued in *Roynon* and *Khoo*) yet, when on the issue of tax liability, arguing the polar opposite; namely that each room is a separate, exclusively-occupied unit thus eschewing the higher non-domestic rates of tax. This is a clear attempt by the property guardianship sector to take two bites of the cherry by engaging in cynical and selective framing of guardianship as both 'exclusive' and at the same time also 'non-exclusive' depending on the legal issue before the court. This 'cake and eat it' mentality and argument is surely both logically inconsistent and consequently untenable in principle. It is argued this only serves to highlight the wider inconsistency and problematic nature of deploying the lease/licence distinction in the property guardianship context.

(4) *Global 100 Ltd v Laleva*[75]

Most recently in *Global 100 Ltd v Laleva* (2021), the Court of Appeal for the first time considered directly the issue of the status of guardians.[76] Ms Laleva entered into an agreement with Global 100 described as a "temporary licence agreement" to occupy a room in a former nursing home owned by the NHS. Global 100 itself had entered an agreement with the NHS to supply guardianship services over this property. The NHS subsequently requested that the building back be returned to it and so, in order to deliver vacant possession, Global 100 began possession proceedings against Ms Laleva to have her removed from the land. Ms Laleva defended the proceedings by arguing that she occupied the premises under a tenancy rather than a licence as she enjoyed exclusive possession of a numbered, lockable room in the property for which she paid £92 per week. The Court of Appeal held that Ms Laleva was a licensee and, moreover, that the agreement was not a sham. Echoing the approach in *Ludgate* and relying heavily on the terms of the written agreement between Ms Laleva and Global 100, Lewison L.J. focused on the purpose of the original agreement between the NHS and Global 100 noting that "the purpose of the agreement was set out at its inception,"[77] was clearly designed to enable property guardianship and not leasehold

[75] *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835.

[76] Recall, the Court of Appeal in *Ludgate* was especially concerned with the matter of whether occupation of rooms amounted to occupation of individual hereditaments for tax purposes.

[77] *Laleva* at [42].

arrangements. In Ms Laleva's agreement with Global 100, Ms Laleva was clearly identified as a "guardian" on a weekly licence; the terms made plain that no tenancy was to be granted and her occupation was consistent with the existence of a licence. In addition, under the agreement, Global 100 was entitled to alter the location and extent of the living space. Ms Laleva did not have a right to any specific room and was required to sleep at the property for at least five nights out of seven. She was provided with keys but, in return, was expected to share the property with others "amicably and peacefully." Occupation was described as 'non-exclusive' and the agreement could be terminated on the giving of 28 days' notice. The Court of Appeal also rejected the suggestion that the "licence agreement" was a pretence or a sham designed to disguise or evade the trapping of a lease. As Lewison L.J. explained, there was no sham. To establish a sham it was necessary to establish that both parties shared the intention as to the actual purpose of the agreement.[78] While Ms Laleva may well have had the intention of having a tenancy not a licence, there was no prospect of establishing that G100 shared that intention.[79] This was not a case where there was "an air of total unreality" (the expression used by Lord Oliver in *AG Securities*). There was no shared intention that the arrangement created a lease and neither was there any basis for suggesting that there was any dishonesty on the part of Global 100.[80]

The agreement between the NHS and Global 100 was designed to ensure the land could be handed back to the NHS with minimum ease and with maximum speed. The agreement with Ms Laleva was therefore framed in such as way to deliver this goal.[81] As such, the agreement gave rise to a licence only.

In so far as *Laleva* represents the first, direct exposition of the status of property guardians by the Court of Appeal, the result could not be any starker. The court has championed and prioritised a contractual reading of the agreements of the parties, focusing on a close textual examination of the purpose and terms of the agreements between both the landowner and

[78] *Laleva* at [49].

[79] *Laleva* at [49]-[50].

[80] *Laleva* at [54]-[57].

[81] *Laleva* at [54].

guardian agency and the agency and the guardian. Particular prominence was given to the terms of the agreement "at its inception" as crystallising the essential nature, character and legal status of the relationship of the parties. On this basis, the court delivered a conclusion that was faithful and steadfastly fixed to the explicitly drafted, overarching purpose of the guardianship scheme and, arguably, one that turned away from or de-emphasised the apparent control retained by the guardians 'on the ground.' This approach resonates strongly with that taken in *Khoo* and *Ludgate* where great emphasis was placed on the inherent design of guardianship as a means of delivering (for the landowner) a quick and trouble-free means of ensuring return of the property when needed. On this view, and until the issue is again revisited, *Laleva* appears to sound the death knell for the prospect of property guardians successfully arguing that they occupy property as tenants rather than licensees especially where there are clearly-drafted "licence agreements" whose overarching purpose and terms are plain on their face.

The next part of this article builds on the case law discussion engaged in this section to argue that the example of property guardianship has the potential to reshape the regulatory landscape of occupational rights by exposing how the lease/licence divide obscures the central issue; namely the protections afforded to occupiers.

IV. Property Guardianship: Re-visiting the Lease/Licence Distinction and Re-shaping the Regulatory Landscape of Occupational Rights

When considered together, the four decisions of *Roynon*, *Khoo*, Ludgate and *Laleva* reveal, it is argued, an inconsistency and artificiality in the court's approach to property guardianship and, more particularly, in the court's deployment of the lease/licence distinction. Over 35 years since Lord Templeman in *Street* advocated for a broad, holistic, status-based assessment of the lease/licence dichotomy, the case law on property guardians appears to demonstrate, in key respects, a sharp and unwelcome move backwards; a return to the overtly contract-focused, stricter, textual assessments observed in long-since-discredited cases such as *Somma v Hazelhurst*.[82] Readers will recall in *Street* that the court overruled the

[82] *Somma v Hazelhurst* [1978] 1 W.L.R. 1014; [1978] 2 All E.R. 1011.

decision in *Somma*; Lord Templeman noting he felt the court in *Somma* had been "diverted from the correct inquiries"[83] by failing to robustly look behind the licence agreements to ascertain the true bargain. These same concerns and same practices of over-emphasis on textual matters and the undue ascribing of weight to written agreements survive and seemingly are thriving in the property guardianship jurisprudence as epitomised by the judgments in *Khoo*, *Ludgate* and *Laleva*. If one agrees with the decision in *Roynon* that Mr Roynon was a tenant and not a licensee, for example, it is hard to isolate why the same conclusion would not be reached for Mr Khoo. If the court is prepared to take a more relaxed, flexible and generous interpretation of inspection arrangements (as happened in *Roynon*), why was the same latitude and holism not deployed in *Khoo, Ludgate* or *Laleva* where the parties seemed to enjoy similar access to designated rooms with assigned keys yet exclusive possession was found not to exist?

However one feels as to the merits of the decisions in *Roynon*, *Khoo, Ludgate* and *Laleva*, there is a troubling incongruity, indeterminacy and lack of clarity in the treatment of guardians in this triptych of cases. The inability to draw out consistent lines of reasoning or points of distinction between the cases indicates the artificiality and arbitrariness of the judgments and, it is argued, of the lease/licence distinction itself. The result is that the court's interpretation of the nature of the guardians' occupation is strained as it is seen to bend disproportionately in favour of upholding the strict terms of the parties' agreements. Even in *Roynon* where a lease was ultimately found to exist, there was no discussion of the potential for a sham or pretence in the drafting of the professed "licence agreement." This sense of deference to the terms of the textual agreements is most apparent in *Khoo*, *Ludgate* and *Laleva* where the court's aversion to looking too far beyond 'what was agreed' is all too clear to see. References to the need to examine the 'context' or the 'purpose' of the guardianship scheme are equally one-sided in execution favouring the guardian agency and landowner. For example, in *Khoo*, we can observe this in the court's emphasis on the importance of licences to the "business model" of guardianship and to the "continued existence" of the sector. Similarly in *Ludgate*, the assessment of the "purpose" of the guardians' occupation amounted to little more than further textual analysis of how the guardianship relationship was described

[83] *Street v Mountford* [1985] A.C. 809 825 per Lord Templeman.

in the agreement; great importance being placed on the precise language used ('guardian' as protector of the land) and on what the land owner "had bargained for." Again, in *Laleva*, the central and most potent motivator of the court's reasoning is seen to be the agreement reached 'at the inception' and the needs of the land owner and guardianship sector to recover land quickly and in the most straightforward manner possible. Strikingly, in all four decisions, there is an absence of close attention paid to the wishes, intentions and context of the guardians themselves. If the interests of guardian agencies and the guardianship sector are valid 'context' why are the interests of the guardians not equally relevant context to be examined? Yet they were not addressed in any of the four judgments analysed here. Equally, and especially discernible in *Laleva*, the court has set the bar for establishing a 'sham' extremely high requiring evidence of dishonesty. Arguably, this threshold is too strict and out-of-step with the broader discussion of pretences and identifying the 'true bargain' between the parties as elucidated by Lord Templeman in *Street*. Plainly, these disputes lay bare the vulnerability and precarity of those occupying as guardians and raise broader questions about how occupiers (interpreted in their widest sense) are protected under the law. If the signal from the court is that the express terms of guardian agreements will take precedence in the event of dispute, this may become an invitation or incentive to guardian agencies to insert even more restrictive and controlling terms. Clauses routinely seen in guardianship agreements (such as those vetoing more than 2 guests and prohibitions on guardians leaving the property for more than a handful of nights per week) might be construed as having a sense of unreality about them and appear somewhat removed from that which one would expect of accommodation in the 21st century. While one can, of course, foresee circumstances when such terms might be sincerely drawn up to deter trespassers or squatters, in the main, it seems reasonable to regard these terms as 'technicalities' in the sense that, in most cases, neither party will genuinely intend to enforce them. Anecdotal evidence, for example, indicates that guardian agencies do not monitor the number of guests visiting or leaving their premises. On this view, such terms are surely implanted into guardian agreements chiefly for one reason – to prevent the agreement becoming a lease. This further exposes the arbitrariness and artificiality of the lease/licence distinction which has been allowed to be exploited through shrewd drafting to absolve landlords and landowners of their obligations to occupiers. Once this becomes clear, it is hard to escape the conclusion that all guardian 'licence agreements' might, in one sense, be regarded as pretences albeit working within our

current and flawed lease/licence framework to ensure maximum return and efficacy for the landowner at the expense of the occupier. This interrogation into the pretence of guardianship agreements is one in which the court was unwilling to engage.

What, then, is the consequence of this for our modern conception of the lease/licence distinction and of the regulatory framework governing occupational rights? Put differently, how might analysis of the novel property guardianship phenomenon serve to re-shape and re-focus our thinking about reform to occupational rights and the protections occupiers enjoy? It is contended that an examination of the property guardianship regime as exemplified and interpreted in recent case law reveals that our classic understanding of the lease/licence distinction is not fit for purpose. Just as *Bruton* presented a controversial challenge to the lease/licence approach, so too, it is argued, does property guardianship and perhaps even more profoundly. Under our current law, given so much rides on whether an occupation arrangement gives rise to a lease or a licence and, moreover, given the great lengths that guardian agencies go to in order to avoid any and all trappings of a lease, a more consistent, predictable and certain approach is needed – one that jettisons the lease/licence distinction altogether. This lease/licence distinction, hitherto unassailable, no longer provides a suitable framework for governing occupational rights in the 21st century as the example of property guardianship amply demonstrates. Something new and a break from this sharp yet inconsistently and unpredictable lease/licence divide is required. The current guardianship proposition is designed almost exclusively to the benefit of just one party to the bargain: the landowner. What the property guardianship cases show is how the lease/licence distinction is being manipulated and stretched in an attempt to accommodate this new form of occupational right but has been exposed as wanting. The time has come to rethink the legal landscape for occupational rights and to reform the law to avoid the arbitrary decisions reached by the court. Property guardianship provides the impetus for this change in the law and for discarding of the lease/licence distinction which simply obscures the wider and vital issues around reforming regulation of occupational rights.

Fortunately, one need not look too far for a workable suggestion for tenure reform that would offer greater security to many currently occupying premises including those occupying as

guardians. The example of reform in Wales[84] provides an effective, more transparent, protective and legally defensible approach to occupational rights than the haphazard, incoherent and indeterminate approach founded on the lease/licence distinction. In May 2006 the Law Commission published its report, *Renting Homes*,[85] proposing a radical restructuring of the law under which the current wide range of different statutory and common law tenancies and licences would be replaced by just two new forms of rental contract: the 'standard occupational contract' and the 'secure occupational contract.'[86] These reforms were not taken forward in England but were adopted in Wales and legislated for in the Renting Homes (Wales) Act 2016.[87]

Once in force,[88] a new legal structure for occupational rights in Wales will be in place. The new framework for occupational rights is designed with simplification, increased comprehensibility of rights and obligations in mind and is aimed at promoting fairness and flexibility through use of 'occupational contracts.' Subject to a number of exceptions, under s7 of the 2016 Act, irrespective of whether an arrangement is a tenancy or a licence, it will also, additionally constitute an 'occupation contract' if the arrangement is made between a landlord and an individual, confers a right to occupy and rent or other consideration is payable.[89] Most relevant for the purposes of this article, licences to occupy premises as a

[84] Issues of housing such as renting homes is a devolved matter in Wales.

[85] Law Commission Report No. 297.

[86] The standard occupational contract would operate in the private sector; the secure occupational contract in the local authority sector.

[87] For a discussion of the changes brought by the 2016 Act, see M. Partington, 'Wales' housing law revolution: an overview Part 1 (2016) 19(2) *Journal of Housing Law*, 33-37; M. Partington, 'Wales' housing law (r)evolution: an overview: Part 2' (2016) 19(3) *Journal of Housing Law* 45-50; S. Skerratt-Williams, 'A comparison of residential tenancies in England and Wales' (2016) 20(4) *Landlord & Tenant Review* 137-142; Shelter Cymru briefing on the changes to occupation rights in Wales under the 2016 Act: https://sheltercymru.org.uk/get-advice/renting/the-renting-homes-wales-act-2016/.

[88] At the time of writing, the 2016 Act is expected to come into force in July 2022 in Wales.

[89] See s7(1)-(2) of the Renting Homes (Wales) Act 2016.

home will be covered by the new regime and as 'occupation contracts' will automatically contain standard terms guaranteeing occupiers rights on repairs, fitness for human habitation and controls over when and how the contract can be brought to an end. As to the benefits this change will bring, every occupational contract must include a statement of the rights and responsibilities of both sides to the contract; there will be an extended minimum notice period (enlarged to 6 months) that must be given before an occupier (known as a 'contract holder') can be evicted under 'no fault' grounds providing significantly greater protection than is presently the case; notice of eviction will not be possible until at least 6 months' after the contract has started and cannot be given unless certain obligations including licensing of premises and deposit protection rules have been met. There will also be increased obligations on repairs. Properties subject to an occupation contract must be fit for human habitation throughout the life of the contract; the structure and exterior of the property must be kept in repair, water, gas, electricity and sanitation provision maintained in proper working order.[90] No contract-holder can be evicted for complaining about the condition of the property (i.e. so-called retaliatory evictions) and, finally, contract-holders will be covered by deposit protection schemes (as is currently the case for tenants). For all intents and purposes, this new Welsh framework will therefore, for almost all practical purposes, erode the distinction that presently exists between leases and licences.[91] This will, in essence, automatically extend the protections enjoyed by tenants to those who today are occupying under a licence. As a result, much of the most acrimonious tussling and wrangling as to whether occupation is under a lease or a licence will be averted.

Were a similar approach to be adopted in England to that in Wales, this would mark a significant change to tenure not just legalistically but perhaps also psychologically as the rental sector would be forced to adapt to this novel legal landscape. However, this change would ensure a level playing field for those with occupational rights, offering greater

[90] Mirroring the language of s11 of the Landlord and Tenant Act 1985 which implies into short residential leases a repairing obligation on landlords.

[91] There may be certain, rare instances where the lease/licence remains relevant, for example, s.156 makes clear that an occupation contract ends on the death of the landlord, but only when the underpinning relationship is a licence, not a lease.

protections and clarity as to rights and responsibilities of both parties and, subject to the precise drafting of the legislation, could be designed so as to capture most if not all property guardians currently occupying land under 'licence agreements.' The introduction of occupational contracts in England would address many of the challenges and respond to many of the problems identified in this article in relation to property guardianship. The use of standard terms around eviction, repairs and other obligations would provide necessary clarity and deliver equity for landowners and occupiers and, simultaneously, remove the heated and at times indefensible decision-making as to the narrow and artificial dividing line between leases and licences.[92]

V. Conclusion

Stuart Bridge evocatively described the lease as "a somewhat amphibious concept."[93] Certainly, determining the crucial dividing line between leases and licences in property law has proved to be especially slippery with the courts' attempting to delimit the boundaries of this fine yet loaded distinction for several decades. Today, as this article has argued, the growing phenomenon of property guardianship has served to both reignite the lease/licence debate but also to challenge our traditional understanding of where the divide is drawn and question the continued value of maintaining this distinction. Through analysis of a quadriptych of property guardianship cases, *Roynon*, *Khoo*, *Ludgate* and *Laleva*, it has been argued that the court's attempts to shoehorn property guardianship into our lease/licence dichotomy have resulted in inconsistency, artificiality and a failure to give equal weight to the interests of landowners and protections for occupiers. This case law examination has been deployed as the impetus for thinking again about how occupational rights are accommodated in English property law and the regulatory regime that governs occupational rights. In summary, it has been argued that property guardianship highlights the deficiencies of the current law and acts as an impetus for change; that the lease/licence distinction should be

[92] For a discussion of alternative proposals for reform see, amongst others, M. Pawlowski, 'Occupational rights in leasehold law: time for rationalisation? [2002] Conv. 550-559.

[93] S. Bridge, 'Leases – contract, property and status' in L. Tee (ed.) *Land Law* (2002: Willan), 98.

jettisoned and England should follow Wales in adopting the 'occupational contracts' model in place of our existing residential tenancies and occupational licence framework. In so doing, important benefits would accrue to both landowners and occupiers and the problems associated with navigating the slender and vexed distinction between leases and licences would be obviated.