Property Guardianship: The New Battleground for the Lease/Licence Distinction in English Property Law

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Introduction

With the end of widespread secure tenancies and the demise of the broad rent control regime,[1] it might have been assumed that the significance of the lease/licence distinction had all but vanished as a central controversy in modern property law. Nevertheless, in key respects, the lease/licence divide remains as fundamental and thorny an issue as ever.[2] As is well-rehearsed, the lease/licence distinction matters because the status of 'lease' brings with it crucial advantages for those found to be tenants including statutory controls on eviction, guaranteed notice periods[3] and, vitally, the range of repairing obligations in particular statutory repair obligations which are owed only to tenants and not to licensees.[4] Property guardianship, it is argued, represents the new battleground for the legal/licence distinction. It describes the situation in which people move into vacant commercial or residential property to live as occupiers in return for a fee, providing security to the landowner of the property against squatters or damage whilst paying less than standard market rent in an otherwise increasingly expensive rental sector. Relatively little is known about property

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[1] 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.

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

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

[4] 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.

guardianship in the UK and scholarship is limited. This chapter offers an examination of a quadriptych of recent property guardianship cases: *Camelot Management Ltd v Roynon,*[5] *Camelot Management Ltd v Khoo,*[6] *Southwark LBC v Ludgate House Ltd,*[7] and the recent case Court of Appeal decision of *Global 100 Ltd v Laleva*.[8] In so doing, it is argued that the property guardianship jurisprudence raises new and important questions and has become a new frontline in the modern law of the lease/licence distinction; laying bare the inadequacy of the existing approach to the lease/licence divide and the inadequacy of the regulatory landscape for occupational rights in England.

What is 'Property Guardianship'?

Property guardianship[9] found provenance in the Netherlands where the practice of 'antikraak' ('anti-squatting') developed in the 1980s but saw a sizeable step up in popularity

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

[6] 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.

[7] 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.

[8] *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835, [2022] 1 W.L.R. 1046.

[9] 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]; 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

in light of the criminalisation of squatting in the country in 2010. Property guardianship arrived in the UK just over a decade ago but is now expanding across all parts of the country. Property guardianship reflects a simple proposition: 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.

From a distinctly, property law perspective, however, how does property guardianship 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 and agrees to select guardians to live in the empty premises 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 agree to certain occupation conditions set out in their agreements which commonly include references to non-exclusive occupation, permitting unannounced inspections by the agency; giving the guardian agency the right to introduce new guardians to the living space at its own discretion and eviction on very little notice. 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. The property guardianship sector has therefore breathed new life into the long-standing tussle as to whether an occupation relationship gives rise to a lease or a licence and, in this way, shines a new searching spotlight on and provides a new impetus for investigating and assessing the law that governs this significant legal dividing line between the powerful, proprietary lease and the less-powerful, personal licence.

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

Traversing the Lease/Licence Distinction: From Objectivity to Subjectivity and Back Again

The lease/licence distinction, in its modern incarnation, stems from the seminal judgment of Lord Templeman in *Street v Mountford*[10] which today is still recognised as the contemporary statement of the ingredients necessary for the existence of a lease.[11] The true, beating heart and the key decisive feature of a lease distinguishing it from a licence is of course the grant of *exclusive possession* but determining whether it has been granted on a set of facts has logn proved to be the most vexed issue and the source of much litigation. So, what is the appropriate 'test' to be deployed by the courts in discriminating the lease/licence dividing line?

In answering this question, what has emerged is a judicial oscillation between an objective, 'status-based' approach and, alternatively, a subjective, 'freedom to contract' or contract-based approach. The objective, 'status' approach to determining the lease/licence distinction focuses on identification of the 'reality' of the entitlement conferred by the agreement rather than the form of that agreement. Here, the court is fixed on the substance and 'status' of the occupation and whether, materially and in practice, exclusive possession has been granted rather than being guided by the terms of the agreement itself. Howsoever the parties choose to define their agreement, the court will find a lease if, on the ground, exclusive possession was conferred. In contrast, the subjective, 'freedom to contract' approach determines the lease/licence distinction by focusing on the intentions of the parties as expressed in the terms of their agreement. If the parties have defined their arrangement as a 'licence' this is what it will have been created even where the wider context would indicate a lease.

These two competing approaches have been deployed, rejected and re-deployed by the courts at different times in our history of property law. Initially, the courts espoused the objective approach as best captured by the case of *Facchini v Bryson*,[12] in refusing to permit landowners' evasion of the Rent Acts by drafting occupation agreements expressly as

[10] *Street v Mountford* [1985] A.C. 809, [1985] 2 W.L.R. 877.

[11] See also the statutory definition of leasehold in s.205(1)(xxvii) of the LPA 1925.

[12] *Facchini* v *Bryson* [1952] 1 T.L.R. 1386, [1952] 4 WLUK 24.

licences. In *Facchini*, an agreement expressly stated to be a 'licence' and containing a clause that, 'nothing in this agreement shall be construed to create a tenancy' nevertheless, on an objective, status-based interpretation by the courts gave rise to a tenancy.[13]

Across a succession of cases in the 1970s, the courts rejected the objective approach and instead engaged a subjective, contract-focused test which gave primacy to the intentions of the parties, the express terms of the agreements and emphasised the parties' freedom to contract as opposed to an objective inquiry. In sharp juxtaposition to *Facchini*, the courts under this subjective approach, prioritised the terms agreed by the parties. The infamous, highwater mark of this approach was *Somma v Hazelhurst*[14] in which separate so-called 'licence agreements' to occupy a double-bed sitting room (of only 22ft by 18ft) were found to be two separate licences. No tenancy existed despite the clear evidence that the agreements had been framed to avoid Rent Act controls. The court engaged a contract-based, subjective, 'freedom to contract' methodology whereby what the parties had agreed was upheld as reflecting the 'intentions' of the parties despite the indisputable unreality of this on the ground. There was, said the court, no reason to unpick the bargain the parties had knowingly created.[15]

In 1985, in *Street*, the prominence of the subjective, 'contractual' approach, so dominant in the 1970s case law, was renounced and the objective, 'status' approach again restored and reasserted by the House of Lords.[16] Lord Templeman, adopting an objective, status approach held that if the requirements were met, a tenancy would be found irrespective of how the parties labelled their arrangement, famously noting that, '[T]the parties cannot alter the effect of the agreement by insisting that they only created a licence… the manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer,

[13] Ibid at 1389–1390 per Lord Denning.

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

[15] *Somma* at 1025 per Cumming-Bruce L.J.

[16] 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.

unfamiliar with the English language, insists that he intended to make and has made a spade.'[17]

The *Street* reinstallation of the objective test was affirmed in the later decision of *Antoniades v Villiers*[18] where Lord Templeman explained that, 'an express statement of intention is not decisive and … the court must pay attention to …. what people do as well as to what people say'[19] and has also found favour in Australia.[20] This objective approach perhaps reached its zenith (or certainly its most extreme expression) in the infamous House of Lords judgment in *Bruton v London & Quadrant Housing Trust*[21] - though, of course, *Bruton* was a somewhat unusual case in that the finding was of a contractual, *non-proprietary* lease. In *Bruton*, a tenancy 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 – and in circumstances where Quadrant itself only enjoyed a licence over the land (and despite the *nemo dat* principle). The authorities of *Street* and *Bruton* had largely been seen as having consigned the subjective, freedom to contract approach to the history books never to be revived. Yet, as will be explored in the sections that follow, in the new battleground of property guardianship, we are seeing the re-emergence of an increasingly subjective, contract-biased approach.

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[17] Ibid at 819.

[18] See also *Rochester Poster Services Ltd v Dartford BC* (1991) 63 P. & C.R. 88, [1991] 7 WLUK 327.

[19] *Rochester Poster Services Ltd* at 464.

[20] See, for example the comments of Windeyer J in *Radaich v Smith* (1959) 101 C.L.R. 209, [1961] 1 WLUK 18.

[21] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406, [1999] 3 W.L.R. 150 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.

The Fledgling and Evolving Property Guardian Jurisprudence: Re-emergence of Subjectivity

This part explores the approach of the court to the lease/licence distinction in the budding property guardianship jurisprudence through analysis of a quadriptych of recent key cases: *Camelot Guardian Management Ltd v Roynon*;[22] *Camelot Guardian Management Ltd v Khoo;*[23] and the Court of Appeal decisions of *Southwark LBC v Ludgate House Ltd*[24] and most recently *Global 100 Ltd v Laleva.*[25] In all four decisions, property guardians occupied land under so-called 'licence agreements' which were explicitly drafted to avoid the consequences of leasehold. It is contended that the evolving property guardianship jurisprudence exposes the unsuitability and inaptness of the lease/licence question in the field of contemporary occupation rights, the ongoing tensions within the 'test' for navigating this distinction and, crucially, reveals that, where one might expect to see a strongly objective approach (as endorsed by *Street*), there are indications of a re-emergence of an increasingly subjective, contract-dominant, contract-biased approach.

(1) *Camelot Management Ltd v Roynon*[26]

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

[22] *Camelot Property Management Ltd v Roynon* unreported 24 February 2017 (CC (Bristol)).

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

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

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

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

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 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. Camelot provided no services or 'attendances' and no 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.[27] The court in *Roynon* answered this question resoundingly in the

[27] Four occupiers in *AG Securities v Vaughan* were found to be licensees and so the question remained unaddressed until *Roynon*.

affirmative. Mr Roynon therefore occupied the two rooms as a tenant under an assured shorthold tenancy.[28]

The court's determination on exclusive possession was extremely benevolent to Mr Roynon and reflects a generous reading and application of the law on exclusive possession. The express clauses of the agreement limiting use of the rooms seemingly (and deliberately) struck at the heart of (and defeated) 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 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 licence 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.[29] Despite one's instinctive support for Mr Roynon as the weaker party in the relationship, the findings and approach of the court could be challenged as contrary to orthodoxy. The case sent 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*[30]

In 2015, Mr Khoo entered an apparent 'licence agreement' with Camelot for occupation of one room in an office building owned by Westminster City Council. In September 2017, Camelot served notice to determine Mr Khoo's agreement with just one month's notice. Mr

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

[29] It is to be assumed that *Roynon* follows the *Bruton* line of reasoning, but this was not explored in the judgment.

[30] 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.

Khoo resisted this arguing he was not a licensee but a tenant. Lengthy clauses in the 'licence agreement' signed by Mr Khoo referred to 'permission to share living space;' that Mr Khoo, would '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 unsupervised visitors and from sleeping away from the property without permission for more than 2 nights out of 7.

At first instance, the judge found that Mr Khoo was a licensee. 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,[31] 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…'[32] and that the court would consider whether the agreement amounted to a sham or pretence disguising 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.'[33]

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

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

[32] Ibid.

[33] 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].

as to what Mr Khoo should and should not do were consistent with the agreement being a licence. 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.'[34] 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. Instructively, Butcher J. went on to consider the nature of property guardianship schemes more broadly; 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; that this commercial purpose and even the continued existence of such schemes, 'depends upon the terms of the contract meaning what they say and not creating a tenancy.'[35] This purpose would be undermined by straining construction of the agreement beyond its natural meaning. This was not a case involving 'an air of total unreality'[36] and there was no evidence of dishonesty. Adopting an approach with clear echoes of the old, contract-focused, subjective approach rejected in *Street*, the court in *Khoo* therefore championed the primacy of the contractual terms between the parties. The agreement created a licence.

On one view, the decision in *Khoo* might be regarded as a statement of lease/licence orthodoxy. That said, there is much that is new and interesting in terms of the approach to property guardianship in this judgment. *Khoo* reflects 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 and, once signed, would be held to the agreement – the court ought not to look too hard behind the terms agreed. In other words, the textual analysis and the agreement itself were given primacy over the discussed, yes, yet quickly dismissed, broader

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

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

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

contextual factors. This overtly contract-biased, 'freedom to contract' interpretation of the lease/licence distinction is quite some distance from the objective, status-based methodology advocated by Templeman in *Street*; reflecting a turn back, a reversion to an approach redolent of that engaged in *Somma v Hazelhurst*.

It is fascinating to see how the court underscored the purpose of guardian schemes, their commercial motivation and how this is seen to influence and add even greater weight to the close, textual reading of the agreement and 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) to guarantee the 'continued existence' of 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 tool to buttress the argument for holding the parties strictly to the precise terms agreed. As an example of navigating the lease/licence distinction (post-*Roynon* which adopted a more guardian-friendly, objective approach) *Khoo* swings the pendulum firmly back in favour of guardian agencies and arguably to an approach not seen since *Somma* in espousing a distinctly subjective, freedom to contract lease/licence test.

(3) *Southwark LBC v Ludgate House Ltd*[37]

Southwark LBC v Ludgate House Ltd 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. For the owners of Ludgate House, the potential savings were enormous;

[37] 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.

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. 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'[38] 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.

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. For the Court of Appeal, 'the primary question [was] whether the [guardians] are in actual occupation and exclusive occupation of these particular hereditaments.'[39] As to whether the guardians were in 'actual occupation and exclusive occupation,' drawing on dicta in *Westminster Council v Southern Railway Co*, the court 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.[40] Whilst for a lease to exist under our traditional conception there must be exclusive possession (exclusive occupation alone will not suffice), the boundary between

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

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

[40] See for example *AG Securities v Vaughan; Antoniades v Villiers* at 455, 459 per Lord Templeman.

exclusive occupation and exclusive possession can sometimes be a narrow one as confirmed recently in *Watts v Stewart.*[41]

With 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 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 emphasis on examining the purpose of the occupation; centring 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.[42] 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.[43] 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 that exclusive ***possession*** existed in favour of the guardians.[44] 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

[41] *Watts v Stewart* at [31] per Sir Terence Etherton.

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

[43] *Ludgate* at [71].

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

possession.[45] 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.'[46] 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.'[47] 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. 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.

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 but beyond the financial ramifications of the judgment, *Ludgate* has something to tell us about the court's treatment of the lease/licence distinction. 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 with that of the Upper Tribunal where emphasis, under a more objective, status-based analysis, was indeed placed on the reality of

[45] *Ludgate* at [72].

[46] *Ludgate* at [73].

[47] *Ludgate* at [18].

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; seemingly following a similar subjective leaning as evidenced in *Khoo*.

(4) *Global 100 Ltd v Laleva*

Most recently in *Global 100 Ltd v Laleva*, and for the first time, the Court of Appeal considered directly the issue of the status of property guardians. In 2016, NHS Property Services entered into a written agreement with Global Guardians Management Ltd (GGM) for the provision of guardian services over a secure building the NHS owned to secure it against squatters, vandals and dereliction. GGM subsequently entered an inter-company agreement with Global 100 under which Global 100 was to select people to share occupation of the property as guardians. Ms Laleva entered into a 'temporary licence agreement' with Global 100 to occupy a room in the NHS-owned property - former accommodation for nursing staff and used latterly as office space. The NHS subsequently requested that the building be returned to it and so Global 100 began possession proceedings against Ms Laleva. Ms Laleva defended the proceedings on several grounds, principally, by arguing (1) that she occupied the premises under a tenancy rather than a licence and enjoyed protection from eviction; and (2) that Global 100 did not itself enjoy a sufficient proprietary interest over the land to bring possession proceedings in the first place.

On the lease/licence aspect, Ms Laleva argued she was a tenant enjoying 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 that the agreement was not a sham. Echoing the subjective approach adopted in *Khoo* and *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 that original agreement between the NHS and Global 100 noting that 'the purpose of the agreement was set out at its inception,'[48] and was clearly designed to enable property guardianship and not leasehold arrangements. The agreement clearly identified Ms Laleva as a 'guardian' on a weekly licence; the terms made plain that no tenancy was to be granted and

[48] *Laleva* at [42].

her occupation was consistent with the existence of a licence. In addition, 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 sham designed to disguise or evade the trapping of a lease.[49] While Ms Laleva may well have had the intention of creating a tenancy and not a licence, there was no prospect of establishing that G100 shared that intention.[50] This was not a case where there was 'an air of total unreality' and there was no basis for establishing dishonesty on the part of Global 100.[51] The court held that the agreement was designed to ensure the land could be handed back to the NHS with minimum ease, with maximum speed and was framed in such a way to deliver this goal.[52] The agreement created a licence only.

The Court of Appeal then turned to consider the next issue: namely, whether Global 100 was entitled to a possession order or, as Ms Laleva contended, Global 100 did not have sufficient standing to bring possession proceedings and an order should be refused.[53] Case law had been put before the Court of Appeal (and before the lower courts) that established that possession proceedings could be initiated and possession orders made where the party applying had only a licence over the land (as was the case for Global 100). Counsel for Ms Laleva argued that these cases were wrong 'as a matter of principle, logic, history, statute and authority;'[54] that only someone with a possessory interest (i.e., a tenant and not a licensee) was entitled to bring an action for possession, that the remedies of licensees lay only in contract law and that this was explained by the historical development of the old action of

[49] *Laleva* at [49].

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

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

[52] *Laleva* at [54].

[53] See *Laleva* at [58]-[82].

[54] *Laleva* at [59].

ejectment which applied only to tenants. As Global 100 did not have a possessory interest in the land Ms Laleva had occupied, it was not, so the argument went, entitled to bring a possession action. Lewison LJ held, however, that he did not need to engage directly with these historical points of legal precedent as, on the facts, the matter could be determined by reference to principles of estoppel which 'had been settled for centuries.'[55] There were, held the Court of Appeal, two grounds on which Ms Laleva's argument failed. First, Global 100 had been granted a right to possession in its agreement with GGM for the purposes of bringing claims for possession against guardians to whom it had granted licences. Even if that was not effective as at the date of the inter-company agreement between GGM and G100, GGM subsequently acquired a right to possession granted by NHS Property Services (the owner of the land). As at the date of the inter-company arrangement, G100 would have been estopped from challenging GGM's title to grant it that right, and the subsequent grant of that right by NHS Property Services would have fed the estoppel.'[56]

Secondly, and independently, it was 'clear' from decided case law, that the principle of estoppel as between landlord and tenant applied equally to a licence of land as between licensor and licensee and did not depend on the existence of any possessory interest in the land. The case law established that occupying licensees could be estopped from challenging a licensor's claim to possession.[57] No reliance should therefore be placed, said the court, on the fact that there was 'a property owner in the background' (i.e., the NHS) as this was 'not a relevant question' and did not 'tell you anything about the interest … Global 100 had.'[58] When Ms Laleva was granted the licence to occupy the land, Global 100 was in control of the land, it selected the occupiers and managed the property. The nature of its right to do so was 'irrelevant to the position as between it and Ms Laleva.'[59]

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[55] Ibid.

[56] *Laleva* at [64].

[57] *Laleva* at [68]-[76] per Lewison LJ citing *Government of the State of Penang v Oon* [1972] AC 425, 433 per Lord Cross of Chelsea and *Terrunanse v Terrunanse* [1968] AC 1086 at 1092 per Lord Devlin and *Doe d Johnson v Baytup* (1835) 3 Ad & El 188.

[58] *Laleva* at [77].

[59] Ibid.

An estoppel therefore arose meaning that whether Global 100 had or did not have a possessory interest in the land made no difference.[60] Ms Laleva 'enjoyed everything that the licence purported to grant her' and so was now required to 'perform her part of the bargain by leaving the Property'.[61]

How, then, are we to interpret the court's approach in *Laleva*? 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 plainer. The court has promoted 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 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 to and steadfastly fixed on 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 a subjective 'test' for determining the lease/licence distinction and is consistent with the approach taken *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 principal purpose and terms are plain on their face. Taken together, the property guardianship case law (*Roynon* excepted), indicates a step back from the *Street*-endorsed objective, status-based analysis of the lease/licence question to a tougher, closer contractual reading and subjective, contract-biased approach reminiscent of the 1970s case law.

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[60] *Laleva* at [79].

[61] *Laleva* at [80].

In relation to the matter of whether Global 100 had the standing to bring possession proceedings, the court chose to answer this question by invoking the principles of estoppel and, it must be said, in a similar (and controversial) manner to that applied, and arguably, misapplied in the case of *Bruton*. Just as in *Bruton*, where Lord Hoffmann memorably noted that it was the tenancy that gave rise to the estoppel and not the reverse, so too in *Laleva* do we encounter another example of estoppel being called in aid to justify a particular (perhaps policy) outcome. Though strictly outside the scope of this chapter, it might be said that similar violence is done to estoppel orthodoxy in *Laleva* and, though not directly analogous, the estoppel discussion in *Laleva* resurfaces and reignites the well-trammelled uneasiness about the apparent flexibility and discretionary boundaries of estoppel principles.[62]

The final part of this chapter 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.

Conclusion: Property Guardianship as the Touchpaper for Reform to Occupational Rights in England

Over 35 years since Lord Templeman in *Street* advocated for a broad, holistic, objective, status-based assessment of the lease/licence dichotomy, the emerging case law on property guardians appears to demonstrate a sharp and unwelcome move backwards; a retrograde step or return to the overtly subjective, almost exclusively contract-focused, stricter, textual readings observed in long-since-discredited cases such as *Somma v Hazelhurst*. As this chapter has argued, the long-rejected practices of over-emphasis on textual matters and ascribing of overwhelming weight to written agreements survives and seemingly is re-emerging and

[62] On *Bruton* and its controversy, see amongst others: D. Rook, 'Whether a Licence Agreement Is a Lease: The Irrelevance of the Grantor's Lack of Title' [1999] Conv 517; S. Bright, 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7; M. Dixon, 'The Non-Proprietary Lease: The Rise of the Feudal Phoenix' (2000) 59 CLJ 25; J. Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting Bruton v London & Quadrant Housing Trust' [2005] Conv 114.

flourishing in the property guardianship jurisprudence as exemplified by the court judgments of *Khoo*, *Ludgate* and *Laleva*. What this chapter has revealed is that the guardianship cases reflect a judicial over-deference to the terms of the textual agreements and an antipathy to looking too far beyond 'what was agreed.' Any reference to the need to examine the 'context' or the 'purpose' of the guardianship scheme are equally one-sided in effect favouring the guardian agency and landowner. Thus, in *Khoo*, the court emphasised the importance of licences to the 'business model' of guardianship and to the 'continued existence' of the sector; using this analysis to reiterate the need to stick rigidly to the terms (and labels) of the agreement. Correspondingly in *Ludgate*, the assessment of the 'purpose' of the guardians' occupation consisted of little more than textual analysis of how the guardianship relationship was defined in the precise terms of the agreement; great significance attaching to the exact language used (e.g., 'guardian' as protector of the property) and to that which the landowner 'had bargained for.' Moreover, in *Laleva*, the core and most powerful driver of the court's approach was seen to be the agreement reached 'at the inception' and the needs of the landowner and guardianship sector to reclaim possession of the land speedily and in the most straightforward way. Conspicuous for its absence, in all four guardianship decisions, is the lack of attention paid to the wishes, intentions and context of the property guardians themselves. If the concerns for the interests of guardian agencies and the guardianship sector business model are valid 'context' why is the same not true of the interests of the guardians themselves? In so far as we can observe an apparent retreat back to the previously renounced subjective 'test' and 'freedom of contract' approach, in this way it is argued that analysis of the property guardianship jurisprudence renders visible the unsuitability and incongruity of the lease/licence distinction to the context of this new occupational form and the overall weakness of the regulatory framework for occupational rights in England. The fledgling property guardianship jurisprudence exposes the vulnerability and precarity of those occupying as guardians and ignites more fundamental questions about how occupiers are protected under the law. If the signal from the courts is that the express terms of guardian agreements will take precedence in the event of dispute, this may well become an invitation or incentive to guardian agencies to insert even more restrictive and controlling terms. Vitally, anecdotal evidence from the sector indicates that many of the strict terms contained within guardian agreements such as limits on the number of guests guardians can welcome are merely inserted as 'technicalities' (or, to put it less benignly, contrivances) which are never

genuinely engaged or enforced. On this view, such terms are surely implanted into guardian agreements chiefly for one reason – to avoid the inevitable trappings of leasehold. This is surely untenable and further exposes the arbitrariness and artificiality of the operation of the lease/licence distinction in the guardianship context which has been allowed to be exploited through shrewd drafting to absolve landlords and landowners of their obligations to occupiers. In an era of Rent Acts, the need for rigorous adherence to the lease/licence binary was more defensible. Yet, today, through analysis of these four guardianship cases, we must begin to question the continued fitness for purpose of this lease/licence distinction to protect occupiers. It can be argued that the lease/licence distinction, hitherto unassailable, no longer provides an effective or defensible framework for governing occupational rights in the 21st century as the power imbalance demonstrated between landowners, guardian agencies and guardians so sharply illustrates. The case law analysis in this chapter can be seen as a spur to argue that the rights and responsibilities of occupiers should be, as far as is possible, decoupled, disentangled, and disaggregated from opaque questions of the status of the arrangement as a lease or a licence. The current guardianship model is designed almost exclusively to the benefit of just one party: the landowner. This leaves occupiers insecure and lacking in adequate legal, regulatory protections. This is only buttressed further by the court's retreat back to a more subjective, contract-focused, freedom to contract methodology which, in almost every conceivable case, will favour the more powerful landowner over the more vulnerable guardian. Examination of the property guardianship case law should prompt us to rethink the legal landscape for occupational rights. Property guardianship provides the impetus and serves as the touchpaper 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. Although the precise shape of such reform is outside the scope of this chapter, one need not look far for inspiration here – namely, the work of the Law Commission in its published report, *Renting Homes.*[63] The Law Commission proposed 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' which would automatically contain standard terms guaranteeing occupiers rights on repairs, fitness

[63] Law Commission Report No. 297.

for human habitation and controls over when and how the contract can be brought to an end.[64] These reforms were not taken forward in England but were adopted in Wales and legislated for in the Renting Homes (Wales) Act 2016.[65] Subject to a number of exceptions, 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.[66] For almost all practical purposes, this new Welsh framework will collapse the contested distinction that presently exists between leases and licences.[67] This will, in substance, extend the protections presently enjoyed by tenants to those who occupy land under a licence. Consequently, a large measure of the significance that currently rests on navigation of the tightrope of the lease/licence divide is circumvented. England should follow Wales and implement a similar reform. This would meet many of the challenges and respond to many of the problems identified in this chapter in relation to property guardianship and the precarity of their position by affording rights not based on outmoded interpretation of the lease/licence divide but based on the truer reflection of reality of the occupation relationship on the ground.

Through analysis of a quadriptych of property guardianship cases, *Roynon*, *Khoo*, *Ludgate* and *Laleva*, this chapter has contended that the evolving property guardianship jurisprudence shows troubling signs of a retrogression to the old ways of navigating the lease/licence distinction via a subjective, 'freedom to contract' approach previously rejected by Lord

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[64] The standard occupational contract would operate in the private sector; the secure occupational contract in the local authority sector. For a discussion of 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.

[65] The 2016 Act is due to come into force in Wales on 1st December 2022.

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

[67] 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.

Templeman in *Street*. This, it has been argued, is a misstep, a retrograde move that demonstrates the unsuitability of the continued adherence to the lease/licence distinction. As such, it has been suggested that this provides the motivation and impetus to consider reform of our entire occupational rights system and, in so doing, reject the existing lease/licence binary and that valuable lessons and a viable way forward can be found in the reform agenda embraced in Wales.