Neutral Citation Number: [2023] EWCA Civ 1243

Case Nos: CA-2022-000767 & CA-2022-002252

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
[Upper Tribunal Judge] Martin Rodger KC, Deputy Chamber President
LC-2021-452
&
The Hon Mr Justice Fancourt
LC-2022-000030

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SINGH
and
LORD JUSTICE DINGEMANS

- -

Between :

GLOBAL 100 LTD	**Appellant**
- and -	
CARLOS JIMENEZ AND OTHERS	**Respondent**
And Between:	
(1) GLOBAL GUARDIANS MANAGEMENT Ltd	**Appellants**
(2) GLOBAL 100 Ltd	
(3) THEO KYPRIANOU	
- and -	
(1) LONDON BOROUGH OF HOUNSLOW	**Respondents**
(2) MARIA LALEVA AND OTHERS	

- -
- -

Nicholas Grundy KC & Sean Pettit (instructed by **Kelly Owen Ltd**) for **Global 100 Limited**
Justin Bates & George Penny (instructed by **Hammersmith & Fulham Law Centre**) for **Carlos Jimenez and the other occupiers**

Nicholas Grundy KC & Sean Pettit (instructed by **Kelly Owen Ltd**) for **Global 100 Limited and Global Guardians Management Limited**
Ranjit Bhose KC & Tara O'Leary (instructed by **HB Public Law**) for the **London Borough of Hounslow**
Justin Bates & George Penny (instructed by **Hammersmith & Fulham Law Centre**) for **Maria Laleva and the other occupiers**

Hearing date : 11 October 2023

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Approved Judgment

This judgment was handed down remotely at 12.00, noon, on 27.10.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Dingemans :

Introduction

1. This is the hearing of two appeals from decisions of the Upper Tribunal (Lands Chamber). Both appeals raise an issue about whether the use made by "property guardians" of their "living accommodation" constituted "the only use of that accommodation" for the purposes of section 254(2)(d) of the Housing Act 2004, meaning that the relevant properties in these appeals were a "house in multiple occupation" (HMO) for the purposes of section 254 of the Housing Act 2004. The Upper Tribunal had dismissed appeals from decisions of the First-tier Tribunal (Property Chamber) (the FTT) which had found that the relevant properties constituted HMOs.

2. The relevant properties in these appeals are the former Addison Lee Office building at 35-37 William Road, Euston, London (the William Road property), and a former nurses' home at 14-16 Stamford Brook Avenue, London W6 (the Stamford Brook property). The first appellant Global 100 Limited (Global 100) was found by the FTT and the Upper Tribunal to be a company managing the William Road property. The second appellant Global Guardians Management Limited (Global Guardians) and Global 100 were companies variously held by the FTT and Upper Tribunal to be in control of or managing the Stamford Brook property. The third appellant Theo Kyprianou (Mr Kyprianou) is a director of Global Guardians and Global 100.

3. The respondents in the William Road appeal are Carlos Jimenez and two other occupiers who were property guardians at the William Road property who were granted Rent Repayment Orders (RROs) by the FTT. The Respondents in the Stamford Brook appeal are: the London Borough of Hounslow (Hounslow), which is the local authority for the area in which the Stamford Brook property is located and which issued a financial penalty notice in relation to that property and Maria Laleva and 10 others who were property guardians at the Stamford Brook property, some of whom were granted RROs by the FTT.

Property guardians

4. There is no statutory or official definition of a "property guardian" who are also referred to as "guardians". The Government published non statutory guidance which recorded that a property guardian is someone who has entered into an agreement to live in a building or part of a building that would otherwise be empty for the primary purpose of securing and safeguarding the property. Property guardian companies use empty buildings such as old factories, offices, schools or pubs. The property guardian companies then license property guardians to live in the empty property who pay the property guardian companies a licence fee for living at the empty property. This assists in securing and safeguarding the empty property. The Government guidance warned about the risks to safety arising from living in buildings which were designed for other purposes. It was estimated that there were 5,000 to 7,000 people living as property guardians in empty buildings.

5. There have been a number of cases involving property guardians in the FTT. The Court of Appeal has considered property guardians in the context of rates and office buildings in *Ludgate House Limited v Ricketts* [2020] EWCA Civ 1637; [2021] 1 WLR 1750

(*Ludgate House*). In that case a property guardian company contacted the owners of an empty office building scheduled for redevelopment, offering to install property guardians to occupy the empty property before it was redeveloped. At paragraph 7 of the judgment Lewison LJ said "a property guardian is a private individual who, usually with others, occupies vacant premises under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters …".

6. In *Global 100 v Laleva* [2021] EWCA Civ 1835; [2022] 1 WLR 1046 (*Global 100 v Laleva*) the Court of Appeal considered a claim for possession made by Global 100 against Ms Laleva and other occupiers in respect of the Stamford Brook property. Ms Laleva, who is a party to this appeal, had been granted permission to defend the possession proceedings by His Honour Judge Luba KC on the basis that it was arguable that Global 100 (as opposed to the registered owner of the Stamford Brook property or Global Guardians) did not have the right to seek possession and on the basis that it was arguable that Ms Laleva had a tenancy of her living accommodation at the Stamford Brook property and not a licence. His Honour Judge Luba KC's description of the contract between the owner of the Stamford Brook property and Global Guardians in that judgment as a licence was submitted, on behalf of Global Guardians, to give rise to an issue estoppel against Ms Laleva and other occupiers in this appeal. Lewison LJ gave a judgment with which Macur and Snowden LJJ agreed, and found that Ms Laleva was estopped from denying Global 100's title to seek possession, given that Global 100 had licensed Ms Laleva to enter the property. Further, that in the light of the surrounding circumstances and the purpose of the agreement, Ms Laleva had been granted a licence and not a tenancy of the property.

Houses in Multiple Occupation

7. Part XI of the Housing Act 1985 provided for the regulation of HMOs by local authorities. Nourse LJ in *Rogers v Islington* (1999) 32 HLR 138 at 140 stated that "it is of the greatest importance to the good of occupants that houses which ought to be treated as HMOs do not escape statutory control". In *Brent London Borough Council v Reynolds* [2001] EWCA Civ 1843; [2002] HLR 15 Buxton LJ identified that Parliament had made special provision for HMOs because of the fact that it was often persons and families most in need of social protection who were obliged to occupy housing that had been designed for occupation by one family but which had been converted for occupation by a number of separate families or individuals. There was reference in the submissions before this Court about the statutory policy to ensure a minimum level of standards for housing accommodation.

8. Part XI of the Housing Act 1985 was replaced by relevant provisions in the Housing Act 2004. The definition of an HMO was altered. It was common ground that this was because the definition of an HMO in the Housing Act 1985 had caught a number of hostels or hotels which were not the intended subject of the legislation. The Housing Act 2004 does, however, include a provision permitting the local authority to declare that certain properties would be HMOs.

9. If a property is an HMO then the property will need to be licensed if it is of a prescribed description, for the purposes of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018.

Material findings in relation to the William Road property

10. The FTT decision in relation to the William Road property was dated 6 July 2021 and the Upper Tribunal decision (Upper Tribunal Judge Martin Rodger KC, Deputy Chamber President) was dated 2 February 2022. The relevant background set out below is taken from the findings made by the FTT.

11. The William Road property was owned by Euston One Limited (Euston One). By an agreement dated 20 November 2019 between Euston One and Global Guardians, possession of the William Road property was handed to Global Guardians so that property guardians could be installed in the property for a fee to be paid by Global Guardians of £3700. Global Guardians' obligations included an obligation on Global Guardians and Global 100 to use reasonable care to ensure that no damage was caused to the property.

12. The property was managed by Global 100 on behalf of Global Guardians. The FTT Judge referred to the "fluidity" of the respective responsibilities of Global 100 and Global Guardians for the William Road property. In the proceedings before the FTT, Global 100 was substituted at its request as the respondent to the application for RROs and it was agreed that it was in control of the William Road property for the purposes of the Housing Act 2004.

13. The part of the William Road property occupied by Mr Jimenez and the other property guardians in this appeal was described as a "flat" which comprised three offices with a communal bathroom on the adjoining landing. One of the rooms was crammed with discarded office equipment which meant that it could not be used. Other property guardians lived in other parts of the building and when Camden Council's housing officers inspected on 26 November 2020 they reported that between 10 and 12 individuals were in residence in the William Road property who had access to shared bathroom facilities and paid rent to Global 100, as evidenced by Global 100's collection of the licence fees.

14. Mr Jimenez was granted a licence to occupy the third floor flat on 5 June 2020. The licence provided, under the heading "agreed purpose of license" as follows: "G100 is an approved supplier of "guardians" who, in order to perform their guardian functions to protect vacant properties from intruders, anti-social behaviour and metal theft, must occupy certain properties designated by G100. The guardian is an individual who is willing to pay a weekly licence fee for use and occupation of the designated space in order to perform the guardian's functions".

15. The functions were defined to mean "the functions a guardian carries out to protect the property from intruders, anti-social behaviour and metal theft, in accordance with British Standard BS8584:2015". The British Standard was not annexed to the licence and was not adduced in evidence before the FTT. Clause 4 of the licence agreement was headed "use of the property" and recorded that the guardian agreed to sleep at the property for five out of seven nights; to ensure that they or another guardian were present at least one hour in every 24 hours; to share the property amicably; and to advise

Global 100 if they became aware of any damage or risk of damage to the property or any person attempting to gain access to the property without the permission of Global 100. Guardians were prohibited from conducting any business on the premises.

16. The other two property guardians were granted licences in similar terms to occupy the third floor flat in June and September. The flat was let unfurnished and Mr Jimenez and the other occupiers had to install a washing machine, cooker, furniture and mattress, which they had to carry up to the third floor. Mr Jimenez and the other occupiers confirmed that they were not monitored when they entered or left the building, they were given 24 hours' notice of visits by Global 100.

17. Complaints were made about the inability to use the room filled with office equipment to Global 100, but the equipment remained and the room could not be lived in. Mr Jimenez and the others complained to Camden Council, which led to the inspection on 26 November 2020. Camden Council recorded that Mr Jimenez and the others occupied the property as their main residence. Camden Council determined that the property was being occupied as a HMO.

The decisions of the FTT and Upper Tribunal relating to the William Road property

18. So far as is material to the appeal, the FTT rejected a submission made on behalf of Global 100 that the property guardians used the accommodation both to live there and to protect the property, and that as there were two uses of the living accommodation the William Road property was not an HMO. The FTT held that Mr Jimenez and the other occupiers "were not service occupiers or otherwise employed to protect the building. A side effect of their presence may be to dissuade trespass or damage, but they were there in order to have a roof over their heads and only that".

19. The FTT rejected other submissions which are not material to this appeal before deciding to make RROs in favour of Mr Jimenez and the other occupiers.

20. The Upper Tribunal dismissed Global 100's appeal against the finding that the Willliam Road property was an HMO. The Upper Tribunal rejected the submission made on behalf of Global 100 that the guardian's use of the property was not the only use of the living accommodation. The Upper Tribunal did not derive assistance from the decisions of the Court of Appeal in *Ludgate House* and *Global 100*. This was because they were not concerned with the uses of the living accommodation. The Upper Tribunal noted that the statutory context was important, and that the purpose of the statute was to provide protection to the residents. The Upper Tribunal determined that the licence agreement did not provide for more than one use of the living accommodation. The guardians were required to sleep at the premises for five out of the seven nights, they were not permitted to leave the property empty and they were to inform Global 100 of damage or unauthorised access. The Upper Tribunal held that "the only thing the respondents were entitled to do with the living accommodation was to use it as their main residence".

Material findings in relation to the Stamford Brook property

21. The FTT decision in relation to the Stamford Brook property was dated 15 December 2021 and the Upper Tribunal decision (Fancourt J) was dated 28 September 2022. The relevant factual background is taken from the findings made by the FTT.

22. The Stamford Brook property is owned by NHS Property Services Limited (NHS PS). By a written agreement dated 31 March 2016 Global Guardians agreed to provide guardianship services for the Stamford Brook property to NHS PS. The monthly licence fee was £600 and the minimum term of the Stamford Brook property agreement was four months, thereafter determinable by four weeks' notice. NHS PS was required to provide Global Guardians with a full set of keys. Global Guardians was required to manage all access to the Stamford Brook property including that by NHS PS and their contractors. Global Guardians was required to list the property on Global Guardian's 24 hour emergency help desk database free of charge and manage the property "24/7". Global Guardians was to provide NHS PS with a monthly report detailing the condition of the property and advising of any issues which required the owner's attention.

23. Global Guardians converted the Stamford Brook property so that it had 30 bedrooms, four kitchens and four lavatories. Global Guardians entered into a written agreement with Global 100, which was described as a sister company to Global Guardians or an associated company of Global Guardians. This was dated 19 January 2018. Global 100 advertised for persons to occupy the property who would act as "guardians" and pay a monthly "licence fee" to live at the property.

24. Hounslow inspected the Stamford Brook property and found that 29 out of the 30 rooms were occupied. Each guardian had a key to their room. The guardians were generally employed in other jobs, and were not employed by Global Guardians to carry out any security functions. They were not trained nor expected to confront any trespasser. There was an expectation that they would report any problems to Global Guardians. The licence fees for each room varied from £350 to £660 per calendar month. If all 30 rooms were occupied Global Guardians would get an income of £15,000 per month. Hounslow asserted that the Stamford Brook building was an HMO.

The decisions of the FTT and Upper Tribunal in relation to the Stamford Brook property

25. The FTT heard appeals against financial penalties imposed by Hounslow on Global 100, Global Guardians and Mr Kyprianou. The FTT identified that it had to address the nature of the contractual relationships between NHS PS and Global Guardians, as well as between Global 100 and the property guardians. The FTT referred to the decisions of the House of Lords in *Street v Mountford* [1985] 1 AC 810 and *AG Securities v Vaughan* [1990] 1 AC 417 and asked "what was the substance and reality of the transaction entered into by the parties".

26. The FTT heard evidence from a regulatory officer from Hounslow and the property guardians living at the Stamford Brook property. Global 100 filed a witness statement from their "asset & delivery manager", Ms Amasanti, who was actually employed by Global Guardians. Ms Amasanti was not available to give evidence but Global 100 tendered Mr Woolgar, Chief Executive Officer of Global 100 and Global Guardians, to give evidence. The FTT found that he was doing his honest best to assist but did not

have sufficient knowledge of the Stamford Brook property to answer many of the questions asked of him. Global Guardians managed 700 properties.

27. The FTT found that the relationship between Global Guardians and Global 100 was opaque and Mr Woolgar could not help in respect of the financial arrangements concerning the Stamford Brook property. At material times Global 100 had cash reserves of £1,171,490 and Global Guardians had reserves of £22,991. The evidence showed that the licence payments were made by the property guardians to Global 100.

28. The FTT found that the substance of the agreement was that Global Guardians would take possession of the property, carry out necessary works to convert the building from office use so that it was fit for human habitation, and place guardians in rooms which they would occupy as their residences.

29. The FTT found that NHS PS had granted Global Guardians an interest in land. NHS PS had no interest other than keeping their building secure. Global Guardians installed the showers, and dealt with all of the maintenance issues. The FTT found that the property guardians had exclusive use of their rooms, even if they did not have exclusive possession. They occupied their rooms as their residences and they had the key for their rooms.

30. The FTT then turned to the issue of statutory responsibility for the unlicensed HMO and noted that the definitions of a "person having control" or a "person managing premises" were wide enough to include a number of different people in respect of one property. The FTT found that the explanation about the relationship between Global Guardians and Global 100 was vague, unclear and unsatisfactory, they had worked together and their operations appeared to be closely intertwined. Global Guardians and Global 100 were both persons having "control" and "managing" the HMO at the Stamford Brook property. They were both in receipt of payments from the property guardians.

31. Both Global Guardians and Global 100 were persons having control because they were in receipt of the rack rent from the Stamford Brook property having received £15,000 per month from the guardians, and it was irrelevant whether it was rent or a licence fee. The FTT recorded that the phrase "let at a rack rent" had a considerable statutory history going back to 1847 and referred to the judgment in *Pollway Nominees v Croydon London Borough Council* [1987] AC 79 where the test was said to be identifying the person who had the right, actual or potential, to receive the rack rent. The FTT went on to determine the appropriate RROs in respect of the occupiers.

32. On appeal in relation to the issue of sole use, the Upper Tribunal summarised the arguments and noted the decision of the Upper Tribunal in relation to the William Road property and its conclusion that "there was only one thing that the occupiers were entitled to do with their accommodation and that was to use it as their only or main residence". The Upper Tribunal followed that decision and held that there was only one use of the living accommodation, namely as the only or main residence of the occupier.

33. As to the issue of whether Global Guardians had been granted a tenancy of the Stamford Brook property, the Upper Tribunal summarised the findings of the FTT, noting that the FTT had referred to the principal authorities of *Street v Mountford* and *AG*

Securities v Vaughan. The Upper Tribunal recorded that the FTT had identified that a fixed term of four months had been created, with a periodic payment of £600 per month "and that the reality was that [Global Guardians] was being granted possession and control of the property including any access to it to the exclusion of [NHS PS] while the agreement lasted". The Upper Tribunal stated that the FTT had considered whether possession was attributable to some different legal relationship such as the provision of services or agency, but found that Global Guardians "was being granted the exclusive right to exploit for its own benefit the whole of the property during the term of the agreement, in consideration of £600 per month and the agreed terms as to the way in which [Global Guardians] would use the property". In these circumstances the Upper Tribunal concluded that "the FTT was clearly right for the reasons that it gave" to find that Global Guardians was a tenant of the property pursuant to the signed proposal. The Upper Tribunal stated that although the proposal was couched in terms of Global Guardians providing services to NHS PS the reality was that those services were only provided by virtue of Global Guardians having exclusive possession of the property and being able to exploit it for its own gain, first by converting it to residential use and then by licensing up to 30 property guardians to occupy all the habitable space in the property.

34. As to the issue of whether Global Guardians and Global 100 were persons managing the property the Upper Tribunal set out the submissions made by Global Guardians, namely that the FTT had failed to direct itself on the criminal standard of proof required to justify a penalty notice for a housing offence and had wrongly concluded that Global Guardians and Global 100 should be treated indistinguishably because there was no adequate evidence of the financial relationship between the companies. The Upper Tribunal recorded Global 100's challenge to the conclusion that it was a lessee of the property, so could not be a person managing the property.

35. The Upper Tribunal considered whether there was evidence, to the criminal standard of proof, showing that Global Guardians received payments from the occupiers. The Upper Tribunal concluded that the FTT's conclusion that Global Guardians and Global 100 were intertwined was not sufficient on its own to prove that Global Guardians did receive the monies from the licence fees.

36. The Upper Tribunal considered the response from Global Guardians to a request for information made by Hounslow which was to the effect that it received licence fees from guardians. The Upper Tribunal also took account of a later letter written on behalf of Global Guardians to the effect that it did not receive rent or other payments from the tenants and never had. There was however another later letter which recorded that Global Guardians would pay a percentage of the licence fees collected from guardians to the property owner, and that the licence fees were collected by Global 100 and distributed to Global Guardians and NHS PS. The Upper Tribunal concluded that there was sufficient evidence, by way of admissions from officers of Global Guardians and its lawyers to conclude that at least some of the licence payments were received indirectly by Global Guardians. That conclusion was not sufficient to show that Global Guardians was a person managing the property unless Global 100 was the agent or trustee of Global Guardians. The Upper Tribunal held that it was a possible inference that Global 100 was acting as a general agent for Global Guardians for the purposes of section 263(3)(a) of the Housing Act 2004, but a possible inference was not enough.

37. The Upper Tribunal did, however, conclude that Global Guardians was a person managing the property because Global Guardians agreed with NHS PS to convert the property and to grant occupational licences of parts of the property to property guardians, but it then agreed that Global 100 should do that instead. The Upper Tribunal held that but for the Global 100 agreement, Global Guardians would have received the income from the property at the relevant time within the meaning of section 263(3)(b) of the Housing Act 2004.

38. As far as Global 100 was concerned the Upper Tribunal concluded that it was not a person managing the property as it was not an owner or lessee of any part of the property, and it was not proved to be an agent or trustee for Global Guardians.

39. That led the Upper Tribunal to the issue of whether Global Guardians and Global 100 were persons having control of the property. That itself depended on whether the property was let at a rack rent within the meaning of section 263(1) and (2) of the Housing Act 2004. The Upper Tribunal referred to the findings of the FTT that: all the fees were less than for properties let under assured shorthold tenancies; this was short life accommodation let in a very basic condition for substantial rent; and the property was let at a rack rent, or that Global Guardians and Global 100 were entitled to the rack rent if the property were so let.

40. The Upper Tribunal found that there was sufficient evidence to show that the rooms were let at a rack rent. This was because there was no reason to believe that Global 100 would have advertised and licensed the rooms for significantly less than the market rate for such accommodation, as they were experienced operators in the guardian business, running their business for a profit and not charity. The Upper Tribunal recorded that Global Guardians was entitled to and did let all the lettable space in the property. There was no other income-producing part to be let. The Upper Tribunal found that there was no evidence that Global Guardians, as opposed to Global 100, was entitled to the licence payments, although it had in fact received some of them. This meant that Global Guardians was not a person in control of the property. That made no difference to the outcome because it was a person managing the property.

The issues on appeal

41. The only ground of appeal in respect of the William Road property and the first ground of appeal for the Stamford Brook property is the same, namely whether the Upper Tribunal erred in finding that the property was an HMO. This depended on the issue (1) whether the residential occupation by the property guardians of their living accommodation constituted the only use of their living accommodation.

42. There are three other grounds of appeal for the Stamford Brook property, one raised by a Respondent's Notice. By the conclusion of the submissions it was apparent there were the following issues to determine: (2) whether the Upper Tribunal was wrong to conclude that Global Guardians had a tenancy of the Stamford Brook property. This ground of appeal also engaged the issue of whether there was any issue estoppel; (3) if so, and pursuant to the Respondent's Notice, whether Global Guardians was a person in control of the Stamford Brook property because Global Guardians was a person who would receive the rack rent in respect of the property if it was let at a rack rent; and (4) whether the Upper Tribunal erred in finding that Global 100 was a person in control of the property because it was in receipt of the rack rent of the Stamford Brook property.

Relevant statutory provisions

43. The principal definition of an HMO for the purposes of the Housing Act 2004 is in section 254. Subsections 254(1), (2), (3) and (4) provide as follows:

> "254 Meaning of "house in multiple occupation"
>
> (1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if –
>
> (a) it meets the conditions in subsection (2) ("the standard test");
>
> (b) it meets the conditions in subsection (3) ("the self-contained flat test");
>
> (c) it meets the conditions in subsection (4) ("the converted building test");
>
> (d) an HMO declaration is in force in respect of it under section 255; or
>
> (e) it is a converted block of flats to which section 257 applies.
>
> (2) A building or a part of a building meets the standard test if –
>
> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.
>
> (3) A part of a building meets the self-contained flat test if -
>
> (a) it consists of a self-contained flat; and

> (b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat)
>
> (4) A building or a part of a building meets the converted building test if–
>
> (a) it is a converted building;
>
> (b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);
>
> (c) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (e) their occupation of the living accommodation constitutes the only use of that accommodation; and
>
> (f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation."
>
> (underlining added).

44. As appears from the underlining the standard test for being an HMO requires the conditions in subsection (2) to be met. It is common ground in this case that conditions (a), (b), (c), (e) and (f) are met. The dispute between the parties relates to condition (2)(d). As to condition (2)(d), section 260 provides that the sole use condition is to be presumed to be met unless the contrary is shown. There is no definition of the phrase "living accommodation" in the Housing Act 2004. A local authority may make a declaration that a property is an HMO in certain circumstances set out in section 255 of the Housing Act 2004.

45. Some definitions of terms are set out in section 262 of the Housing Act 2004.

> "262 Meaning of "lease", "tenancy", "occupier" and "owner" etc.
>
> (1) In this Act "*lease*" and "*tenancy*" have the same meaning.
>
> …
>
> (2) The expressions "*lessor*" and "*lessee*" and "*landlord*" and "*tenant*" and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly.
>
> …

> (6) In this Act "*occupier*", in relation to premises, means a person who -
>
> (a) occupies the premises as a residence, and
>
> (b) (subject to the context) so occupies them whether as a tenant or other person having an estate or interest in the premises or as a licensee;
>
> and related expressions are to be construed accordingly. This subsection has effect subject to any other provision defining "occupier" for any purposes of this Act.
>
> (7) In this Act "*owner*", in relation to premises -
>
> (a) means a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion; and
>
> (b) includes also a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds 3 years.
>
> …
>
> (9) In this Act "*licence*", in the context of a licence to occupy premises -
>
> (a) includes a licence which is not granted for a consideration, but
>
> (b) excludes a licence granted as a temporary expedient to a person who entered the premises as a trespasser (whether or not, before the grant of the licence, another licence to occupy those or other premises had been granted to him);
>
> and related expressions are to be construed accordingly. And see sections 108 and 117 and paragraphs 3 and 11 of Schedule 7 (which also extend the meaning of references to licences)."

46. Section 263 of the Housing Act 2004 defines a "person having control" and a "person managing" as follows:

> "263 Meaning of "person having control" and "person managing" etc.
>
> (1) In this Act "*person having control*", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

> (2) In subsection (1) "*rack-rent*" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "*person managing*" means, in relation to premises, the person who, being an owner or lessee of the premises -
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from–
>
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
>
> (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
>
> (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

47. As the FTT in the Stamford Brook property case pointed out, the definition of "person having control" under the Housing Act 2004 section 263(1) as the person in actual receipt of the rack rent, or entitled to receive it if the premises were let at a rack rent, mirrors the wording of earlier statutes such as the Public Health (London) Act 1891.

The use of the property (issue one)

48. It was common ground that the only question on the first issue was whether the property guardians' occupation "of the living accommodation constitutes the only use of that accommodation". Mr Grundy KC and Mr Pettit on behalf of Global Guardians and Global 100 submitted that the dictionary definition of "use" as "application to a purpose" meant that a "use" was a purpose which was being applied. Use and purpose were synonymous and where an arrangement provided for more than one purpose, there was more than one use. The property guardians occupied their living accommodation as their residence, but it was necessary for the provision of guardian services that the property guardians should occupy their property, as appeared from paragraph 46 of the judgment of the Court of Appeal in *Global 100 v Laleva*. The Upper Tribunal had looked at matters only from the point of view of the occupier. The relevant local authority could have made a declaration in respect of the properties that they were HMOs under section 255 of the Housing Act 2004, but had not done so.

49. Mr Bates and Mr Penny on behalf of the occupiers led on this issue for the Respondents, and their submissions were adopted by Mr Bhose KC and Ms O'Leary on behalf of Hounslow. Mr Bates relied on the provisions of section 260 which provide that the sole use condition is presumed to be met unless the contrary was shown, and he submitted that the contrary had not been shown by Global Guardians and Global 100. It was

further submitted that there was only one use of the living accommodation made by the property guardians, namely to live in it. It may have been that because they were living there Global 100 and Global Guardians were able to achieve their purpose of protecting the buildings from trespassers, but that did not change the use made of the living accommodation.

50. Mr Grundy is right to point out that "use" and "purpose" can, on occasions, be used interchangeably but everything depends on the circumstances. In general terms the use describes what use is being made of the living accommodation, and the purpose is the reason why that use is being made of the living accommodation. In the course of submissions Lord Justice Lewison gave an example of a person who was driving a car, which was the use of the car, but the purpose of driving it was to decide whether to purchase it. The fact that the car was being test driven by a person interested in purchasing it (their purpose) did not alter the use made of the car. Further, section 254(2)(d) focuses on the "use" made by the property guardians of their living accommodation ("their occupation of the living accommodation …") and not Global Guardians' purpose in allowing the property guardians to reside in the property.

51. In this case, on the findings of fact made by the FTT in both cases, it was apparent that the property guardians were using the living accommodation as their main residence. They had no responsibilities as property guardians save to live in the accommodation. The presence of the property guardians in their living accommodation and the property may have deterred persons from entering the property, but it did not convert the use made of the living accommodation. In these circumstances in my judgment the Upper Tribunal was right in both appeals to find that the occupation of the property guardians of the living accommodation constituted the sole use of that living accommodation. I have reached this conclusion without having to rely on the presumption set out in section 260 of the Housing Act 2004. This was because the standard test set out in section 254(1)(a) of the Housing Act 2004 was satisfied in respect of both properties. I would therefore dismiss the first ground of appeal.

The tenancy from NHS PS to Global Guardians of the Stamford Brook property (issue two)

52. The issue of whether NHS PS had granted a tenancy, and not a licence, to Global Guardians in respect of the Stamford Brook property was relevant to the finding that Global Guardians was a person managing the property. This is because the person managing the property is defined by section 263(3) of the Housing Act 2014 to be the person who is an owner or lessee of the property. The definition of lessee in section 262 of the Housing Act 2004 was a person with a grant of a lease or tenancy.

53. Mr Grundy and Mr Pettit drew attention to the finding made by His Honour Judge Luba KC on 9 August 2021 in paragraphs 27 and 51 of his judgment hearing an appeal by Ms Laleva and the other occupiers in respect of an order for possession made against them. His Honour Judge Luba KC had recorded a submission that Global 100's rights had arisen from a sub-licensing "of the original licence agreement" between NHS PS and Global Guardians. In paragraph 51 His Honour Judge Luba KC referred to the licence to the property guardians being "either parasitic or a mere extension of the licence earlier granted" by NHS PS to Global Guardians and relied on this finding of the relationship between NHS PS and Global Guardians as being a finding which bound

Ms Laleva and the other occupiers who were party to the possession proceedings and this appeal.

54. Mr Grundy and Mr Pettit also relied on the terms of the agreement between NHS PS and Global Guardians and submitted that the FTT and Upper Tribunal were wrong to start by looking at what had happened on the ground. It was accepted that the FTT and Upper Tribunal were entitled to approach the agreement between NHS PS and Global Guardians by reference to its express terms in the context of the surrounding circumstances but Mr Grundy emphasised the provisions which made it clear that Global Guardians were granted possession to provide security for the property, that Global Guardians could only license guardians and the term that Global Guardians would manage NHS PS' access and egress to the property, noting that the term did not restrict NHS PS's access and egress to the property.

55. Mr Bhose and Ms O'Leary, whose submissions were adopted by Mr Bates and Mr Penny, submitted that there was no estoppel in this case, because all His Honour Judge Luba KC had decided was an issue of arguability, and his decision had been overturned by the Court of Appeal in any event in *Global 100 v Laleva*. The FTT and Upper Tribunal were entitled to conclude that Global Guardians had a tenancy in the light of the evidence. It was clear that Global Guardians had exclusive possession of the Stamford Brook property.

56. In my judgment there is no issue estoppel which binds Ms Laleva, or any of the other occupiers, on this appeal. This is because first His Honour Judge Luba KC was deciding only whether Ms Laleva had an arguable defence to the claim for possession made by Global 100. Secondly he had not heard evidence and he did not make a decision in the light of the terms of the agreement and the evidence about what had happened at the property, in part because he was sitting on appeal. Thirdly the Court of Appeal had allowed an appeal by Global Guardians against his judgment in *Global 100 v Laleva*, and it is not possible to identify any specific finding which he made which was necessary to his decision which should bind Ms Laleva and the other occupiers.

57. Mr Grundy is entitled to refer to the fact that His Honour Judge Luba KC, who has considerable experience in property law, had characterised the agreement between NHS PS and Global Guardians as a licence. The answer to that point is, however, that the FTT took full account of the terms of the agreement, and found that NHS PS had no interest in permitting the property to be used as residential accommodation, their interest was only that the property should not be subject to squatting or be vandalised. The FTT, at paragraph 69 of its judgment, made the same point on the agreement as His Honour Judge Luba KC, saying "the property protection proposal is drafted in language more consistent with a service agreement or licence" but went on to find that "it has all the hallmarks of the grant of an interest in land, namely the grant of exclusive possession for a term at a rent …". There was not an issue as to the term or rent, and the only issue was whether Global Guardians had exclusive possession. The FTT had found that Global Guardians was, in fact, being granted the exclusive right to exploit the whole of the property, and had therefore been granted exclusive possession of it. There was no misdirection of law, or a failure to consider the terms of the agreement between NHS PS and Global Guardians.

58. On these findings, and in the light of the decision in *Street v Mountford,* it is apparent that NHS PS had granted Global Guardians a tenancy of the Stamford Brook property.

As is apparent from the judgment of the Court of Appeal in *Global 100 v Laleva,* Global 100 had then licensed the guardians to occupy the property. I would therefore dismiss this ground of appeal.

Global Guardians and control of the property (issue three)

59. The conclusion in relation to the second issue above, means that it is not necessary to determine the third issue. This is because Global Guardians is liable as a person managing the Stamford Brook property, and there is no need to establish whether it is also liable as a person in control of the property.

Global 100 and receipt of the rack rent (issue four)

60. This issue is relevant to the finding that Global 100 was a person having control of the property. This is because section 263(1) of the Housing Act 2004 defines a person having control as "the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent." Section 263(2) defined a rack-rent as "a rent which is not less than two-thirds of the full net annual value of the premises". Although this was in dispute earlier, it became common ground at the hearing that licence fees qualified to be counted as part of the rack-rent of the property.

61. Mr Grundy and Mr Pettit pointed to the fact that the phrase "rack-rent" had been used in previous statutes, and highlighted comments by Lord Bridge in *Pollway Nominees* to the effect that it seemed to have been used by generations of parliamentary draftsmen without ever contemplating all of the different scenarios in which it might apply. Mr Grundy referred to authorities showing that very often parties adduce evidence from surveyors showing what is the full net annual value of premises and in this case there was no, or no sufficient, evidence of the net annual value of the premises. The rack rent must be the best rent that could be obtained for the premises if let on an annual tenancy. Mr Grundy submitted that the Upper Tribunal's finding that Global 100 would not have advertised and marketed the rooms for significantly less than the market rate was wrong and circular.

62. Mr Bhose and Ms O'Leary, whose submissions were adopted by Mr Bates and Mr Penny, submitted that the FTT was an expert tribunal and it had found that the sums paid to Global 100 were a rack-rent for the property. There was no need to adduce expert evidence about the net annual value of the property. It was apparent that NHS PS was content to receive £600 per month for letting the property to Global Guardians, and Global 100 would receive £15,000 per month from the licence fees if all the rooms were let. That was the full value of this empty property.

63. In my judgment the FTT and Upper Tribunal were entitled to find that Global 100 had received the rack-rent for the property. NHS PS had only received £600 per month for letting the property. Global Guardians, with Global 100, arranged for the property to be modified for habitation and then licensed property guardians to live in the property. That generated £15,000 per calendar month. Global 100 was not acting as a charity and was in the business of making money. The property guardians were willing licensees of the living accommodation and Global 100 was a willing licensor. The evidence of the transactions between Global 100 and the property guardians is, at the least, some evidence of the market value of the accommodation and the FTT and Upper Tribunal

were entitled to rely on it to find the rack-rent of the property. There was nothing to suggest that anything more could be obtained from letting or licensing the property. In any event, as Global 100 was the only person who could charge the guardians for living in the property, if the property had been let at a rack rent, it would be Global 100 who "would so receive" the rack rent for the purposes of section 263(1) of the Housing Act 2004. I would dismiss this ground of appeal.

Conclusion

64. For the detailed reasons set out above I would dismiss the appeal.

Lord Justice Singh

65. I agree.

Lord Justice Lewison

66. I also agree.