UPPER TRIBUNAL (LANDS CHAMBER)

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Rolls Building, Fetter Lane, London, EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – HOUSE IN MULTIPLE OCCUPATION – CIVIL PENALTY – Housing Act 2004 – whether First or Second Appellant a "lessee" of the HMO - whether a person having control of or a person managing the HMO – meaning of "person managing" and "person having control" – when indirect receipt of part of rent suffices – meaning of "rack-rent" – whether aggregate of rack-rents of rooms in the HMO is the rack-rent of the HMO

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

BETWEEN:

(1) GLOBAL GUARDIANS MANAGEMENT LTD
(2) GLOBAL 100 LIMITED
(3) THEO KYPRIANOU

Appellants

-and-

(1) LONDON BOROUGH OF HOUNSLOW
(2) MARIA LALEVA
(3) MICHAEL GREEN
(4) BLIDGEON HENRY
(5) GAELLE NDANGA
(6) GENTIAN LUMANI
(7) ELLIOT PARKIN
(8) CAROL NDUNGE
(9) CHARMAIN GRIFFITHS
(10) JOANNA BUDZICH
(11)ANDREA KYSELAKOVA

Respondents

Re: Stamford Brook Centre,
Stamford Brook Avenue,
London, W6 OYD

The Hon. Mr Justice Fancourt

Heard on: 26 July 2022

Decision Date: 26 September 2022

Ms Tara O'Leary for the first respondent
Mr George Penny for the second to ninth respondents
The tenth and eleventh respondents in person

The following cases are referred to in this decision:

Street v Mountford [1985] 1 AC 810

Pollway Nominees Ltd v Croydon LBC [1987] 1 AC 79

AG Securities v Vaughan [1990] 1 AC 417

Manchester Airport plc v Dutton [2000] QB 133

Urban Lettings (London) Ltd v Haringey LBC [2015] UKUT 0104 (LC)

Ludgate House Ltd v Ricketts (Valuation Officer) [2020] EWCA Civ 1637; [2021] 1 WLR 1750

Global 100 Ltd v Laleva [2021] EWCA Civ 1325; [2022] 1 WLR 1046

William Road (LON/00AG/HMF/2021/0042)

Gill v The Royal Borough of Greenwich [2022] UKUT 26 (LC)

Global 100 Ltd v Jimenez [2022] UKUT 50 (LC)

Introduction

1. In its decision dated 15 December 2021 ("the Decision"), the First-tier Tribunal (Property Chamber) ("the FTT"):

   (1) upheld penalty notices under the Housing Act 2004 ("the 2004 Act") issued by the First Respondent ("the Council") against each of the Appellants on the basis that they were persons having control of and persons managing an unlicensed house in multiple occupation ("HMO"), namely the Stamford Brook Centre ("the Property"); and

   (2) made rent repayment orders against the Second Appellant ("Global 100") in favour of the other Respondents, who were all individual licensees of rooms in the Property who had paid licence fees to Global 100.

2. The Decision involved a determination of two primary questions of mixed fact and law, so far as relevant to this appeal:

   (1) whether the Property was an HMO within the meaning of the 2004 Act because the occupation of the rooms licensed to the Second to Eleventh Respondents and others as their only or main residences was "the only use of that accommodation", within the meaning of s.254(2)(d) of the 2004 Act;

   (2) whether the First Appellant ("GGM") and Global 100 were each a "person having control" of and a "person managing" the Property, as defined in s.263 of the 2004 Act, and according had correctly been served with penalty notices.

3. It is common ground on this appeal that, if those conclusions were right, the Third Appellant, Mr Kyprianou, was rightly also served with a penalty notice because he was the sole director of the First and Second Appellants, and that the rent repayment orders were correctly made against the Second Appellant only. Further, there is no appeal against the amount of the penalty notices or the rent repayment orders.

4. The FTT itself gave permission to appeal its decision. The Appellant's Notice, not drafted by Counsel, was dated 19 January 2022 and took a somewhat discursive approach to identifying grounds of appeal. As a result of attempts made on behalf of the Respondents in correspondence to identify the real grounds of appeal and some further clarification in opening from Mr Pettit, it became clear that the issues on appeal for this Tribunal to determine are:

   (1) whether the FTT was wrong to conclude, on the basis of the facts that it found, that the only use of the individual rooms in the Property made by the licensees was as their residences, and should have held that there was also a second use, namely the provision through the licensees' presence of property protection services, which is what GGM agreed with NHS Property Services Ltd (" NHSPSL"), the owner of the Property, to provide;

   (2) whether the FTT was wrong to conclude, on the basis of the facts that it found, that the agreement between NHSPSL and GGM amounted in law to a tenancy of the Property;

(3) whether the FTT was wrong to conclude that GGM and Global 100 were both "persons managing" the Property, within the meaning of the statutory definition; and

(4) whether the FTT was wrong to conclude that GGM and Global 100 were both "persons having control" of the Property, within the meaning of the statutory definition.

5. The FTT also had to decide a number of other issues that are not live on this appeal. Given the limited reach of the live issues, it will be unnecessary to refer to much of the content of the Decision. It is right, however, to acknowledge the considerable care with which the FTT prepared a detailed decision on all issues for the benefit of the parties.

6. If this Tribunal is persuaded that there was more than one use being made of the individual rooms in the Property, the consequence is that the Property was not an HMO and accordingly the penalty notices and rent repayment orders must be set aside. Similarly, if either GGM or Global 100 was neither a person having control of the Property nor a person managing the Property then, even if the Property was an HMO, the penalty notice served on that Appellant must be set aside. If that person is Global 100 then the rent repayment orders must be set aside.

7. By a Respondent's Notice dated 28 February 2022 the Council raised the following further arguments:

(1) Global 100 was in any event a person managing the Property because of its role as a licensee or agent of GGM, or because GGM as lessee received rents or other payments from the occupiers through Global 100;

(2) GGM was a person managing the Property because it would have received rent or other payments from the occupiers but for its agreement with Global 100.

THE FACTUAL BACKGROUND

8. The essential facts can be taken from paras 3 to 5 of the Decision, as follows:

"3. [The Property] is owned by NHS Property Services Limited (NHSPSL) which has played no part in these proceedings, albeit that it paid a Financial Penalty without protest when [the Council] contended that it had also committed an offence. On 31 March 2016, NHSPSL entered into a contractual agreement with GGM to provide guardianship services at [the Property]. The monthly licence fee was £600. The minimum term was four months, thereafter determinable by 4 weeks' notice. GGM entered into a contractual agreement with [Global 100], a sister company, pursuant to which [Global 100] identified occupants who would act as "guardians" paying a monthly "licence fee".

4. Upon taking possession of [the Property], which had most recently been used as offices, Global Guardians converted the building to create 30 bedrooms with four kitchens, four bathrooms and four toilets. [Global 100] licenced the rooms to guardians who paid a

monthly licencing fee which depended upon the size of the room. Each guardian had a key to their room.

5. On 6 February 2020, [the Council] inspected [the Property] and satisfied itself that it was occupied as an HMO. 29 of the 30 rooms were occupied……"

9. The FTT found that the licence fees of the guardians who applied for rent repayment orders varied between £350 and £660 per month, with the average being £500 per month, and that GGM would obtain income of £15,000 per month if all 30 rooms in the Property were occupied. It appeared to accept the evidence of Mr Bhatia of the Council that, on 17 February 2020, he checked the Global Guardians website and found that it advertised that there were 30 rooms at the Property (and 4 bathrooms, 4 kitchens and 4 toilets), of which one room was available, and it stated that the rent advertised for it of £450 to £500 per month was 65% less than the rent of a room in that area let to modern standards.

10. The FTT also appeared to accept the evidence of Mr Woolgar, tendered by the Appellants for cross-examination when their intended witness was too ill to attend, that 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 or expected to confront any trespasser. They were merely expected to report any problem to Global Guardians.

11. Mr Woolgar also gave evidence about GGM's use and control of the Property as a whole. The FTT appeared to accept this evidence and summarised it in this way:

"73. Mr Woolgar stated that when Global Guardians entered into any agreement with an owner, they would immediately change the keys both to [sic] the main entrance doors. On accepting responsibility for [the Property], six sets of keys were cut. These were provided to (i) NHSPSL; (ii) GGM; (iii) G100; (iv) GGFM; (v) The Global Guardian office; and (vi) the guardian. Global Guardians exercised control over who entered the property. The owner would only enter with their permission. Mr Woolgar stated that Global Guardians ensured that all the rooms occupied by guardians had locks, to which the occupants had keys. This arrangement was essential to enable Global Guardians to exercise control over the property.

74. Mr Woolgar explained how Global Guardians used to charge the owner for the start-up costs, council tax and utilities. Global Guardians now absorbed these costs. Properties would be accepted for a minimum period of three months, albeit that a scheme would only be viable if the property is available for a longer period. At Stamford Brook, four electric shower units were installed. These would have a minimum life expectancy of a year. Four basic kitchens were installed. These would often be recycled from other properties. Inevitably, the longer the guardian arrangement lasted, the more tired these units would become."

The Agreements between NHSPSL and GGM

12. The principal agreement between NHSPSL and GGM in relation to the Property is a document headed "Property Protection Proposal", with a maintenance schedule attached,

issued by GGM on 4 April 2016 ("the Proposal"). This was signed on behalf of NHSPSL on 31 March 2016, accepting the proposed services on the terms set out in the document.

13. The letter from GGM forming part of the Proposal describes its provision of property guardian services to protect empty buildings, including a building manager and a head guardian. It explains that guardians sign a weekly licence agreement stating that no tenancy is created. It states that the services provided by GGM start on the date the Proposal is signed by NHSPSL and that the minimum contract period is 4 months, with a notice period of 4 weeks, expiring on a Monday. GGM agrees to carry out works at its own expense to make the Property suitable for occupation by the guardians.

14. Other than the express provision negativing the grant of any tenancy by GGM to an occupier, the Proposal makes no reference to the creation of a tenancy and is couched in terms of the provision of services by GGM to NHSPSL.

15. However, there is no payment by NHSPSL for the services. The Proposal states that GGM will not charge management fees and that it will "return £600 per month of the property guardian fees to the Owner". GGM is therefore paying NHSPSL rather than being paid to provide services. NHSPSL is liable for all maintenance works and GGM is authorised to spend up to £750 on urgent works. GGM is responsible for all utilities and council tax levied on the occupied rooms.

16. A clause headed "Access and Egress" states: "GGM will manage all access to the Property including that by the Owner and their contractors." All keys for the Property are to be handed back to NHSPSL as part of the managed process for vacating the Property upon termination of the agreement.

17. The Proposal provides for two-phase occupation of the Property by GGM:

> "GGM will occupy the ground and first floors as the first phase of a two phase occupation.
>
> Once the necessary plumbing works are completed by GGM on the 2nd floor, GGM will then look to occupy the 2nd floor in the second phase of the process."

18. On 1 October 2020, NHSPSL entered into a further agreement with GGM which provided:

> "To the extent that such a right does not already exist on an ongoing basis under the terms of the agreement … NHS PS Ltd hereby grants GGM Ltd a right of possession of the Property for the sole purpose of enabling eviction of GGM's former licensees and any other person occupying the Property."

As its terms suggest, this agreement was made after NHSPSL had terminated the agreement contained in the Proposal and difficulties had begun to emerge in obtaining possession of various parts of the Property from licensees.

Temporary Licence Agreements

19. Specimen licence agreements made between Global 100 and occupiers of rooms in the Property were exhibited to the witness statements that were before the FTT. These are written as being licences to occupy a designated space in the Property, on a non-exclusive basis. The occupier pays a weekly licence fee, collected monthly in advance, and a contribution towards council tax. Global 100 has the right to allocate and change rooms. The licence is expressed to terminate when the licence period expires, or if GGM's own permission to occupy the Property is terminated.

20. The licence agreements recite that GGM provides guardian management services to property owners and that Global 100 is placing guardians in the Property in order that the guardians may perform their guardian functions. The occupier is required to sleep at the Property for at least five nights out of any seven and be present at least one hour in each 24 hours, and to share the Property amicably with other occupiers. The occupier is required to notify Global 100 immediately if they become aware of any damage or of any unauthorised person attempting to gain access to the Property, and to keep all doors and windows locked. Otherwise, there is no obligation to provide any guardian function. Materially, the occupier agrees not to conduct business on the Property or hold any meeting.

The Global Guardians Inter-company Agreement

21. On 19 January 2018, the Third Appellant, Mr Kyprianou, signed on behalf of GGM and Global 100 a one-page document setting out the inter-company arrangements for the appointment and termination of guardian licences ("the G100 Agreement").

22. The G100 Agreement states:

> "Global Guardians Management Ltd Co No 07676554, 'GGM', provide services to property owners to, among other benefits, secure premises against trespassers and protect such premises from damage. To assist GGM in providing these services GGM grants permission to Global 100 Ltd Co No 07680230, 'G100', to grant temporary, non- exclusive licenses, to persons selected by G100, to share occupation of such part or parts of the property as G100 may from time to time designate, on terms which do not confer any right to the exclusive occupation of the property or any part of it.
>
> These temporary licenses are the Guardians' licenses to occupy the property.
>
> The grant of the license from GGM to G100 confers on G100 such rights to manage, protect and occupy the premises as are required for the proper protection of the properties through their residential guardians.
>
> Guardians sign agreements directly with G100 Ltd whose authority to grant such licenses emanates from its permission, or license, from GGM. In as much as GGM authorize G100 to grant such Guardian licenses, it also confers on G100 sufficient interest in the properties for G100 to bring claims for possession if required against the Guardians to whom it has granted licences.

This situation has existed since the two companies were set up in around June 2011."

23. The G100 Agreement therefore purports to record and restate an arrangement said to have been in place between GGM and Global 100 since before the Proposal was signed by NHSPSL and GGM. It is not specific to the Property or any other individual set of premises. Its effect, going forwards, is to confer on Global 100 power to select occupiers of parts of the Property, grant occupational licences and administer and manage the occupation of premises by licensees. It also purports to confer on Global 100 sufficient interest in occupied premises for Global 100 to be able to bring possession claims against occupiers in its own name. It does not purport to grant Global 100 possession of or title to any of the premises occupied by guardians.

24. The final paragraph of the G100 Agreement appears intended to give effect to the decision of the Court of Appeal Manchester Airport plc v Dutton [2000] QB 133 that a licensee without a right to possession and not in occupation of land could bring a claim against trespassers for possession of the land as needed in order to give effect to its rights under the licence.

THE FTT'S CONCLUSIONS

25. It was on the basis of the evidence and contracts summarised above and the reality of GGM's intended possession and control of the Property that the FTT held that, despite the Proposal being in terms of a licence and service agreement, the reality was that GGM was the tenant of the Property for a term of 4 months and thereafter on a periodic basis, subject to termination by 4 weeks' notice. It held that the agreement could not be characterised as a service agreement whereby GGM managed the Property on behalf of NHSPSL, which had no interest in permitting the Property to be used as residential accommodation or in recovering market fees from the occupiers.

26. The FTT also concluded that the guardians enjoyed exclusive use of their rooms, which they occupied as their residences. In other proceedings relating to the Property, Global 100 Ltd v Laleva [2021] EWCA Civ 1325; [2022] 1 WLR 1046, the Court of Appeal held that it was unarguable that the temporary licence agreements made with the occupiers of rooms in the Property amounted in law to a tenancy of each room. Lewison LJ explained that, even if (which the Court did not decide) Global 100 only had a licence of the Property and not a tenancy, the defendant, who is the Second Respondent to this appeal, was estopped from denying that Global 100 Ltd had sufficient interest in the Property to bring a claim for possession against her.

27. As to ultimate receipt of the licence fees payable by the occupiers, the FTT found itself stymied in making a factual finding by the absence of any witness on behalf of the Global Guardians group of companies who could explain the business relationship between GGM, Global 100 and other companies in the group, or where exactly the fees initially received by Global 100 ended up. The FTT stated that, notwithstanding payment of the licence fees to Global 100, it seemed to be GGM that paid the utility bills and council tax on behalf of the occupiers and the £600 monthly fee to NHSPSL. There was documentary evidence before the FTT that both Global 100 and GGM were substantial businesses with significant assets:

the FTT noted that on 30 June 2020 GGM had cash reserves of £22,991 and Global 100 had cash reserves of £1,171,490.

28. Having recorded that Mr Woolgar was unable to assist it on the financial arrangements between the two companies and having described the position as "vague, unclear and wholly unsatisfactory", the Decision states that the two companies "have worked closely together and their operations appear to be entirely intertwined". It then simply confirmed the decision of the Council that both companies had control of and were managing the Property, giving as a reason for that conclusion that both companies had been in receipt of the rack rent from the Property, or would both be in receipt of the rack rent if the Property were to be let at a rack rent.

29. It appears, therefore, that the conclusions of the FTT were that:

    a. The occupiers of the rooms in the Property had exclusive use of the rooms for residential purposes only: the Appellants had not rebutted the statutory presumption to that effect. Accordingly the Property was an HMO.

    b. GGM and Global 100 were both indistinguishably in receipt of the rack rent of the Property, or would have been if it were let on a rack rent, and so were both persons in control of the Property.

    c. GGM and Global 100 were both indistinguishably lessees of the Property and received rents or other payments from those in occupation as licensees of parts of the Property.

THE RELEVANT STATUTORY PROVISIONS

30. Subject to certain exemptions that do not apply here, any HMO requires to be licensed under Part 2 of the 2004 Act. A building or part of a building may be an HMO by satisfying one of a number of definitions in the Act, or as a result of a local housing authority making a declaration to that effect. The Respondents contend and the FTT held that the Property is an HMO because it satisfies the "standard test" in s.254(2) of the 2004 Act. The relevant statutory provisions in that regard are the following:

> "254. (1) For the purposes of this Act, a building or part of a building is a "house in multiple occupation" if –
>
> (a) it meets the conditions in subsection (2) ("the standard test") ……
>
> (2) A building or 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."

There is a rebuttable presumption that condition (d), the "sole use condition", is satisfied: s.260(1),(2) of the 2004 Act.

31. It is notable that there is a distinction, in the drafting of s.254, between the building or part of a building, which may or may not be an HMO depending on whether one of the tests is satisfied, and the units of living accommodation in the building that are occupied for residential purposes. It is the living accommodation, not the building or part of a building, to which the sole use and occupation tests in s.254(2)(c) and (d) are directed. The relevant question in this case is whether the residential use constituted the sole use of the living accommodation, i.e. of the rooms in the Property.

32. Section 72(1) of the 2004 Act provides:

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

The terms "person having control" and "person managing" are defined as follows, so far as material:

> "263. (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

….; 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."

33. The terms "owner" and "lessee" are themselves defined in s.262 of the 2004 Act:

(1) In this Act "lease" and "tenancy" have the same meaning.

(2) Both expressions include –

(a) a sub-lease or sub-tenancy; and

(b) an agreement for a lease or tenancy (or sub-lease or sub-tenancy)…..

(3) 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.

……..

(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 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."

Thus, a person with a 4 months tenancy continuing thereafter on a 4-weekly periodic basis is a "lessee".

34. So far as material, s.249A of the 2004 Act provides:

"(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2) In this section "relevant housing offence" means an offence under --

(a) ……

(b) section 72 (licensing of HMOs) ….

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct…."

35. Under s.43 of the Housing and Planning Act 2016, the FTT may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which Chapter 4 of Part 2 of that Act applies, whether or not the landlord has been convicted. That Chapter applies to, among others, the offence of having control of or managing an unlicensed HMO under s.72 of the 2004 Act.

GROUND 1: SOLE USE

36. Before the FTT, the Appellants argued that the Property was not an HMO because the residential use made of the Property was not the only use of the Property, within the meaning of s.254(2)(d) of the 2004 Act.

37. The argument advanced, as recorded in the Decision, was that the guardians occupied their rooms, pursuant to the express terms of the licence agreements, to fulfil the guardian function of protecting the Property, as recited in the agreements. One of the purposes of the occupation of the Property by the licensees was to protect it. The guardians were said not to occupy the living accommodation in the Property as a form of use of the accommodation but rather for the purpose of protecting it. Reliance was placed on the decision of the Court of Appeal in Ludgate House Ltd v Ricketts (Valuation Officer) [2020] EWCA Civ 1637; [2021] 1 WLR 1750 to the effect that guardians were not in rateable occupation of the premises because their position was analogous to the position of a service occupier, who did not enjoy exclusive occupation. It was necessary for the occupier to reside in the premises for the provision of the guardian services to the owner of the premises.

38. The FTT rejected that argument on the basis that the relevant living accommodation was the rooms in the Property, of which the licensees had exclusive use even if not exclusive possession, and that they occupied the rooms as their residences. It noted that a similar conclusion had been reached previously by a differently constituted tribunal in a case called *William Road* (LON/00AG/HMF/2021/0042) and that the Upper Tribunal had given permission to appeal that decision.

39. That appeal was heard after the Decision was published and is reported as Global 100 Ltd v Jimenez [2022] UKUT 50 (LC). The facts of that case, as the Appellants conceded, are

materially indistinguishable from the facts in this appeal (and indeed the licensor of the residential rooms was the same company and the terms of the licence to similar effect).

40. In that decision, the Deputy President of this Tribunal, Mr Rodger QC, held that the question of whether the only use of the living accommodation was as residences for the occupiers was a different question from whether the occupiers were in rateable occupation of it, and that accordingly the decision in the Ludgate House case did not assist. The purpose of the rating legislation was quite different from the purpose of the 2004 Act. The focus in the latter was on the use of the premises in question, not the respective rights of the licensor and licensee in their agreement. 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 purpose or motive of the licensor in licensing occupiers to reside in premises was not the same issue as the use of the premises, which was to be judged objectively. In any event, he held that providing security services to or for the protection of a building was not a use of the building, within the meaning of s.254(2)(c),(d).

41. Faced with that decision of this Tribunal on facts that are materially indistinguishable, Mr Pettit recognised that he might have difficulty in persuading me to reach a contrary conclusion of law. Permission to appeal the Jimenez case was granted by this Tribunal but the appeal has not yet been listed to be heard.

42. I asked Mr Pettit whether he had a further argument or authority on the basis of which he would contend that the Deputy President's decision was wrong, but he accepted that his argument in support of Ground 1 was the same as the argument that he had presented to the Deputy President in Jimenez. Having considered the point in pre-reading, I indicated to Mr Pettit that although the issue was properly arguable and would be argued in due course before the Court of Appeal, I was very unlikely to be persuaded that the Deputy President was clearly wrong and depart from it. In those circumstances, given the forthcoming appeal, the appropriate course for me to take would be to follow the earlier decision of this Tribunal and, if the appeal of any Appellant otherwise fails, grant permission to appeal on Ground 1. Mr Pettit accepted that and proceeded to develop his arguments on the remaining grounds of appeal.

43. Accordingly, for the reasons given by the Deputy President in the Jimenez case, I reject the Appellants' argument that there was a second use of the living accommodation in the Property, namely the provision of security to the Property. The only use of the living accommodation was use as the only or main residences of the occupiers, and accordingly the condition in s.254(2)(d) of the 2004 Act was satisfied and the Property was at the material time an unlicensed HMO.

GROUND 2: NO TENANCY

44. The conclusion of the FTT on the existence of a tenancy was expressed as follows, at para 75 of the Decision:

> "On the basis of this evidence, the Tribunal is satisfied that NHSPSL granted GGM an interest in land. It is impossible to categorise the agreement as a service

> agreement whereby GGM managed Stamford House on behalf of NHSPSL. NHSPSL had no interest in permitting the property to be used as residential accommodation. Their concern was that their vacant property should not be squatted or vandalised. G100 collected licence fees of some £15,000 per month from the guardians, but only paid £600 per month to NHSPSL. This was not of concern to NHSPSL as Global Guardians were securing their property."

45. The FTT had referred to the principal authorities of the House of Lords on whether an agreement expressed to be a licence nevertheless in law creates a tenancy, Street v Mountford [1985] 1 AC 810 and AG Securities v Vaughan [1990] 1 AC 417. In the latter case, Lord Templeman explained that where the terms of a licence contradict the factual reality, the facts had to prevail, and that:

> "In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation." (p.458H)

This was said in the context of a grant by a landlord of co-extensive rights to occupy rooms in a flat but it is of more general application.

46. The FTT then analysed the facts in the light of the principles established by those authorities. It identified that a fixed term of 4 months certain had been created, that a periodic payment of £600 per month was payable, and that the reality was that GGM was being granted possession and control of the Property including any access to it to the exclusion of NHSPSL, while the agreement lasted. The FTT then considered whether possession was attributable to some different legal relationship, namely the provision of services or agency, and concluded that GGM was not acting as agent or servant of NHSPSL but 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 GGM would use the Property.

47. In reality, although the FTT did not put it in this way, the service to be provided to NHSPSL, protection and security for the Property, was a by-product of GGM's intended exclusive beneficial use of the Property.

48. Mr Pettit argued that there was nowhere in the Proposal a grant of exclusive possession of the Property, nor a tenancy or the language of landlord and tenant, and that it was the intention of the parties that no tenancy would arise.

49. He further submitted that the further agreement made between NHSPSL and GGM on 1 October 2020 only makes sense if prior to that time GGM did not have a tenancy of the Property, and that the right granted implicitly recognises that there is no such tenancy.

50. In my judgment, the FTT was clearly right for the reasons that it gave to reach a conclusion that GGM was a tenant of the Property, pursuant to the signed Proposal, and therefore a

"lessee" within the terms of the 2004 Act. Although the Proposal is couched in terms of GGM providing services to NHSPSL, the reality is that those services were only provided by virtue of GGM 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 residential occupiers to occupy all the habitable space in the Property. The benefit – which NHSPSL sought – of protecting the Property from trespassers and vandalism was secured by means of the occupation of the Property by others. GGM was granted exclusive control of the Property for a term at a rent of £600 per month. For the reasons given by the FTT, the argument (not pursued on appeal) that GGM was an agent of NHSPSL is contrary to the reality of the arrangement.

51. I am unable to understand Mr Pettit's argument that, objectively, the parties did not intend to grant exclusive possession to GGM. On the contrary, it appears to me that both parties' objectives were fully served by such a grant, on the terms as to liability for repairs, utility bills and tax that were agreed in the Proposal. What the parties subjectively intended and what they subsequently thought they had created is irrelevant in law. The agreement made on 1 October 2020 throws no light on whether, as a matter of law, the parties created a tenancy two and a half years earlier by the signed Proposal. That agreement was made to serve a particular purpose, as evidence in court of GGM's (and possibly Global 100's) right to bring possession proceedings against remaining occupiers. Given that the Proposal was expressed in terms of a services agreement, it is perhaps understandable that the parties agreed to make that further agreement to serve their purposes at the time.

52. The appeal on Ground 2 is dismissed.

GROUND 3: GGM AND GLOBAL 100 NOT PERSONS MANAGING THE PROPERTY

53. The FTT held that GGM and Global 100 were both persons managing the Property. It did so having held that GGM was a lessee of the Property, for the reasons previously given, and on the basis of a finding that both were in receipt of rents or other payments, indeed in receipt of the rack rent, from the occupiers of rooms in the Property.

54. GGM challenges that conclusion on the basis that the FTT failed to direct itself appropriately on the standard of proof required to justify a penalty notice for a relevant housing offence and drew conclusions about GGM's receipt of licence fees that were not justified by the evidence. In particular, GGM submits that the FTT wrongly concluded that GGM and Global 100 should be treated indistinguishably because there was no adequate evidence provided by the Appellants of the financial relationship between the companies.

55. Global 100 challenges the FTT's conclusion on the basis that it was wrong to conclude that it was a lessee of the Property and so could not be a person managing the Property, as defined.

56. Since GGM was a lessee of the Property, it matters not for the outcome of its appeal on this ground whether it received the rack rent or would so have received it. It is sufficient for GGM to be liable as a person managing the Property if it received rents or other payments

from the licensees, whether directly or through an agent or trustee, or (as raised by the Council's Respondent's Notice) if it would have received them but for having entered into an arrangement with another person for it to receive them. I will therefore leave the issue of whether or not rack rents were paid by the occupiers of the Property and related issues to be dealt with under Ground 4.

57. The first question regarding GGM's liability is whether there was sufficient evidence before the FTT to justify its conclusion that GGM received payments from the occupiers of the Property at all. To uphold the civil penalty notice served on GGM by the Council, the FTT had to be satisfied to the criminal standard of proof that a relevant offence had been committed, viz that GGM was a person managing an unlicensed HMO. In view of the conclusions it reached about sole use and GGM's tenancy, that turned on whether GGM (not Global 100, which was a different person for the purposes of the Act) received payments from the occupiers.

58. The FTT found no facts about payments received from occupiers being transferred from Global 100 to GGM. It found that the two companies were "intertwined" and it was evident that they were both controlled by Mr Kyprianou. That is not sufficient. It found that GGM and not Global 100 paid utility bills, council tax and the £600 per month rent, but in view of the size of GGM's business and its cash resources, that is not evidence that Global 100 transferred any part of the licence fees to GGM. It was not appropriate to draw an inference adverse to GGM, namely that it received some of the licence fees, merely because GGM produced no witness capable of explaining the financial arrangements. A party's duty under the FTT's rules to cooperate with its processes does not require it to adduce incriminating evidence. The onus of proof was on the Respondents to prove beyond reasonable doubt that GGM did receive such monies.

59. The FTT gave no other reason for concluding that GGM was a person managing the Property. However "intertwined" the businesses of GGM and Global 100 might have been, Global 100's very substantial cash assets demonstrated that it was not merely a conduit for licence fees. It is possible that Global 100 was created or used for the very purpose of receiving the licence fees. The FTT was not entitled to treat GGM and Global 100 as if they were one entity receiving licence fees from the Property when, in law and for the purpose of s.72 of the 2004 Act, they were separate persons. The reasons given by the FTT do not justify its conclusion that GGM received the licence fees.

60. The Council has, however, pointed to other evidence capable of supporting the FTT's conclusion and contends that this proves beyond reasonable doubt that licence fees were passed from Global 100 to GGM.

61. In a response dated 24 February 2020 to a statutory requisition for information served by the Council on GGM, Mr Slatter, the business development manager of GGM, stated that it was authorised to manage the Property and that it received rent, not directly but indirectly (the response added: "we receive license fees from guardians"). However, in a response dated 9 November 2020 to a notice from the Council of intention to impose a financial penalty relating to the Property, Kelly Owen Ltd, the Appellants' lawyers, wrote:

> "[GGM] does not have any relationship with the occupants you mention … You have been shown various licenses of occupying licensees (not tenants), these licenses are with Global 100 Ltd. This has always been the case. GGM does not 'receive rent or other payments from the tenants' and it never has."

62. In a letter dated 17 December 2020, in response to a letter from the Council's Mr Bhatia asking for information, Kelly Owen Ltd, the Appellants' lawyers, provided some information. It is a long letter and some of the content is opaque. The passages relied on are:

> "As G100 is a property guardian provider it follows that *GGM will pay a percentage of the property guardian licence fees collected from G100 to the property owner*, as this is what the return is from G100 to GGM in relation to this specific property".
>
> "The money [from licence fees] is distributed to cover the running costs of the property *and to pay staff at GGM* and to the client."
>
> "[Q: Who directly and indirectly receives the rent and how is it distributed and what is G100 and GGM's relationship? A:] G100 receives the licence fees (not rent) and *it is distributed to GGM and to NHS Property Services*. Licence fees are not being received at the moment." (*emphasis added*)

63. In my judgment, there was sufficient evidence here, by way of admissions from officers of GGM and its lawyers, for the FTT to have concluded beyond reasonable doubt that some at least of the payments made by licensees of rooms in the Property were received indirectly by GGM. The letter dated 9 November 2020 is inconsistent with the response dated 24 February 2020, but the former is merely asserting that Global 100 had the direct relationship with the occupiers and the latter is specific about indirect, not direct, receipt of fees. The position is put beyond doubt by Kelly Owen Ltd's letter dated 17 December 2020.

64. However, under s.263(3)(a), indirect receipt of some of the income from the Property only makes GGM a person managing it if Global 100 was its agent or trustee (i.e. if GGM was entitled to the monies that came first into Global 100's hands, subject to the terms of the agency agreement or trust). There was and is no sufficient evidence of any such relationship of agency or trust. It is a possible inference that GGM, having taken a tenancy of the Property from NHSPSL, was entitled to the income from the Property and used Global 100 to transact business with the licensees on its behalf, as a general agent; but a possible inference is insufficient. The Respondents had to satisfy the FTT beyond reasonable doubt that Global 100 was GGM's agent if the offence was to be established on that basis. It has failed to do so.

65. The next question, raised by the Respondent's Notice, is whether, under s.263(3)(b), GGM would have received those licence fees but for having entered into an arrangement with another person who is not an owner or lessee of the premises, by virtue of which that other person received them. GGM certainly *could have been* the recipient of rents or other payments from occupiers of the Property if it had granted occupational licences itself. But such licences would have been different (hypothetical) licences from the licences actually granted by Global 100. It is not clear whether para (b) of the subsection includes such a case

or only cases where an owner or lessee has diverted rent that it was already receiving to another person by entering into an agreement with that person.

66. It seemed to me on an initial consideration of the section and the rival arguments that what is contemplated by para (b) is receipt of the income from the actual occupiers: "those rents or other payments" in para (b) refers back to the rents or other payments paid by those who are in occupation, in para (a). If the relevant licences were granted by Global 100 in the first place, GGM never had a right to those fees and so arguably would not receive them but for the G100 Agreement.

67. However, if that is the right approach, the effect is that neither the owner nor the other person receiving the rent is a "person managing" the premises, even though the lessee who owns a sufficient interest to manage and exploit them permits another person (which may be a company in the same group or a family member) to manage and exploit the full value of the premises. That is such a counter-intuitive conclusion to reach in this context that I am driven to the conclusion that para (b) can apply both in a case (1) where the owner or lessee, who would otherwise have received income from occupiers of the premises, enters into an agreement to permit someone else to exploit the premises in their own right, and (2) where the owner or lessee was receiving or entitled to receive income from actual occupiers but then diverted it to the other person by agreement. The rents or other payments that the owner or lessee would have received are, as a matter of construction, rents or payments for occupation of parts of the HMO at the relevant time. There does not seem to me to be sufficient justification, given the clear policy of the Act, to construe s.263(3)(b) more narrowly so as to exclude from the definition of "person managing" persons in the position of GGM.

68. Accordingly, in my judgment the FTT was right to conclude that GGM was a person managing the Property, though not for the reason that it gave. GGM agreed with NHSPSL to convert the Property and grant occupational licences of parts to guardians, but instead of doing so it agreed with Global 100 that that company would do so instead. But for the G100 Agreement, GGM would itself have granted occupational licences (because it was obliged to do so) and would have received the income from the Property at the relevant time. The fact that those licences would have been different agreements from the licences granted by Global 100 is of no materiality.

69. The FTT also held that Global 100 was a person managing the Property. There is no dispute that Global 100 received the licence fees from the occupiers of the Property but, to be a "person managing" the Property within the definition, Global 100 also had to be an owner or lessee, or alternatively a trustee or agent for GGM. The FTT did not explain on what basis Global 100 was an owner or lessee, or find that it was an agent or trustee of GGM.

70. Given that GGM was itself the lessee of the Property, under the signed Proposal, Global 100 could only have been a lessee if, after 31 March 2016, GGM had granted it a sub-tenancy. There was no evidence of any oral sub-tenancy having been created. The only document capable of amounting to such a sub-tenancy is the G100 Agreement. There is, however, no credible argument that that agreement was a tenancy agreement. Mr Pettit suggested that the Court of Appeal decided in Global 100 v Laleva that there was no tenancy, but that is not

so. It held that even if Global 100 was only a licensee, the defendant was estopped from denying that it had sufficient interest in the Property to claim possession. It did not decide that Global 100 was a licensee.

71. The FTT did not address any argument that Global 100 was a sub-tenant, nor did Ms O'Leary on behalf of the Council develop one before me. Mr Penny, on behalf of the Second to Ninth Respondents, submitted that the G100 Agreement was on its true interpretation a tenancy agreement; alternatively, that it is right to infer from the statement in the agreement that it reflects the position that existed from June 2011 that at some point in the past a leasehold interest must have been granted to Global 100. Ms Budzich and Ms Kyselakova adopted Mr Penny's arguments.

72. I am unable to accept either argument. The G100 Agreement does no more than confer on Global 100 authority to grant non-exclusive licences of parts of the Property and the right to manage, protect and occupy the premises as required to protect them through their guardians. That is a long way short of granting Global 100 exclusive possession of the Property and is only a restricted right to occupy and manage, not a right to possession as against GGM. Indeed, the Agreement does not even refer to the Property: it is perfectly general as to the premises to which it applies. No term or rent is identified. The intention of the Agreement is clearly to give Global 100 only such rights as are needed for it to be able to bring possession claims against licensees. That, as established by Manchester Airport v Dutton, does not require a proprietary interest in land. Further, for the same reasons, there is no basis at all for an inference that a lease must have been granted to Global 100 previously.

73. In my judgment, the FTT was therefore wrong to conclude that Global 100 was a person managing the Property. It was not an owner or lessee of any part of the Property and it was not proven to be an agent or trustee for GGM.

GROUND 4: GGM AND GLOBAL 100 NOT PERSONS HAVING CONTROL OF THE PROPERTY

74. The central issue here is whether the Property was let at a "rack-rent", within the meaning of s.263(1) and (2) of the 2004 Act. If it was, Global 100 unquestionably received it. Whether GGM also received the rack-rent then depends on whether, as a matter of construction of the definition, indirect receipt of part of the rack-rent suffices.

75. In landlord and tenant law, rack rent generally means the rent that reflects the full annual value of property, that is to say a yearly rent that a person seeking to use the property beneficially would agree to pay in the market. In the 2004 Act, it has a different meaning: see s.263(2). The definition, by reference to two-thirds of full net annual value, is of some antiquity. It derives from a 19th Century statute and appears in s.39(2) of the Housing Act 1957:

> "For the purposes of this Part of this Act, the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house.

> In this subsection the expression "rack-rent" means rent which is not less than two-thirds of the full net annual value of the house."

76. Part II of the Housing Act 1957 was concerned with liability to carry out works to houses that were unfit for human habitation. "House" was widely defined. The purpose of defining "person having control" by reference to receipt of rack rent was to impose the responsibility for repairs on the person who received, or who is in a position to receive, substantially the full rental value of the property in question.

77. In Pollway Nominees Ltd v Croydon LBC [1987] 1 AC 79, the House of Lords was concerned with whether a freeholder or long lessees of flats in a building was the "person having control" of the building, for the purpose of being served by the local housing authority with notice requiring works to be carried out to make the building fit for occupation. The freeholder argued that it was only in receipt of ground rents from the long lessees and was not in a position to grant a lease at a rack rent, and so it was not the person having control. It succeeded. Lord Bridge of Harwich identified at p.91 and later accepted the following argument of the freeholder:

> "The argument for the respondent is that the definition is only apt to apply to a person whose interest in the property entitles him to dispose of the right of occupation. It is for the right of occupation that rack rents are paid. Hence the person entitled to grant that right will receive the rack rent if the property is let at a rack rent or would receive it if it were so let. In the case of a house comprising a multiplicity of residential units let on long leases at ground rents, there is either no person to whom the definition can apply or the definition applies collectively to all the long leaseholders who between them either receive the rack rents of units sub-let at rack rents or would receive the rack rents if the units were so sub-let."

78. All but one of the other members of the Committee agreed with Lord Bridge. Lord Goff of Chieveley addressed the case where different parts of a house were owned by different persons:

> "I consider that the words "the person who receives the rack rent of the house" in the first limb of section 39(2) can, with the aid of the Interpretation Act 1889, be read as applicable to the case where a number of persons, having interests in different parts of the house which together comprise the totality of the house, join together to grant a lease of the whole house at a single rack rent."

Thus, in Lord Goff's opinion, all the owners of parts could be persons having control of the house if they either received in aggregate a rack rent or were entitled to grant leases at rack rents. The same would apply to the various long lessees of flats in a building, if they either had or could sub-let their flats on rack rents. In Gill v The Royal Borough of Greenwich [2022] UKUT 26 (LC), this Tribunal decided that the same principle applies where the relevant property interest is jointly owned, even though each joint owner is only entitled to an equal share of the income, if together they receive or are entitled to receive not less than two-thirds of the net annual value of the property.

79. The policy of Part 2 of the 2004 Act is of course different, namely to ensure that all HMOs that should be licensed are licensed and subject to control of the local housing authority. Although, where an application for a licence is made, the 2004 Act requires the local housing authority to identify from among qualifying persons the most suitable person to be granted a licence, the net is cast wider as regards the commission of offences under s.72 of the 2004 Act. Any person who falls within the definitions of "person having control" and "person managing" commits an offence if the HMO is unlicensed. The definitions show that a person who receives rent may commit an offence regardless of whether they have an interest in the property or are entitled to the rent. It is not the purpose of Part 2 to identify only one person having control of the premises and one person managing them.

80. The test of not less than two-thirds of the net annual value was probably adopted to avoid argument that the rent that was actually being received was not a rack rent because it was a little less than the full annual value of the property. Also, but for that provision, a tenant who was paying 99% of the net annual value by way of rent would be the person having control – because they were theoretically in a position to sub-let the premises for 100% of that value – and their landlord, who was receiving substantially the whole of the net annual value of the premises, would not be a person having control.

81. The FTT decided that the licence fees received in the first instance by Global 100 were the rack-rent of the Property, within the definition. The only reasons it gave were that in aggregate the income from the Property would be £15,000 per month, when all the rooms were occupied, and that:

> "Whilst the sums payable by the guardians are significantly less than they would have paid in respect of market rents for accommodation let under Assured Shorthold Tenancies, this is short life accommodation let in a very basic condition at substantial rents." (para 118)

In other words, the fact that the fees payable were low in comparison with rents payable for the type of accommodation that would be let on an assured shorthold tenancy did not mean that they were not the rack-rent of the Property.

82. The FTT further held that if the Property was not let at two-thirds of the rack-rent, GGM and Global 100 would be entitled to the rack-rent if the Property were so let, because, as between NHSPSL and GGM, GGM had the right to let the Property at a rack rent.

83. The Appellants submit that there was no evidence that the Property was let at a rack-rent within the meaning of the definition. They argue, correctly, that it is the rack-rent of the Property as a whole with which the definition of "person having control" in s.263(1) of the 2004 Act is concerned, because the "premises" in question in s.72 are the HMO, not individual rooms in it. Accordingly, they argue, there is no evidence of the rent at which the Property as a whole would let on the open market, no such letting having taken place and no opinion evidence of its rental value having been adduced before the FTT or this Tribunal. Further, GGM had no right under the signed Proposal to let or sub-let the whole of the Property, so it cannot be said that GGM (or Global 100) would receive the rack-rent if the Property were let at a rack-rent: only NHSPSL had the right to let the whole of the Property,

so it was (on this basis) the person having control of the Property. The Appellants noted that NHSPSL had not challenged the penalty notice that was served on it.

84. Further, the Appellants argue that it is logically impossible for both GGM and Global 100 to be in receipt of the rack-rent of the Property, so the FTT's decision was wrong for that reason too.

85. I am grateful to Mr Pettit for the clarity and succinctness of his written and oral arguments but I am fully satisfied that he is wrong in relation to the issue of rack rent. There can be no doubt that the licensees were paying to Global 100, in aggregate, more than two-thirds of the net annual value of the Property within the definition of "rack-rent" in s.263(2). There is no proper distinction to be drawn, either in law or fact, between the aggregate of the licence fees payable by the licensees, being the fees for occupation of the 30 available residential rooms in the Property, and the rack-rent of the Property as a whole. The evidence before the FTT established that the rooms had been advertised on Global Guardians' website and comprised all the lettable space in the Property. The accommodation advertised was basic, involving shared WCs, bathrooms and kitchens, and was licensed without security of tenure. It would be unlikely to appeal to anyone minded and financially able to take a private tenancy of a room or flat. As the FTT said, such premises and the rooms in the Property are not comparable.

86. Further, there is no reason to believe that Global 100 would have advertised and licensed the rooms for significantly less than the market rate for such accommodation. They are experienced operators in the guardians business. They run their business for profit, not as a charity. The fact that their website indicated, in relation to the 30th room, that it was 65% cheaper than rented accommodation, is neither here nor there. The question is what was the net annual value of a room in the Property, not what rents were payable for an assured shorthold tenancy of privately rented rooms or flats. Given the nature of the accommodation, the fees being paid and the evidence about how the rooms were advertised and let, there was strong evidence that the fees being paid by the licensees were in aggregate the net annual value of those parts of the Property, or at least must have been more than two-thirds of that value, and so the "rack-rent", as defined.

87. As a matter of law, in a case such as this, there is no relevant distinction to be drawn between the aggregate of the rack-rents payable for the lettable rooms in the house and the rack-rent of the house. The issue was addressed by this Tribunal in Urban Lettings (London) Ltd v Haringey LBC [2015] UKUT 0104 (LC).

88. That case concerned an HMO which was a converted block of flats falling within s.257 of the 2004 Act, and accordingly the provisions of Part 2 of the 2004 Act applied subject to the modifications specified in The Houses in Multiple Occupation (Certain Blocks of Flats) (Modifications to the Housing Act 2004 and Transitional Provisions for section 257 HMOs) (England) Regulations 2007. Reg 3 provides a different definition of "person having control", in the form of a new s.61(7) of the 2004 Act, which applied in that case:

> "(7) In this Part the "person having control" in respect of a section 257 HMO is—

(a) in relation to an HMO in respect of which no person has been granted a long lease of a flat within the HMO, the person who receives the rack rent for the HMO, whether on his own account or as an agent or trustee of another person;

(b) ……."

"Rack rent" was not further defined for that purpose.

89. The definition of "person having control" was therefore different from the definition in s.263(1) and (2), but the issue in that case was whether the aggregate market rents received by a mesne landlord, who was the lessee of 4 flats on a floor of the block, represented the rack rent for that floor (which was the HMO). The mesne landlord argued that the HMO itself had a different identity from the flats comprised in it, since it also included common parts of which it was not the lessee, and so it was not in receipt of the rack rent for the HMO. Since it had no interest in the common parts it would not be granted a licence to manage them, and so the policy of the Act was better fulfilled by holding that it was not a person having control.

90. His Honour Judge Behrens rejected the argument, holding that, in the light of the reasons given for the decision in the Pollway Nominees case, there could not have been an intention to distinguish in such a case between the rack rents received from the flats and the rack rent of the HMO itself. If there were a distinction, it would mean that no one could be a person having control of the HMO. The policy of the Act was better served by concluding that the person who received the full net annual value of the lettable accommodation in the HMO was a person in control of it. If that person could not obtain an HMO licence in its own name, because it had no interest in common parts, then it should not have entered into business arrangements whereby it could not comply with the licensing obligations of Part 2.

91. In my judgment, the conclusion that Judge Behrens reached applies equally to the facts of this case. The definition in s.263(1) is different in several respects from the definition in s.61(7), but the essential point – by reference to receipt of the rack-rent of the HMO – is the same. Further, the Pollway Nominees case, on which Judge Behrens relied for his conclusion, was decided on the basis of the definition in s.39 of the Housing Act 1957, which is in the same terms as s.263(1) and (2) of the 2004 Act. It could not have been intended by the draftsman of the Act that if any part of an HMO were not let reserving a rent, the recipient of the rack rent of all the remaining parts cannot be a person in control of the HMO, with the possible consequence that there would be no such person. Although it can be said that the recipient would, in most cases, at least be a "person managing" the premises, it is not the policy of the Act to identify one person who is either a person having control or a manager, or the most appropriate person falling within either definition. On the contrary, the policy is that all persons falling within either description are liable in the case of an unlicensed HMO. That is evident from the drafting that makes both the agent who first receives rent and the person who is entitled to it from the agent persons managing the premises.

92. As a factual question, there is no distinction here between the rack-rent of the licensed rooms of the Property and the rack-rent of the Property because GGM was entitled to and did let

all the lettable space in the Property. The evidence established that there was no other income-producing part to be let. It is unrealistic to consider that additional rental income could have been obtained for kitchens or bathrooms and common parts that the occupiers of rooms had the right to use. As any property valuer would explain, were premises such as the Property to be let as a single whole, instead of all the individual rooms being separately let, the rent produced by the single letting would be less than the aggregate of the rents for the individual rooms. That is because anyone taking a lease of the whole of the Property would want to profit from sub-letting the rooms and would factor into their rental bid the likely costs of sub-letting the individual rooms, the time taken to achieve full occupation and the risk of later voids when no income is received for individual rooms.

93. In my judgment, the FTT was right to reach the conclusion that Global 100 received the rack-rent of the Property and was therefore a person having control of the Property. The contrary is not seriously arguable given the purpose of the criminal and civil penalty provisions of Part 2 of the 2004 Act. It is unnecessary in those circumstances to consider the FTT's alternative conclusion, based on s.263(3)(b) of the 2004 Act, as to who would have received the rack-rent of the Property if it were let at a rack-rent.

94. The remaining question is whether the FTT was right to reach the conclusion that GGM also received the rack-rent of the Property. I have already decided that there was sufficient evidence to be sure that some of the rack rent initially received by Global 100 reached GGM. It is however not possible to go further, on the evidence available, and conclude that the whole of the income was passed to GGM, or that GGM was entitled to income as against Global 100.

95. The issue raised is accordingly whether it is sufficient to make GGM a "person having control" of the Property that Global 100 passed some of it to GGM even though it was not obliged to do so.

96. It cannot have been the intention of Parliament that anyone such as an employee, family member, bank or provider of services or goods, who receives from the initial recipient monies representing part of the rent paid to it, is a person having control of the premises in question. The labels "person having control" and "person managing" are not, perhaps, an obvious description of every person falling within the definitions, but the labels are not wholly arbitrary as descriptions. None of the persons mentioned above could sensibly be said to be a person having control of the premises because they receive wages, an allowance, a transfer or a payment that represents part of the monies previously paid as rent. It is material that there is no *mens rea* requirement for the commission of any of the offences in Part 2 of the 2004 Act.

97. It seems to me that a "person having control" of premises, within the meaning of the definition, is either someone who, alone or in combination with others, receives the whole of the rack-rent, because they receive it as agent or trustee of the person entitled to it, or because they receive it and are entitled to it ("on his own account"), or someone who does not receive the rack-rent because the premises are not let at a rack-rent but is in a position to receive the rack-rent because they own an interest in the premises (alone or in combination with others) that enables them at the relevant time to realise at least two-thirds of their net

annual value. If the premises are in fact let at a rack-rent then the alternative limb ("who would so receive it if the premises were let at a rack-rent") does not come into play. Someone who is not entitled to any part of the rack-rent but to whom, without obligation, the initial recipient pays part of the income, is not a "person having control" merely because some of the monies representing the rent are paid to them. That is so even if the payee is a company in the same group. It is unnecessary for this case to decide whether indirect receipt of all of the rack-rent would suffice.

98. On the facts proved in this case, although GGM was a lessee of the Property, as between Global 100 and the occupiers Global 100 was entitled to the licence fees. There was no sufficient evidence of a relationship of agency or trust between GGM and Global 100. There was therefore no sufficient evidence that GGM was entitled to be paid any part of the fees, but there was evidence that Global 100 in fact paid some of the fees to GGM. In my judgment, mere payment and receipt, because Global 100 chose to transfer some of the fees to GGM, is insufficient to make GGM a person having control. Since the Property was in fact let at a rack-rent, there is no occasion to decide whether GGM was in a position to do so if it had not been. The FTT was therefore wrong to hold that GGM was a "person having control" of the Property, as defined.

DISPOSAL

99. GGM succeeded in establishing that it was not a person having control of the Property but its appeal against the penalty notice ultimately fails because the FTT rightly concluded that it was a person managing the Property.

100. Global 100 succeeded in establishing that it was not a person managing the Property but its appeal against the penalty notice fails because the FTT was right to conclude that it was a person having control of the Property.

101. It therefore necessarily follows that Mr Kyprianou's appeal is dismissed, since both GGM and Global 100 remain liable.

102. So far as the rent repayment orders are concerned, the appeal of Global 100 against the imposition of these orders is dismissed. They remain justified on the basis that Global 100 was a person having control of the Property, receiving the licence fees, at a time when an offence under s.72 of the 2004 Act was being committed.

Mr Justice Fancourt

27 September 2022

Right of appeal

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