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Property guardianship, security of tenure, HMOs and  
the Housing Act 2004

Where are we now, and what comes next?

Dean Underwood and Tara O'Leary, Barristers

## Overview of this webinar



1. Introduction and overview
2. *Laleva*: Security of tenure at guarded properties
3. *Jimenez & Global Guardians*: Guarded properties as HMOs
4. Guarded properties as licensable HMOs:  
Management, control and the Schedule 14 conundrum
5. Questions



## Introduction and overview

## What is 'property guardianship'?



- *“A form of private accommodation in which occupants live, but where they also have an explicit role in providing security for a property that otherwise would be empty and potentially at risk of squatting or vandalism.”*
- An ‘innovation’ from the Netherlands: arrived with the expansion of two Dutch companies into the UK in early 2000s
- Typically – though not exclusively – involves non-residential buildings e.g. offices, clinics, warehouses, churches, pubs, retail
- Typically relies upon on the services of ‘guardianship companies’
- Used both by private and public sector landowners

## Scale of guardianship in the UK



- FOI request in 2016 identified 1,000 guardians living in central London, and research in 2017 estimated 5,000 – 7,000 guardians nationally
- 2022: 41% of local authorities were aware of guardians in their area
- January 2021: rooms advertised to let in 95 local authority districts, 80 of which were outside London
- Estimate of between 20-40 companies offering guardianship services in operation at any given time
- Example: Global Guardians gave evidence to the FTT in 2021 that it was then managing 700 properties and had had 5,000 guardians on its 'books'

*"Property Guardians: Headline Report"*, June 2022  
Commissioned by the Dept. for Levelling Up, Housing & Communities

# Who are the guardians?





## Who are the guardians?



- *“Among the property guardians interviewed for this study, the decision to enter guardianship was nearly always underpinned by financial insecurity and the (un)affordability of traditional private rented sector housing. ... Rather, they were people of varying ages, sometimes facing homelessness, and often with few alternatives. ... It is relevant that around two thirds of the sample occupied roles in the labour market that were part time, low paid and/or insecure.”*
- *“One company had started working with a large homelessness charity after identifying the need for homelessness accommodation during the pandemic”*
- *“Most property guardians reported very poor conditions, with properties frequently described as deteriorating and susceptible to adverse weather conditions. Local authorities also reported poor conditions in properties they had inspected. Persistent issues with damp and mould were very commonly reported, including damp from flooding, faulty plumbing and leaking roofs.”*

*“Property Guardians: Headline Report”, June 2022*



- Vacuum of any targeted law or policy
- *“Property Guardians: Guidance”, April 2022, DfLUHC:*
  - *“The government does not endorse or encourage the use of property guardianship schemes as a form of housing tenure, as guardians can be asked to live in conditions that do not meet the standards expected in residential properties, but people have the right to make their own informed decisions about their housing choices.”*
- London Assembly Housing Committee, *“Protecting London’s Property Guardians”, 2018:*
  - *“Current legislation does not reflect this new housing option and has left a grey area which is being exploited by guardian companies and property owners to the detriment of guardians. The Housing Act 2004, the Fire Safety Order 2005 and accompanying guidance must be revisited to ensure they are still relevant and protect guardians effectively. The need for planning permission for temporary change of use must also be clarified.”*



## So far before the courts



- Security of tenure within guarded properties:
  - *Camelot Guardian Management v Khoo* [2018] EWHC 2296 (QB)
  - *Global 100 Ltd v Laleva* [2021] EWCA Civ 1825
- Licensable under Housing Act 2004:
  - *Global 100 Ltd v Jimenez* [2022] UKUT 50 (LC)
  - *Global Guardians Management v Hounslow LBC & others* [2022] UKUT 259 (LC)
  - *49 Russell Hill Road*, FTT 22.02.21 - *Kaszowska v White* [2022] UKUT 11 (LC)
  - *255-279 Cambridge Heath Road*, FTT 09.12.19
  - *35-37 William Road*, FTT 06.07.21
- Ratings and valuation:
  - *Southwark LBC v Ludgate House Ltd* [2020] EWCA Civ 1637
- Planning status:
  - No reported decisions as yet, but conversion to HMO might be a material change of use requiring planning consent, e.g. Class C4 versus *sui generis* use

• • • *Laleva:*  
• • •  
• • • Security of tenure at guarded properties

# *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835; [2022] 1 WLR 1046

## The *Laleva* licence



### Essential facts:

- NHS Property Services Ltd (freeholder) entered into agreement with Global Guardians Management Ltd (GGM) for property guardian services
- GGM entered into inter-company agreement with G100, granting G100 the right to grant temporary, non-exclusive licences to property guardians, and sufficient interest in the property to bring any claim to eject them
- G100 entered into an agreement with Laleva (L) described as a temporary licence
- When L and others failed to vacate the property when required, G100 brought a claim to repossess it
- L argued that her agreement with G100 created a tenancy, not a licence; and HHJ Luba QC found the argument substantial

### Held (on G100's appeal):

- Both the terms of L's agreement and the circumstances in which it was made were material to its classification in law (35-37, 41)
- L's agreement with G100 created a licence, not a tenancy, the following factors being determinative (42-46)
  - Lack of security of tenure was essential to the purpose of the agreement (42)
  - The occupants were chosen by G100, not self-selected (42)
  - G100 could alter the location and extent of their living space (43)
  - The occupants agreed to "share amicably" with others chosen by G100 (43)
  - and had non-exclusive possession of the whole, not any particular part (43)
  - Their situation was analogous to that of service occupiers (44-46)

# Tenancy or licence?

Both terms of agreement and surrounding circumstances material



- Lewison LJ applied Lord Templeman's well-known dicta in *Street v Mountford* [1985] AC 809, at 819, and cited the Supreme Court's approval of his own dicta in *Secret Hotels2 Ltd v HMRC* [2014] 2 All ER 685, at (32):

“In all these cases, the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.”

- But, citing Lord Templeman in *AG Securities v Vaughan* [1990] 1 AC 417, at 458, as well as the terms of agreement, the court may consider the circumstances in which the agreement was made (37) ...

“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,”

- They included the reason - significant in *Laleva* - why the occupier was let into occupation in the first place (41)
- Further, sole use would not necessarily be tantamount to exclusive occupation (39)

# Service occupancy

## Guardians as service occupiers



- Equally significant in *Laleva* was the fact that occupation of the property was necessary in order for her, and others, to perform the agreed guardianship services (44)
- That fact rendered their situation akin to that of service occupiers who, in law, do not generally acquire exclusive possession of property occupied for the purpose of performing employment services: see *Comr of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708
- Lewison LJ acknowledged that property guardians are not strictly employees of those providing guardian services to the owner, but noted that the above proposition of law had already been applied to property guardians: *Ludgate House Ltd v Ricketts* (Valuation Officer) [2021] 1 WLR 1750, at (66)
- So, the fact that “it was necessary for the provision of the guardian services that Ms Laleva should occupy the Property” (46) meant that she did not enjoy exclusive possession of it
- Conclusion (48):

“[...] on the proper interpretation of Ms Laleva’s agreement considered in the light of the surrounding circumstances and the purpose of the agreement, the argument that it created a tenancy rather than a licence has no real prospect of success.”

## The significance of *Laleva I*?



- *Laleva* is necessarily a decision on its facts, based on “the proper interpretation of [her] agreement considered in light of the surrounding circumstances and the purpose of the agreement [...]” (48)
- Strictly its conclusion will be determinative only where – as in *Global Guardians* below – the facts and circumstances of any subsequent case are indistinguishable
- Otherwise it may be persuasive; but each case must be assessed on its own facts
- Nonetheless, as the purpose and circumstances of other such agreements are likely to be very similar, it is unlikely that a court or tribunal would be easily persuaded to a different conclusion about agreements similar to those used in *Laleva* ...
- And *Laleva* now settles the proper classification of G100’s seemingly standard term agreements and guardianship arrangements: the argument that they create a tenancy rather than a licence has no real prospect of success



• • • *Jimenez & Global Guardians:*  
• • •  
• • • Guarded properties as HMOs

# Sections 254(2)(d) and 260(1), Housing Act 2004

## Standard-test HMOs and the “sole use” condition



### Section 254(2):

- (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;
- (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;
- (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.

### Section 260(1):

- (1) Where a question arises in any proceedings as to whether either of the following is met in respect of a building or part of a building –
  - (a) the sole use condition, or
  - (b) the significant use condition,
- it shall be presumed, for the purposes of the proceedings, that the condition is met unless the contrary is shown.
- (2) In this section –
  - (a) “*the sole use condition*” means the condition contained in – (i) section 254(2)(d) (as it applies for the purposes of the standard test or the self-contained flat test), or (ii) section 254(4)(e), as the case may be; and
  - (b) “*the significant use condition*” means the condition contained in section 255(2) that the occupation of the living accommodation or flat referred to in that provision by persons who do not form a single household constitutes a significant use of that accommodation or flat.

# *Global 100 Ltd v Jimenez* [2022] UKUT 50 (LC); [2022] HLR 25

## The sole use of guarded properties



### Essential facts:

- GGM agreed to provide property guardian services for Euston One Ltd (freeholder of the former Addison Lee Building, Euston)
- GGM then granted G100 the right to grant licences to various property guardians
- G100 granted Jimenez (J) and others a licence to occupy offices in the building
- LHA (Camden LBC) found the building occupied as an unlicensed, standard-test HMO; and J and others applied for a RRO alleging an offence under s.72(1) HA 2004
- G100 argued that the building was not an HMO as the “sole use” condition was not met – J and others occupied it so as to provide property guardian services
- FTT made a RRO; and G100 appealed

### Held (dismissing the appeal):

- The “sole use” condition is presumed met unless the contrary is shown (s.260), so the burden was on G100 to show that the building was used other than as living accommodation (9, 43)
- Further, it was important that the statutory definition of an HMO (and the “sole use” condition) was “not interpreted so narrowly as to frustrate the achievement of the statutory purpose” (15, 46)
- G100’s licence agreements (see *Laleva*) did not allow for more than one use of the living accommodation: J and others could only use it as their main residence (47); and the services they provided were essentially a by-product of that use (49)
- Nor did the building have more than one use

# *Global Guardians Management Ltd etc v Hounslow LBC, Laleva etc* [2022] UKUT 259 (LC)



## Essential facts:

- GGM agreed to provide property guardian services for NHS Property Services Ltd (freeholder, Stamford Brook Centre)
- GGM entered into inter-company agreement with G100, giving G100 the right to grant licences to property guardians; and G100 granted licences to various guardians, including Laleva
- LHA (Hounslow LBC) found the building occupied as an unlicensed HMO and penalised GGM and G100 (as persons controlling or managing the building), and a director, for an offence under s.72 HA 2004
- Laleva and others applied for RROs
- The FTT dismissed appeals against the penalties and made RROs against G100 as the guardians' "landlord"

## Held (dismissing the appeal):

- Two issues arose on appeal: "sole use" (s.254(2)) and control and management (s.263)
- On the "sole use" ground (see below for control and management) -
- "[...] 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."

# The significance of *Jimenez* and *Global Guardians*?



- The Upper Tribunal granted G100 permission to appeal its decision in *Jimenez* to the Court of Appeal but, as noted at (41) in *Global Guardians*, the appeal has not yet been listed for hearing (indeed the case does not appear in a search of Case Tracker)
- For the time being, therefore, *Jimenez* is likely authoritative as to the use made of buildings occupied pursuant to G100's standard term licences
- Note however that the building's status in *Jimenez* and *Global Guardians* need not have been different even if the "sole use" condition had not been met, provided the guardians' use of the living accommodation as the only or main residence was a "significant use" of it
- In that case –
  - the LHAs would have been empowered to declare the buildings to be HMOs under s.255, HA 2004
  - the guardians' use of the accommodation would be presumed to meet the "significant use" condition unless the contrary were proved (s.260), and
  - the building would be an HMO (s.254(1)(d)) so long as the declaration was in force

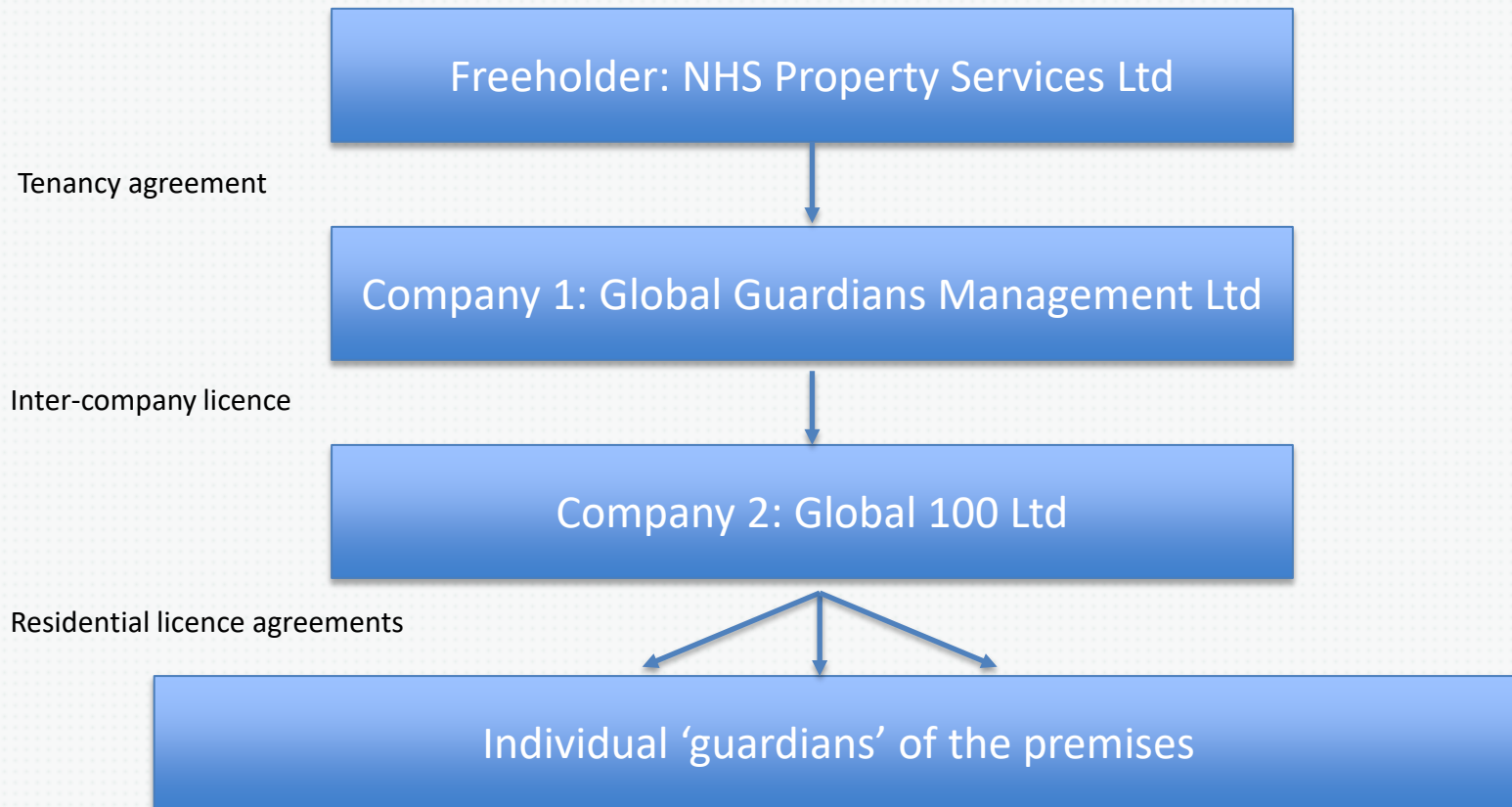
- Guarded properties as licensable HMOs:
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# *Global Guardians: the Stamford Brook Centre*



# Global Guardians: the contractual relationships



## Persons 'managing' HMO



- 263(3) - 'person managing':
  - An “owner or lessee of the premises” who:
    - ‘Owner’ includes anyone with a lease of 3+ years: s.262(7)(a)
    - Receives (directly or through “**an agent or trustee**”) “rents or other payments” from persons who – in an HMO – are in occupation of “parts of the premises” OR
    - “Would so receive” rents or other payments “but for having entered into an arrangement ... with another person who is **not an owner or lessee of the premises** by virtue of which that other person receives the rents or other payments”
  - Includes – where rents/payments are received through another person as agent or trustee – that other person

## Persons 'managing' HMO: *Global Guardians* [§56-73]



- 'Managers' can include: (i) owner; (ii) lessee; (iii) agent or trustee of the owner or lessee who receive rents **on their behalf** from the persons in occupation of parts of the HMO
- Two lacunae applied to G100 – **not** a 'manager':
  - Section 263(3) does not apply to licensees – *i.e.* G100
  - G100 not an agent/trustee: therefore final limb of s.263(3) not met
- GGM **not** receiving payments (either directly or through agent/trustee) from the HMO occupants: did not satisfy s.263(3)(a):
  - Evidence that G100 transferred *some* of the money to GGM
  - *Sharing* payments/proceeds is not enough
  - Remember the burden of proof is beyond reasonable doubt!

## Persons 'managing' HMO: *Global Guardians* [§56-73]



- GGM **was** a person who 'would have received' the guardians' licence fees but for its agreement with G100: s.263(3)(b)
  - The arrangement must be with a person who is 'not an owner or lessee': applied to G100 as a mere licensee
  - Irrelevant that GGM had no direct relationship with the guardians and was not contractually entitled to their payments
  - Any other interpretation of s.263(3) would allow an owner or lessee to escape liability merely by allowing a friend/relative/sister company to contract with occupants
- Identical conclusions in *Cabo v Dezotti* [2022] UKUT 240 (LC) [§59]

## Persons 'in control' of HMO



- Criminal offence to be a “*person having control of or managing*” an HMO which is required to be licensed under Part 2 but is not: s.72(1)
- Section 263(1)-(2) - ‘person having control’:
  - “*The person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person)*”

OR

- The person “*who would so receive it [rack-rent] if the premises were let at a rack-rent*”
- Rack-rent means “*a rent which is not less than two thirds of the full net annual value of the premises*”



## Persons 'in control' of HMO: *Global Guardians* [§74-98]



- Accepted that “*rack-rent*” can be comprised of mere licence fees – not only rent payable under tenancy agreement
- No distinction (in theory or reality) between rack-rent for HMO as a whole versus aggregate rent for individual rooms within it: *Urban Lettings (London) Ltd v Haringey LBC* [2015] UKUT 0104 (LC)
- Satisfied of sufficient evidence to show £15,000pcm was ‘rack-rent’
  - Valuation evidence not required
  - Can be inferred from (i) evidence of condition and use of premises; and (ii) the commercial reality that guardianship operators exist to maximise profit

## Persons 'in control' of HMO: *Global Guardians* [§74-98]



- G100 **was** a person 'in control' because it received the rack-rent, *i.e.* the totality of the licence fees paid by the guardians
- GGM **was not** 'in control':
  - Section 263(1) only met if **all** of the rack-rent is received, *i.e.* “*on his own account or as agent or trustee of another person*”
  - Not sufficient to pay wages, allowances, or transfers of **part** of the income generated by premises
- Identical conclusions in *Cabo v Dezotti* [§48]
- **NB** *Global Guardians* declined to consider whether GGM was a person 'who would have received rack-rent' on basis that “*if the premises are in fact let at a rack-rent then the alternative limb ... does not come into play*”.

## Schedule 14 exceptions



- A building or part of a building is not an HMO if listed in Schedule 14: s.254(5)
- Para. 2 Schedule 14: a building where “***the person managing or having control of it***” is a “*public sector body*” as defined by para. 2. Includes:
  - “(a) ***Local housing authority***”
  - “(f) A ***health service body*** within the meaning of s.9 NHS Act 2006”, including:
    - “***The Secretary of State***” [for Health & Social Care] – s.9(4)(m)
- Was NHS Property Services Ltd the same as the “*Secretary of State*”? FTT said no [§92] and not pursued at Upper Tribunal
  - Schedule 14 / s.9(4) provide an exhaustive list of exceptions
  - No basis in HA 04 or NHS Act 2006 to interpret ‘the SoS’ (a natural person) as extending to corporate or legal persons



- Properties ‘controlled’ or ‘managed’ by LHAs are not HMOs for the purpose of Part 2
- Are LHAs, as freeholders who **contract with** guardianship companies, persons ‘controlling’ or ‘managing’ the property?
- An untested question: no reported decisions of higher courts
- *49 Russell Hill Road* [§63-64] versus *Global Guardians*
- In the interim: what remedies are available to guardians occupying poor quality accommodation managed by companies on behalf of LHAs?



# Questions

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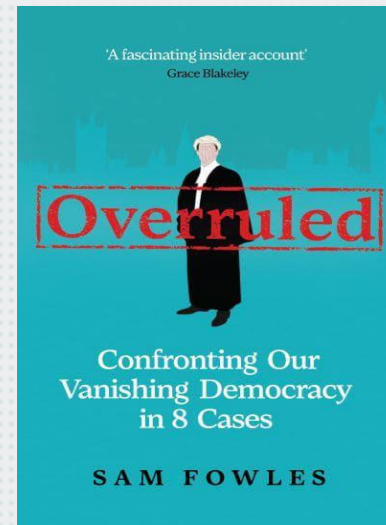
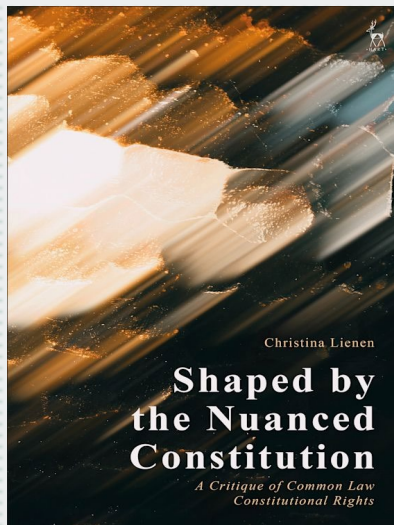
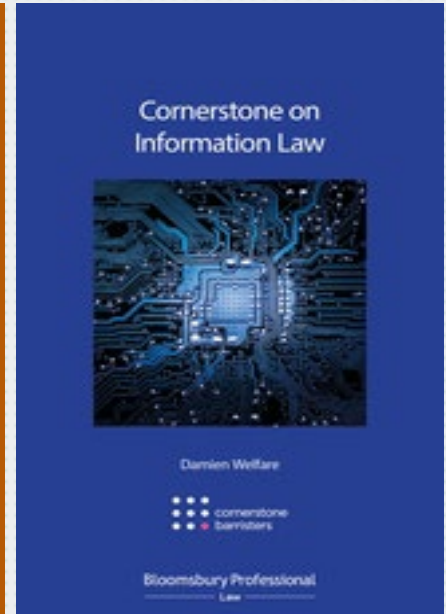
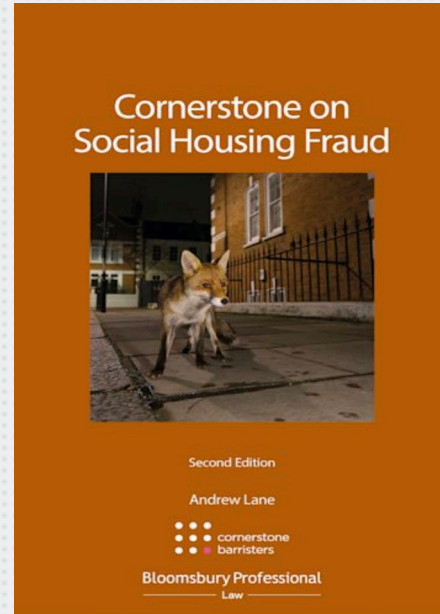
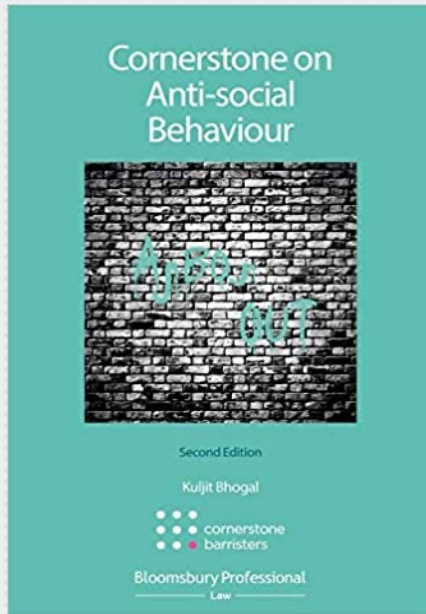
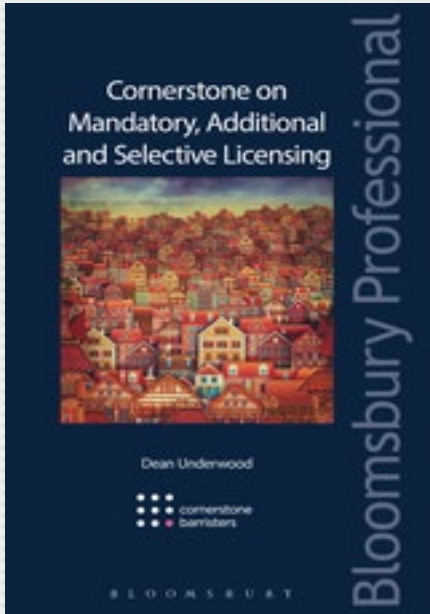
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