FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

HMCTS code (audio, video, paper)		A: BTMM REMOTE
Case reference	**:**	**CAM/00MD/MDR/2020/0004**
Property	**:**	**Apartment 1, The Coppice, 12 The Grove, Slough SL1 1QP**
Applicant	**:**	**Janet D'Sa**
Representative	**:**	**N/A**
Respondents	**:**	**Paul Garner** **Steven Jackson**
Representative	**:**	**Catriona Cairns, solicitor**
Type of application	**:**	**Market rent determination pursuant to s.22(1) of the Housing Act 1988.**
Tribunal member(s)	**:**	**Tribunal Judge S Evans** **Mrs M Hardman FRICS IRRV (Hons)**
Date and venue of hearing	**:**	**14 October 2020, by telephone**
Date of decision	**:**	**21 October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing which was not objected to by the parties. The form of remote hearing was A:BTMMREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a

remote hearing. The documents we were referred to were in an unpaginated bundle, the contents of which we had read in full in advance of the hearing.

Decision of the tribunal

The Tribunal determines that it does not have jurisdiction to determine a market rent because the Applicant was not granted an assured shorthold tenancy of the Property.

REASONS

Introduction

1. By an Application dated 16 June 2020, the Applicant seeks a determination of a rent under an assured shorthold tenancy pursuant to section 22(1) of the Housing Act 1988 as amended by section 100 of the Housing Act 1996.

2. By directions dated 6 October 2020, the Tribunal directed that it would determine the matter of whether the tenancy was an assured shorthold tenancy as a preliminary issue, and then consider the market rent once it had heard submissions on the nature of the occupation agreement.

The hearing

3. The hearing took place on 14 October 2020 by telephone. On 16 July 2020, the Tribunal gave directions that any remote hearing would be by telephone or video. We confirmed the Tribunal direction that the hearing be in private and by telephone, recorded on BT Meet Me.

4. The Applicant tenant represented herself. Ms Catriona Cairns, solicitor, represented the Respondents, Mr Paul Garner and Mr Stephen Jackson.

5. The Tribunal started by hearing the Applicant's bullet points as to why she alleged she had been granted a tenancy, before hearing from the Respondents as to their essential points as to why no tenancy had been granted.

6. The Applicant was then able to set out her evidence in full, assisted by questions from the Tribunal. The Respondent's solicitor did not cross examine the Applicant. Mr Paul Garner then gave evidence on behalf of the Respondents. He confirmed his written statement and gave additional evidence by way of clarification. The Applicant was offered the opportunity

to ask questions of Mr Garner, but declined. Mr Steven Jackson then gave evidence, but was not cross examined by the Applicant.

7. At or about 12 noon the Applicant appeared to become upset and the Chair suggested an adjournment, but the Applicant said that she wished to carry on. Shortly afterwards, at or about 12:15 PM, the Applicant again became upset and indicated to the Tribunal that she did not wish to continue with the hearing. The Tribunal suggested an adjournment of 10 minutes to enable the Applicant to compose herself, and the Applicant then left the telephone hearing, followed by the other participants.

8. When the Tribunal resumed at about 12:30 PM, the Applicant had not re-joined, and did not do so at any time thereafter. The Respondents were asked what position they took in the light of the Applicant's absence. The Respondents invited the Tribunal to dismiss the Applicant's application and to award costs against her.

9. The Tribunal dismissed that oral application, on the grounds that, although the hearing had been listed both for a determination of the preliminary issue as to whether or not a tenancy had been granted, followed by a hearing as to what market rent was appropriate, the Tribunal had heard all necessary evidence in order to reach a reasoned decision on the preliminary issue. That, whilst acknowledging that if the Tribunal ruled in the Applicant's favour there might need to be a further hearing and thus further costs might be incurred by the Respondents in addressing the issue of the appropriate market rent, the Tribunal considered that any application sought in relation to costs on the grounds of unreasonable behaviour might be made at the adjourned hearing. Moreover, the Respondents had not made any written submissions or provided any comparable market valuations, so any adjourned hearing would be likely to be short. In the event, for the reasons set out herein, the Tribunal has found that no assured shorthold tenancy was granted to the Applicant, and no further hearing will now be necessary.

10. It is right to record that the Applicant missed the opportunity to make her closing submissions to the Tribunal on the preliminary issue. Recognising that situation, during the closing submissions of the Respondents, the Tribunal was at pains to put the Applicant's main arguments to the Respondents' solicitor.

The Applicant's case

11. The Applicant's bullet point arguments in advancing her case that an assured shorthold tenancy had been granted were:

- The principles in the seminal case of *Street v Mountford* [1985] 1 AC 809, HL applied to her circumstances, in that the Property was self-contained, she was not sharing with her landlord, she was paying rent, and that she did not get clean laundry or towels by way of attendance or services.

- Although the Applicant contended that she had never been given any written terms and conditions of occupation until recently (25 August 2020), she did point the Tribunal to clause 5.1.1 of the occupation agreement, which reads (emphasis supplied):

  "You shall throughout the hire period…use the apartment as private *residential* accommodation"

- She contended that if this were a serviced apartment, the Respondents would have to pay VAT on any sum charged, but that was never the case here.

- In the light of a tenancy having been granted, she alleged, the tenancy had become an assured shorthold tenancy.

12. The Tribunal noted that the Applicant claims to have been unlawfully evicted from the Property on 29 June 2020 by the Respondents, although we indicated that this does not bear on our assessment of whether she had been granted an assured shorthold tenancy.

13. In evidence, the Applicant explained that, at about the time of the national lockdown by reason of the Coronavirus pandemic, she was occupying other accommodation from which she needed to move because it was closing up. After trying other providers, she was eventually put in touch with Your Place Home From Home Limited, and more particularly Mr Paul Garner, its director.

14. She stated to the Tribunal that she and Mr Garner had a telephone conversation in which she told him that she was looking for accommodation during lockdown. This conversation took place on the Thursday or Friday before she moved into the property on Saturday 28 March 2020. Mr Garner said he could provide a serviced apartment, which would be cleaned from time to time, and clean towels and bedding would be provided every week. The Applicant considered she had little choice but to go to the Property, and that she was going to have to stay for whatever period was necessary. She also told the Tribunal that Mr Garner wanted a charge of £75 per night, but she was able to negotiate that figure down to £65 per night; that she knew absolutely nothing about what the Property looked like, but that did not concern her because she would never have accepted anything based solely

on a telephone call, but only after viewing it. She said that the Holiday Inn where she was staying could only let her stay one more night, so there was an element of desperation as regards her position.

15. Although she cannot remember precisely what Mr Garner had said about the accommodation, the Applicant told the Tribunal that Mr Garner's description was like she would be moving to Buckingham Palace. However, when she arrived there, it was nothing like he had described, so she said. In particular, she said that Mr Garner had contended it would be a one-bedroom apartment, whereas it turned out only to be a studio.

16. The Applicant described the accommodation for the benefit of the Tribunal. She said it was open plan, included a kitchen, had an outside seating area; that it was a L shaped, but it was small and there wasn't any storage space for her many belongings. She said that it looked new, perhaps a few years old. She said the kitchen had a microwave, sink, oven, dishwasher, and washing machine, and that there was an immersion heater in the bedroom. She also said it was furnished with a sofa, bed, TV, and a table and 2 chairs on the balcony seating area. She said although there was Sky television provided, there was no signal. She said there was a self-contained bathroom, containing a bath with shower over, and a WC. She said the flat was on the ground floor. She added that towels and bedding were provided on the day she moved in, and that they all were clean.

17. The Applicant told the Tribunal that Mr Garner had said on the telephone call that he was happy for her to stay as long as she wanted and as long as she agreed to pay rent.

18. The Applicant then described how she had been taken from the Holiday Inn where she was staying to the Property by taxi. Upon arrival at the Property, she was met by the Operations Manager, Barbara, who showed her around. The Applicant contended that Barbara didn't have a clue as to how to use each of the many appliances.

19. She described how Barbara gave her the keys, although Barbara said nothing about the terms of living there. The Applicant further explained that she did not meet anyone else from the Respondents before she met Mr Jackson on the following Friday. This was a meeting which had been arranged through Mr Garner (as soon as Barbara had left on 28 March 2020, the Applicant had contacted Mr Garner to express her disappointment with the flat. It was during this call that the arrangements were made for Mr Jackson's attendance).

20. As for the provision of services, the Applicant alleged that when she met Barbara, she asked her what the cleaning arrangements would be, and that

Barbara responded it was 'never going to happen', because the cleaners were refusing to clean the apartment during lockdown.

21. The Applicant explained that it was not a condition of her occupation that she paid a deposit. She also explained that she did not pay any money in advance, because she was told that she would have to wait until Mr Steven Jackson attended on the following Friday to take payment.

22. The Applicant explained that Mr Garner had refused to take her bank details, despite her offering the same. She said he insisted on a chip and pin payment in person with Mr Jackson, because all the banks were closed.

23. On the Friday following Saturday 28 March 2020, Mr Jackson came round to the Property, the Applicant explained. He took a payment by chip and pin to cover a period of 28 days, at a nightly rate of £65. The Applicant explained that Mr Garner had said it had to be payment for a period of 28 days during his earlier telephone call.

24. The Applicant denied that Mr Jackson had given her anything in writing; in particular she was adamant he had not given her any written terms and conditions. The only thing he gave her was a payment slip from the chip and pin machine; although she asked for a receipt, Mr Jackson said he did not deal with administration and that the Applicant would need to speak to Mr Garner.

25. After Mr Jackson had left, the Applicant explained that she rang Mr Garner and said she wanted a written receipt. She alleges that Mr Garner said he was not VAT registered.

26. The Applicant then said she told Mr Garner she wanted the rent reduced because she had agreed rent on the basis that the apartment would be cleaned. Mr Garner's response was that he would consider a reduction in rent, but only in a months' time.

27. The Applicant explained that she did not pay for any utilities, that she did not pay council tax, and that no demand was ever made for the same by either the Respondents or the local council.

28. The Applicant further explained that she did not receive any food or any other services during her period of occupation. In respect of the television, she said she did mention the fact that it was not working to Mr Jackson, who replied that he would get someone in to fix it.

29. She also described how that she had received advice from Shelter and from the local council that an assured shorthold tenancy had been created, such

that the Respondents would need to serve her with a section 21 notice requiring possession (under the Housing Act 1988).

30. During her evidence, the Applicant pointed to the lack of signature on the written terms and conditions.

31. The Applicant then clarified to the Tribunal that when she went into the apartment there were towels and fresh linen and that they were all clean, but thereafter she had to wash them all herself. The Respondents never cleaned them or replaced them.

32. The Applicant was then asked by the Tribunal whether she had any further representations to make on the matter of the terms of her occupation, and she replied no.

The Respondents' case

33. The Respondents' bullet points submissions at the commencement of the hearing were:

- Your Place Home From Home Limited was contacted by an associate provider, explaining that the Applicant was seeking accommodation.

- The initial terms of occupation were negotiated by telephone between Mr Garner and the Applicant.

- The Applicant's stay was agreed at £65 per night for a term of 28 days.

- That the Applicant was given a copy of the terms and conditions.

- There were written terms and conditions which provided for maintenance services and cleaning.

- The Applicant later said she did not want any cleaning to be done, because she was vulnerable.

- In legal terms this was a serviced apartment which cannot create a tenancy.

- There was an applicable exclusion under the Protection from Eviction Act 1977.

- All the written terms and conditions were commensurate only with the creation of a contractual licence and not a tenancy.

34. The Respondent's solicitor proceeded to call Mr Garner to give evidence. He stated that, although he did not have his statement dated 23 August 2020 before him, he had looked at it on the day before the Tribunal hearing and could confirm its contents were true.

35. Mr Garner explained that Your Place Home From Home Ltd have been in business providing serviced apartments for many years; that they had an association with another company called Stockley Park, with which they enjoyed what might be termed reciprocal arrangements for the placing of occupant guests. He explained that on or about 25 or 26 March 2020 he had received a call from Stockley Park, informing him that Staybridge Apartments (which are part of Holiday Inn) had to close down and that there were five or six persons who needed some accommodation. He said the lady to whom he spoke had told him that she had none available herself, and so had asked him if he had a one-bedroom apartment available.

36. So it was that Mr Garner came to have a telephone conversation with the Applicant. Mr Garner said that he explained to the Applicant that the normal nightly rate would be £85 plus VAT, to which the Applicant responded that she was paying £75, but did not have too much money now, and did not want to pay more than £60 per night. Mr Garner explained he felt sorry for the Applicant. Mr Garner said that he told her £68 (including VAT) was his best rate. Mr Garner told the Tribunal he was prepared to agree a reduced rate because a number of units of accommodation were coming empty during lockdown. So Mr Garner told the Applicant that he would agree £68 per night and that he could not go any lower. He added that he told the Applicant that, if she did later decide to stay longer than 28 days, he might then be able to reduce it. Mr Garner informed the Tribunal this did in fact happen, because when the Applicant did decide to stay longer, the Applicant only had to pay £65 per night.

37. Mr Garner said that he explained to the Applicant that the Property was equipped with everything she needed; that it was in size approximately 500 feet square, and was only 2½ to 3 years old; that it had a fully equipped kitchen, was open plan, had Sky television, and fibre optic broadband. Even crockery was provided. Mr Garner told the Tribunal that the Applicant had described it quite well in her evidence.

38. Mr Garner then told the Tribunal that he had explained to the Applicant on the telephone all the terms and conditions, but on being pressed by the Tribunal, Mr Garner accepted that he did not explain every word in the written terms and conditions to the Applicant. He clarified what he meant. Firstly, that he had told the Applicant the nightly rate. Secondly, he had explained all about the Property and what it included, adding that this went

as far as the provision of shampoo, toilet roll, and everything in fact needed for occupation in a serviced apartment.

39. Mr Gardner accepted that whilst he could have agreed a lump sum for a 28 day occupation by the Applicant, that was not his business model (which was based on a nightly rate), in particular because the main demographic for these apartments was corporate persons, who needed flexibility in terms of the period of hire.

40. Mr Gardner described how he had explained to the Applicant that she would get someone coming in once a week to change all the linen/ towels and to undertake cleaning of the apartment. However, as time went on, the Applicant had said that she did not want these items. Mr Garner said he thought that event took place about 2 weeks after she had commenced her stay, when she told Barbara the Operations Manager.

41. Mr Garner explained to the Tribunal that he believed the cleaner did go in at least once after the Applicant had taken up occupation.

42. Mr Garner said that he thought the written terms and conditions were dropped off when Mr Jackson went to take a credit card payment from the Applicant on the Friday after she commenced occupation. Mr Garner agreed that under normal circumstances he would have served a copy of the terms and conditions on the Applicant before she entered into occupation, but they were in the middle of the Coronavirus pandemic, when the Applicant was in desperate need of accommodation.

43. When asked why the terms and conditions were not signed, Mr Garner explained that the Applicant had said she wanted to look at the terms and conditions in detail, and so did not sign them at the time Mr Jackson went round.

44. Mr Garner told the Tribunal that all the utilities bills were paid by the company, including gas and electricity, and all council tax. He explained that they also paid the TV licence, and provided the television and Sky and fibre optic broadband within the price agreed.

45. Mr Garner said that the television was always working; it was only when the Applicant was out of her initial hire agreement and refused to pay that the television services were withdrawn.

46. When asked about the clause in the written terms and conditions which appears to place an obligation on the occupant to repair the apartment, Mr Garner stated that he did not consider there was an obligation to repair, but

the term had been added because someone had destroyed one of their apartments in the past.

47. Mr Steven Jackson then gave evidence on behalf of the Respondents. He explained that on the Saturday morning, which the Tribunal understands to be 28 March 2020, he had received a telephone call from Mr Garner advising that a client was moving in. However, Mr Jackson could not be there, so asked his partner, Barbara, the Operations Manager, to meet the Applicant to give her the keys. Mr Jackson explained that he believes that Barbara did show the Applicant everything in the Property and how it worked.

48. Mr Jackson explained that he had been an estate agent in Slough for over 28 years. He explained that checking into this apartment was quite different to checking into an assured shorthold tenancy. In particular there was no EPC provided, no deposit was taken, no proof of deposit was given, no copy of a tenancy agreement was signed, no gas safety or electrical certificate had to be obtained, and no right to rent documentation or checks were needed. Mr Jackson explained this was a much easier checking-in procedure: there was no need to show the Applicant how the utilities worked, only how to lock up.

49. He then explained that items such as dishwasher tablets were provided, as was washing up liquid and shampoo, and that each of these items was renewed after the first 28 day period.

50. On the Friday after the Applicant moved in, Mr Jackson explained that he had been asked to go to the Property. He attended with a card machine in order to take payment. He explained that he went armed with the written terms and conditions; that these were prepared by Paul Garner and emailed to him before he went there. Mr Jackson explained that Mr Garner was stuck in the Canary Islands because of the closure of airports during lockdown. Mr Jackson explained he also had an invoice which Mr Garner had emailed him, so that he knew how much to take from the Applicant in payment.

51. Mr Jackson explained that he did give the Applicant the written terms and conditions, but that she wanted to read them through. He told the Tribunal he had informed the Applicant that was no problem. He explained how he got the firm impression that the Applicant did not want him in the apartment for any longer than was necessary: she had had a jumper over her mouth (the implication being that she was concerned about coming into contact with him during the pandemic lockdown).

52. Mr Jackson explained that he couldn't physically collect the terms and conditions after this visit, although he had later asked the Applicant over the

telephone if he could collect them the following week, but the Applicant declined.

53. Mr Jackson confirmed that he had given the Applicant a card machine receipt only; that she did ask for a full receipt, but he told her that Mr Garner only had access to invoices, because they were provided on headed notepaper.

54. Mr Jackson explained that the Applicant had paid for the 2nd and successive periods of 28 days' hire by bank payment.

55. Mr Jackson then gave evidence that in the first 4 weeks of the Applicant's occupation, the cleaner did go into the apartment. He knows this, because the Applicant had struck up a good relationship with Barbara, who was his partner. He gave an example: at one time, the Applicant had wanted more toilet rolls, or rather different toilet rolls because the ones provided she considered to be cheap. Therefore, Barbara had obtained more expensive items for the Applicant.

56. Mr Jackson also explained that after 4 weeks the Applicant did not want any further items brought into the Property, and that the linen and towels were left outside the front door. Mr Jackson explained this was because the Applicant told them that she had contracted Coronavirus. Mr Jackson proceeded to refer to a text message which had been sent on 4 May 2020 at 15:36 by the Applicant, the terms of which the Tribunal permitted Mr Jackson to read out. It was a long text, and not all its terms are relevant. These are the salient remarks made by the Applicant, however:

> "Please do not call round today as I'm very ill."
>
> "… you cannot come round as I have the coronavirus."

57. Finally, Mr Jackson described how the Applicant had taken video footage on her phone of her dealings with him, but had not disclosed it.

58. When asked by the Tribunal why the Respondents' written response to the Application stated that the written terms and conditions were provided on 28 March 2020 when the Applicant was first checked in (in contrast to both Respondents' oral evidence), the Respondents' solicitor informed the Tribunal that those were her initial instructions, and that it was only afterwards that she became aware that the information was incorrect.

Relevant law

59. As the Applicant rightly submits, the seminal case on creation of residential tenancies is *Street v Mountford* [1985] 1 AC 809 in which the House of Lords laid down the relevant principles. Lord Templeman, giving the judgment of all their Lordships, held:

"In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own … If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant."

And:

"The traditional view that the grant of exclusive possession for a term creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession can exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

And:

"…In my opinion, in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether on its true construction the agreement confers on the occupier exclusive possession."

60. Lord Templeman added that the proper approach in these cases is to analyse each agreement to decide whether exclusive possession has been granted.

61. Moreover, the label that the parties attach to an agreement is not conclusive. The mere fact that they call it a licence does not necessarily mean that it is a licence. Lord Templeman said:

"The consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy, and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacturer of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

62. The Respondents in correspondence have cited the case of *Marchant v Charters* [1977] 3 all ER 918, in which a bedsitting room was occupied on terms that the landlord cleaned the rooms daily and provided clean linen each week. Lord Templeman in *Street v Mountford* stated that this court's decision that the occupier was a licensee and not a tenant was sustainable on the grounds that the occupier was a lodger and did not enjoy exclusive possession.

63. This Tribunal, however, must be astute to consider whether any provisions might arguably be sham provisions: see *Crancour v De Silvaesa* [1986] 1 EGLR 80, in which the Court of Appeal held that provisions relating to the times at which a room could be used, and as to the right to remove furniture, were arguably sham provisions, such that the case was therefore not sufficiently clear to justify a summary order for possession in favour of the owner.

64. An agreement in respect of a room in a hostel providing that the occupier could be moved to another room at any time in order to facilitate better management of the hostel was held to be a genuine licence: *Brennan v Lambeth BC* (1997) 30 HLR 481, CA.

65. However, in deciding whether or not the terms of a so-called licence agreement in fact create a tenancy, the court or Tribunal does not simply ask itself whether the agreement is a sham. It also considers whether in the light of all the circumstances its provisions truly represent the agreement between the parties or whether they are a pretence: see *AG Securities v Vaughan* [1990] 1 AC 417, HL.

Issues

66. The main issues for determination are:

(1) What the express terms of the agreement between the parties were;

(2) Whether the Applicant was granted exclusive possession of the Property;

(3) If so, whether it was for a term at a rent.

Decision

(1) What the express terms of the agreement between the parties were

67. The Applicant's case is that the agreement was purely oral and did not incorporate any written terms. The Respondents' case is that the written terms and conditions were incorporated by reference, in that they were expressly mentioned by Mr Garner in his telephone conversations with the Applicant, in terms that a copy of them would be in due course be supplied to the Applicant.

68. The Tribunal's decision is that the agreement did incorporate the written terms and conditions. Having heard the evidence of Mr Garner and Mr Jackson, we prefer their evidence to that of the Applicant. It seems inconceivable to the Tribunal that the Respondents would go to the trouble of drafting written terms and conditions, or at least adding the Applicant's name and 2 signature blocks to a standard form written agreement, if they did not intend to bring those terms to the attention of the Applicant. At one point the Tribunal was concerned by the fact that the terms and conditions had not been brought to the Applicant's attention before she crossed the threshold of the property. However, we believe Mr Garner insofar as his evidence was to the effect that he indicated to the Applicant that a copy of the terms and conditions would soon be provided.

69. The Tribunal was also impressed by the evidence of Mr Jackson on this point. He is a man with some considerable experience in the field of letting properties. The Tribunal found his evidence to be measured and considered. We therefore have no reason to disbelieve him when he stated that a copy of these terms and conditions had been emailed to him by Mr Garner in advance of his first meeting with the Applicant, and that he had given the Applicant a copy. We find that the written terms and conditions were not signed, because as stated by Mr Garner and Mr Jackson, the Applicant wished to have time to consider the terms in more detail.

70. The written terms and conditions run to 7 pages, and we do not propose to set them out in full. These are the salient parts, however:

71. The agreement is headed “Terms and conditions of apartment hire” and “this is not a short term tenancy agreement.” Clause 1.4 also provides that “You acknowledge that this Agreement does not give rise to an assured shorthold tenancy…” However, in line with *Street v Mountford*, the Tribunal attaches no weight to the label which the Respondents placed on the agreement.

72. The heading is followed by wording which states that “These terms and conditions apply to the contract between Your Place Home From Home Limited serviced apartments…. and Janet D’Sa for the hire of serviced apartment accommodation at Coppis (sic) no 1, 12 the Grove, Slough, SL1 1QP”.

73. What is clear (from clauses 1.2, 2.1, 2.2, 3.4 and others) is that the agreement does not incorporate all the terms of the contract because there is repeated reference in those clauses to “the Booking” (itself defined in clause 12.8 as meaning “an offer from you to us to hire the apartment on the terms of this agreement following your provision of sufficient information to enable us to complete our telephone or website provisional booking process”).

74. In the Tribunal's view, the terms of agreement for the Applicant’s stay at the Property were therefore a mixture of both oral terms (agreed on the telephone between the Applicant and Mr Garner before the 28 March 2020) and the written agreement.

75. Turning to clause 1.1, the agreement continues:

> “We shall provide, and you shall hire the Apartment for the Hire Period at the Agreed Price and upon the terms of this Agreement.”

76. By clause 12.8 the “Agreed Price” means “the price at which the Applicant agreed to hire the apartment, as identified in the Booking or in any subsequent agreement.”

77. In the Tribunal's view the agreed price was £68 per night for the initial 28 days, followed by £65 per night thereafter. In this regard we prefer the evidence of Mr Garner to that of the Applicant. He was running a business, the circumstances of the Coronavirus lockdown were unusual, and we were impressed by his recollection on this point, not least because it was his intention to secure £85 plus VAT per night, yet given the circumstances of the pandemic, he was prepared to agree a reduced rate of £68 including VAT for the Applicant, for whom he felt some sympathy. That is something which has made an imprint on his mind, and which we find credible.

78. Nevertheless, it did not seem to be in dispute between the parties that the initial "Hire Period" was for 28 days.

79. As for services, at clause 1.2 of the written agreement it is provided that the company will provide:

    (a) routine maintenance services as required to keep the Apartment in good and working condition;
    (b) fresh bed linen as specified in the Booking; and
    (c) furniture and appliances.

80. Clause 1.3 provides "We give you the right in common with us and all others authorised by us to use the Apartment for the Hire Period." In the Tribunal's view, clause 1.3 was a pretence: the Respondents were unable to provide an explanation or example of any circumstances in which the Applicant might have been required to have shared the Property either with the company or with anyone authorised by the company. The Respondents were driven to argue that words had been omitted from clause 1.3 such as "to enter and" before the word "use". We were not impressed with that argument, nor could we easily see how that might assist the Respondents.

    (1) Whether the Applicant was granted exclusive possession of the Property

81. We can understand how the Applicant might consider subjectively that she did have exclusive possession (because no-one else had a key or used the Property, it was for a term (either per night, or for 28 days) and she considered she paid a "rent".

82. However, the Tribunal determines that there was no grant of a tenancy, whether assured shorthold or otherwise, because there was no exclusive possession granted, for the following reasons:

83. Firstly, there are the surrounding circumstances of the Coronavirus pandemic and the lockdown. Whilst subjective intentions are not strictly relevant in these matters, it is important to note that the Applicant understood she would be going into a serviced apartment and was not signing up for a tenancy agreement in the normal sense, because in her understandable desperation she needed accommodation at very short notice in extreme circumstances.

84. Secondly, it was part of both the oral terms reached and the written agreement that the company would provide attendance or services to the Applicant. In this regard, the agreement expressly refers to "maintenance services" and "fresh bed linen" to be provided. The parties were in

agreement that Mr Garner had mentioned linen towels and cleaning in his very first telephone call with the Applicant.

85. Thirdly, the Tribunal finds that such services were in fact provided to the Applicant for at least the first four weeks of her use of the accommodation. The Applicant does not disagree that fresh bed linen and towels were provided when she entered the property. The Tribunal prefers the evidence of Mr Jackson that those items were indeed changed for clean ones, and that cleaning of the property by a dedicated cleaner took place every week for the first four weeks of the Applicant's stay. We were persuaded by Mr Jackson's clear evidence that the only reason they did not continue to be physically provided inside the Property was because the Applicant did not want them, because she had contracted coronavirus. Her text message on 4 May 2020 evidences this, and fits with the general timings. Even then, we prefer the evidence of Mr Jackson that the linen and towels continued to be left outside the Property for the Applicant's use.

86. The Tribunal further finds that the provision of dishwasher tablets, washing liquid, toilet roll and other such items, and their renewal after the period of 28 days, is a further indication that attendance and services were provided.

87. We do not find that the provision of a television, Sky TV, fibre optic broadband, or indeed the inclusion of utilities to be of significance, because these did not involve attendance by the company's representatives, and it is not uncommon for tenancies to have a rent which is inclusive of such matters.

88. The Tribunal is conscious that the written terms and conditions are a "mixed bag". Some terms are consistent with the grant of a tenancy (such as the clause requiring the occupier to repair the Property, and the reference to "weekly rental" in clause 3.4); others could be consistent with either a tenancy or licence, and others yet might be construed as more indicative of a licence only. It is, however, the analysis of the agreement of a whole which is important: *Street v Mountford*. In this regard, we find that exclusive possession has not been granted in the light of all the terms, including:

- Clause 1.2, as set out above;

- Clause 1.3, because it refers to the grant of a right to *use* as opposed to *occupy* the property;

- The provisions for cancellation in clauses 3.2, 3.3, 3.5, and 3.7;
- The provision in clause 8.3, which enables the company to relocate the hirer to an apartment of similar type and standard in a similar location if the apartment specified in the booking becomes unavailable prior to

the commencement of the hire period. This is inconsistent with the grant of a tenancy;

- Clause 12.4, which expressly states that the agreement is personal to the parties and not assignable by the hirer.

89. It is a fundamental consequence of the grant of a tenancy that it creates an estate in land, which is so much more than the grant of a personal right of user of land whether subject to restrictions or otherwise. If the Applicant is right that she was armed with exclusive possession, she would have had an estate in land which was good against the world, including her landlord. In the Tribunal's judgment, this was not the intention of the parties as objectively assessed, nor is the Tribunal driven to the conclusion that the Applicant had a right of occupation as opposed to a mere right to use the Property for the period which was agreed. She had no right to call the place her own.

(3) If so, whether it was for a term at a rent.

90. Given our findings in issue (2), it is not necessary to decide these matters, which are not straightforward, and we prefer to express no concluded view. By way of illustration, a term for the duration of the lockdown might not be a term certain (In *Lace v Chantler* [1944] KB 368 no tenancy was found, as term was held uncertain, being expressed to be for the duration of the war). Further, there would appear to be no clear authority on whether a tenancy can be periodic in terms of being from night to night.

Conclusions

91. The Tribunal determines that no tenancy was granted because exclusive possession was not granted to the Applicant.

92. In the circumstances, the application to the Tribunal for determination of a rent under an assured shorthold tenancy pursuant to section 22 (1) of the Housing Act 1988 cannot be entertained, because the Tribunal does not have jurisdiction to decide it, in the light of its findings herein.

Name: S J Evans **Date:** 21 October 2020.

APPENDIX - RIGHTS OF APPEAL

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).