FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HMF/2021/0285**
Property	**:**	**Old Moselle School Building, Moira Close, London. N17 6HZ**
Applicants	**:**	**(1) Sasha Jam Ros** **(2) Carlos Gustavo Dos Santos Morgado** **(3) Jordan Orlebar** **(4) Ricardo Oliveira** **(5) Stellios Kampisoulis** **(6) Zeus Ioannou**
Representative	**:**	**Mr. G. Penny of counsel, instructed by Flat Justice**
Respondent	**:**	**Global 100 Ltd.**
Representative	**:**	**Mr. A. Owen of Kelly Owen Solicitors Ltd.**
Type of application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge S.J. Walker** **Tribunal Member Mr. K. Ridgeway MRICS**
Date and Venue of Hearings	**:**	**22 August 2024** **10, Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**23 September 2024**

DECISION

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(1) The Tribunal makes Rent Repayment Orders under section 43 of the Housing and Planning Act 2016 requiring the Respondent to pay the specified sums to the specified Applicants as follows;
To the First Applicant, Sasha Ros, £3,520
To the Second Applicant, Carlos Morgado, £892

To the Third Applicant, Jordan Orlebar, £3,580
To the Fourth Applicant, Ricardo Oliveira, £4,252.50
To the Fifth Applicant, Stellios Kampisoulis, £2,490
To the Sixth Applicant, Zeus Ioannou, £3,026.25

(2) The application for an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbursement by the Respondent of the fees of £300 paid by the Applicants in bringing this application is allowed.

Reasons

The Application

1. In this application, which was made as long ago as 29 November 2021, the Applicants sought rent repayment orders pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act"). It was asserted in this application that the Respondent had committed an offence of having control of or managing an unlicensed House in Multiple Occupation ("HMO") contrary to section 72(1) of the Housing Act 2004.

2. Directions were issued on 3 February 2022 and the application was due to be heard by the Tribunal on 29 June 2022.

3. However, the proceedings were then stayed pending the outcome of a similar case in the Court of Appeal. That stay was lifted on 15 January 2024 when further directions were issued, which have been complied with.

The Hearing

4. The hearing was conducted face-to-face. The First, Fourth, Fifth and Sixth Applicants attended, represented by Mr. Penny. The Respondent was represented by Mr. Owen.

5. In the course of the hearing, it quickly became apparent that there was very little, if any, factual dispute between the parties and that the whole case turned on one legal point, namely, whether or not the property in question was an HMO. That issue is explained and dealt with below.

6. That issue aside, there was broad common ground between the parties. It was agreed that the single legal issue was determinative, so that if the Respondent succeeded in its argument on that point the Tribunal had no jurisdiction to make any orders, and if the Applicants succeeded on that point, it did have jurisdiction.

7. Whilst not in a position to do so at the hearing, the Tribunal was informed that the degree of consensus was such that, within a few days, the Tribunal could be provided with a schedule which would set out agreed sums for the amount of each order which should be made should

the Applicants succeed in their arguments. The hearing therefore proceeded on that basis and was confined solely to the legal arguments.

8. On 2 September 2024 the Tribunal received the promised schedule from the parties and the sums which the Tribunal has ordered to be paid to each Applicant are the sums set out in that schedule.

9. For the purposes of the hearing the Tribunal had, in addition to the documentary bundles produced by the parties, skeleton arguments produced by Mr. Penny and Mr. Owen. In the course of argument, the Tribunal was also referred to the cases of Cabo -v- Dezotti [2022] UKUT 240 (LC), Cottam and Others -v- Lowe Management Ltd. [2023] UKUT 306 (LC) and Global 100 Ltd. -v- Laleva [2021] EWCA Civ 1835. It was also provided with a document setting out the arrangements between Global Guardians Management Ltd. and Global 100 Ltd. which was not included in the hearing bundles.

The Background

10. This is one of the many property guardian cases in which property guardian companies license property guardians to live in properties which would otherwise remain empty for the purposes of securing and safeguarding those empty properties.

11. In this case the property in question is the Old Moselle School, which is owned by the London Borough of Haringey. On 28 June 2013 the local authority entered into an agreement with Global Guardians Management Ltd ("GGM") under the terms of which agreement GGM were permitted to use the property for live-in guardianship purposes. A copy of that agreement is at pages 9 to 15 of the Respondent's bundle and reference will be made to it in what follows. GGM then granted permission to the Respondent to grant licences to live-in guardians, including the Applicants in this case.

The Legal Issue

12. The only issue in this case is whether or not the property is an HMO as defined in the Housing Act 2004 ("the 2004 Act"). If the Applicants can establish that it is, to the criminal standard, ie beyond reasonable doubt, then they win, if not, they lose.

13. The legal issue is in fact even narrower than that, as there is only one aspect of the definition of an HMO that is in dispute, namely whether or not the property falls within the statutory exception contained in paragraph 2 of Schedule 14 of the 2004 Act. This provision exempts any building from being an HMO if the person managing or having control of it is, among other things, a local housing authority.

14. It is not disputed that the London Borough of Haringey owns the property nor that they are a local housing authority. So, the remaining question is whether or not they are the person *"managing or having control of it*".

The Arguments

15. It makes sense in this case to consider the Respondent's arguments first. Their argument is based on the contents of section 263 of the 2004 Act. This defines the terms "*person having control*" and "*person managing*". The Respondent's case is that the London Borough of Haringey is a person managing the property as defined in section 263(3) of the 2004 Act (see para 2 of their skeleton argument). In the course of argument, it was accepted that they could not now succeed in arguing that the local authority was a person having control of the property as defined in section 263(1) of the 2004 Act. This is because of the decision of the Upper Tribunal in the case of Cottam where it was held that a freeholder who has let property at less than a rack-rent cannot be a person in control, as they are not a person who could, if they chose, grant a lease at a rack rent – see paras 48 and 49 of the judgment.

16. Section 263(3) of the 2004 Act states as follows;

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

17. Mr. Owen also made it clear that the Respondent only relied on section 263(3)(b) of the 2004 Act. It was accepted that the local authority did not itself receive payments from the people in occupation of the property.

18. In order for the exemption in Schedule 14 to apply, therefore, the situation must be such that the London Borough of Haringey would receive payments from the occupiers but for having entered into an arrangement with another person by virtue of which that other person receives those payments. In addition, that other person must not be an owner or a lessee of the premises.

19. There were, therefore, two questions for the Tribunal to consider. Firstly, was GGM a lessee or merely a licensee of the property. If the

agreement between the local authority and GGM was a lease, then the Respondent's argument failed.

20. The second question, which only arises if the agreement is not a lease, was whether or not the local authority would receive payments but for having entered into an arrangement with GGM "*by virtue of which that other person receives the rents or other payments*".

21. The Tribunal considered the two questions in turn as follows;

Lease or Licence?

22. There was no dispute that the starting point for deciding this question was the decision in the well-known case of Street -v- Mountford [1985] AC 809. As is made clear in that case and by Lewison LJ in Laleva the test is whether or not, as a matter of interpretation, and taking into account the circumstances in which the agreement was made, including the reasons why the occupier has been let into occupation, the effect of the agreement is to grant exclusive possession, for a term and at a rent (see paras 35 to 41 of Laleva).

23. Mr. Owen argued that the terms of the agreement between the local authority and GGM were clear, and that the agreement was a mere licence. He drew the Tribunal's attention to various aspects of the agreement as follows. It is described at the outset as a licence to occupy. GGM are only permitted to use and occupy the site "*under the leave and licence*" of the Council (clause E1). Clause E3 restricts permitted user to live-in guardianship only. Under clause E4 no alteration may be made save for temporary additional security features. Clause E6 allows the Council to withdraw the facilities at any time, albeit on notice. The agreement makes references throughout to "this licence". Finally, he argued, the wording of clause E18 made the position clear. It states as follows;

> "*The facilities conferred by this Licence are personal to and not assignable by the Occupier and nothing in this Licence is intended to confer or shall be construed as conferring upon the Occupier its servants agents invitees or licensees any interest in land or any right to the exclusive use and possession of the Site or as creating the relationship of landlord and tenant or as conferring upon the Occupier their servants agents invitees or licensees any rights or subjecting the Occupier its servants or agents to any obligations of a nature to which a tenant would be entitled or obligated.*"

His argument was that the document spoke for itself and that it did not grant exclusive possession to GGM

24. In response Mr. Penny argued that the agreement between the local authority and GGM was in fact a lease and that, despite what it said on its face, it granted exclusive possession to GGM.

25. In the Applicants' reply it was argued that clause E4, by excluding the right to make general alterations, implied that otherwise the right would

have been granted, which would be consistent with the grant of an estate. They argued that the requirement to give notice to terminate in clause E6 was inconsistent with a mere licence, and that clause E19, which required the local authority to wait for 4 weeks before re-instating the site on GGM's departure again implied the creation of a legal estate.

26. In his arguments before the Tribunal Mr. Penny argued that regard must be had to the intentions of the parties and the purpose of the agreement. He contended that the contemplated effect of the agreement must have been to provide exclusive possession to GGM as, otherwise, the purposes of the agreement would be frustrated. If GGM did not have exclusive possession it would not be able to place live-in guardians into the property. This, he argued, led to the conclusion that what was granted was a lease, not a licence.

27. The Tribunal's conclusion was that the agreement between the local authority and GGM was indeed a licence and not a lease. It was not satisfied that its effect was to grant exclusive possession to GGM. Whilst the wording of the agreement is not conclusive, it indicates a clear intention between the parties not to create an interest in land.

28. With regard to the Applicants' argument that the agreement would be frustrated if exclusive possession were not granted, the Tribunal considered the extent of the site included within the agreement. The site defined in the agreement is the area edged in red on the plan annexed to the agreement. What is notable about that plan is that the area in question consists of far more than the actual school buildings in which the live-in guardians would be accommodated. Also included are playground and car-parking areas. Very little reference is made in the agreement to the external areas, though clause E7 requires guardians to park in the car park rather than on the street. There is nothing in the agreement which distinguishes between the buildings and the external areas. In the Tribunal's view there was nothing in the agreement which would prevent the local authority from making use of the external areas for its own purposes – for example parking its own vehicles or storing goods and/or equipment. Such use by the local authority would not be inconsistent with the use of the site by GGM for the purpose of accommodating live-in guardians, but would be inconsistent with the grant of exclusive possession. Therefore, the Tribunal did not accept the Applicants' argument that the purpose of the agreement would be frustrated if exclusive possession were not granted. It therefore decided that the effect of the agreement between the local authority and GGM was not to grant GGM exclusive possession and so the agreement was not a lease.

Would Payments be Made to the Council But For the Arrangement

29. In view of the Tribunal's decision that the agreement between the local authority and GGM was not a lease, it was necessary to consider the second question set out above.

30. Mr. Owen argued that but for its agreement with GGM the local authority would have received rent for the property. The agreement provided for payments to be made by GGM to the local authority and this was an intervening agreement which directed the flow of rent towards GGM or the Respondent (paras 22 and 23 of his skeleton argument). His argument was that although rent paid by the occupiers was paid to the Respondent, payments were made to the local authority which would not have been made had the agreement with GGM not been in place.

31. Mr. Penny's argument was that there was no evidence to show that the local authority had entered into an arrangement with another person by virtue of which that other person receives the payments made by the occupiers. The local authority's agreement was with GGM but the occupiers made payment to the Respondent. There was, it was argued, nothing to show that GGM received rents or other payments from residential occupiers by virtue of their agreement with the local authority (para 13 of his skeleton). In the alternative, he argued that the term "would so receive" should be treated in the same way as it is treated in section 263(1) where, as a result of the decisions in Cabo and Cottam, the Tribunal has to consider the situation with the current agreements in place. He argued that the Tribunal should not ask if the local authority could itself have installed guardians. Instead, the question it should ask is who would receive the payments if the agreement were not in place. His answer is that nobody would because, but for the agreement, there would be no residential occupiers (paras 14 and 15 of the skeleton).

32. The Tribunal's conclusions were as follows. In its view, for section 263(3)(b) to apply, the arrangement between the local authority and GGM must meet two requirements. Firstly, it must be the case that "*but for*" that arrangement the local authority would itself receive payments from occupiers. Secondly, the arrangement must be one "*by virtue of which*" GGM receives those payments.

33. With regard to the first test, the Tribunal did not accept the Applicants' argument that it could not ask if the local authority could itself have received payments. This is because section 263(3)(b) requires the Tribunal to consider what would happen if the arrangement were not in place. As explained in Cabo and Cottam, when considering section 263(1), the Tribunal must look at the situation as it stands at present. That would require considering the situation with the agreement in place. But section 263(3)(b) expressly requires the Tribunal to consider the situation *"but for*" that agreement, which must mean disregarding it. That being so, there is no evidence of any other agreements in existence which would prevent the local authority from obtaining rental payments if it wished to do so, so the logic in Cabo and Cottam does not apply. The Tribunal was satisfied that but for this agreement the local authority would have been able to receive rental payments.

34. However, that still leaves the second test, which is whether or not GGM receives payments *"by virtue of*" the agreement. Whilst the agreement in question does require GGM to make payments to the local authority

at a rate of £980 per calendar month, it makes no mention of any payments made by occupiers and neither does it make any reference to the Respondent whatsoever. There is also nothing in the document which sets out the inter-company arrangements between the Respondent and GGM which shows that the Respondent is required to make any payments to GGM and nor is there anything in that document which shows that the Respondent is acting as an agent or trustee for GGM. (The Tribunal bore in mind the concluding words in section 263(3) which expressly include payments received through agents or trustees.)

35. Whilst it may well be, as Mr. Owen says, that at least some money derived from the payments made by occupiers to the Respondent makes its way to GGM and thence to the local authority, it does not follow that any payments made to GGM are made by virtue of this agreement. In the Tribunal's view, for this requirement to be met there must be something either express or necessarily implicit in the agreement with the local authority itself as a result of which occupation payments will be made to GGM rather than to them. In other words, the agreement itself must provide for GGM to receive rental payments rather than the local authority. The agreement in this case does not do that, so in the Tribunal's view, this requirement is not met.

36. In reaching this conclusion the Tribunal considered it significant that section 263(3)(b) includes both the "but for" and the "by virtue of" tests. If all that was required in order to fall within the subsection was an arrangement whose practical effect was that someone other than the local authority received the rent, then nothing more than the "but for" test would be needed. It would be enough to say that the owner would receive payments but for having entered into an arrangement with another person who is not an owner or lessee. The Tribunal took the view, therefore, that for the words "by virtue of" to have any meaning they must impose something more than the "but for" test. That additional requirement is that there must be something in the arrangement itself which results in payments going to a person other than the owner.

37. In this case the Tribunal was satisfied to the criminal standard that there was nothing in the agreement between GGM and the local authority by virtue of which GGM rather than the local authority received payments from occupiers.

38. That being the case, as there were no other matters in dispute, the Tribunal was satisfied that the property was an HMO and that, therefore, the Respondent had committed an offence under section 72(1) of the 2004 Act.

Conclusions

39. For the reasons set out above the Tribunal decided that an offence had been committed and so it had jurisdiction to make rent repayment orders in favour of the Applicants.

40. The amounts to be ordered to be paid to each of the Applicants has been agreed between the parties. The Tribunal therefore makes orders in the sums requested, which are as follows;
To the First Applicant, Sasha Ros, £3,520
To the Second Applicant, Carlos Morgado, £892
To the Third Applicant, Jordan Orlebar, £3,580
To the Fourth Applicant, Ricardo Oliveira, £4,252.50
To the Fifth Applicant, Stellios Kampisoulis, £2,490
To the Sixth Applicant, Zeus Ioannou, £3,026.25

41. The Applicants also sought an order under rule 13(2) of the Rules for the re-imbursement of the fees paid for bringing the Application. The Tribunal concluded that, given that the Applicants had succeeded in their application, it was just and equitable to make such an order.

Name: Judge S.J. Walker **Date:** 23 September 2024

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.