Neutral Citation Number: [2024] EWHC 2023 (Admin)
Case No: AC-2023-CDF-000120
IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
CARDIFF DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff St
Redcliffe
Bristol
BS1 6GR

Date: 26/11/2024

Before :

LORD JUSTICE WARBY
and
MR JUSTICE DOVE

- -

Between :

THE KING **on the application of** **CLEARSPRINGS READY HOMES LIMITED**	**Claimant**
- and -	
SWINDON MAGISTRATES' COURT	**Defendant**
-and-	
SWINDON BOROUGH COUNCIL	**Interested Party**
-and-	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Intervener**

- -
- -

Chris Buttler KC and Imran Mahmood (instructed by **Anthony Gold Solicitors LLP**) for the **Claimant**
Stephanie Harrison KC and Tim Baldwin (instructed by **Swindon Borough Council**) for the **Interested Party**
Jack Holborn (instructed by **Government Legal Department**) for the **Intervener**

Hearing dates: 22 and 23 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 26 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WARBY and MR JUSTICE DOVE :

Introduction

1. This is the judgment of the court.

2. This case concerns the regulation of accommodation which the Secretary of State for the Home Department ("the HO") has a statutory duty to provide to a person who is seeking asylum in the UK ("a service user") as part of their asylum support to avoid them becoming destitute. In this case the HO decided that this accommodation would not be provided by the HO direct but that the HO would enter into an arrangement with a private provider for the discharge of this statutory duty. The court was given to understand that this kind of arrangement was in widespread use to enable the HO to discharge its statutory duty to ensure that service users are not homeless.

3. On 8 January 2019 the claimant entered into a contract with the HO for accommodation for service users. The claimant agreed to provide residential accommodation for service users in return for payment of charges by the HO to the claimant at a daily rate in respect of the time when that accommodation was being occupied. The accommodation was provided to the service users free of charge. The service users each signed an occupancy agreement in which they accepted that they would vacate the accommodation upon termination of their asylum support.

4. In order to provide the accommodation required by the contract the claimant entered into leases in respect of properties which were then used as houses in multiple occupation, or HMOs. These included leases with freeholders of residential property in the administrative area of the Council, Swindon Borough Council ("the Council"). These properties were then commissioned for use under the contract, including the obtaining of licenses for their use as HMOs from the Council. Service users commenced occupation of the properties as HMOs and officers of the Council inspected them. During the course of the inspections they discovered conditions which they concluded justified the taking of enforcement action against the claimant.

5. On 24 November 2022 the Council laid 39 charges against the claimant in connection with five HMOs within the Council's administrative area. No evidence was offered in respect of one charge. Of the remaining 38 charges, 27 alleged a breach of the Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Management Regulations"). Whilst it is not altogether clear, it would appear that the charges were originally drafted as accusing the claimant of being "a person having control of or managing a house in multiple occupation". It seems that the charges were amended during the course of the proceedings, and on a charge sheet dated 19 October 2023 the charges are phrased as simply accusing the claimant of a failure to comply with the various elements of the Management Regulations in respect of the properties concerned.

6. Following the plea hearing before the defendant Magistrates' Court on 11 April 2023, the claimant made an application for the charges to be dismissed, which was heard on 13 June 2023. The grounds which were the basis of the application were that the claimant was not a "manager" for the purposes of the Management Regulations. The nature of this submission is set out in greater detail below. The District Judge delivered a ruling in respect of the application to dismiss on 31 July 2023. For reasons given in her detailed judgement the District Judge concluded that the application should be refused. Following the receipt

of this decision the claimant issued judicial review proceedings to quash the decision of the District Judge. The defendant has, in accordance with the usual practice, taken no part in the proceedings. The Secretary of State for Housing and Local Government ("the SSHCLG") made an application to intervene in the proceedings on 19th September 2024. Permission was initially granted for written submissions only, but during the hearing the court acceded to an application to allow oral submissions to be made on the SSCHLG's behalf.

The legislative framework

7. The legislative framework in respect of HMOs is provided by the Housing Act 2004. The definition of an HMO is provided by section 254 of the 2004 Act. Section 254(1) provides a number of tests as to whether a building or part of it qualifies as an HMO. In particular section 254(1)(a) establishes that a building or part of a building qualifies as an HMO if it meets the conditions in section 254(2) which are as follows.

> "(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;
>
> (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; and
>
> (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."

8. Pursuant to section 61 of the 2004 Act it is necessary for HMOs to be licensed. Not all buildings or parts of buildings which come within the definition of an HMO have to be licensed and there are some exemptions from this requirement (see schedule 14 of 2004 Act and regulation 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description)(England) Order 2018). Section 63 of the 2004 Act makes provision for applications for licences for HMOs. It empowers local authorities to receive and grant such applications, and enables regulations to be made at a national level in respect of how such applications are to be formulated.

9. Under section 64 of the 2004 Act the local authority is required to determine an application for the licensing of a HMO by either granting or refusing the application. Certain matters are set out within section 64(3) about which it is necessary for the local authority to be satisfied before it can grant the licence application either to the applicant, or to some other person, if both that other person and the applicant agree. The matters

which are pertinent to the issues before the court contained within section 64(3) are as follows.

> "(3)
>
> …
>
> (b) that the proposed licence holder-
>
> (i) is a fit and proper person to be the licence holder, and
>
> (ii) is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder;
>
> (c) that the proposed manager of the house is either-
>
> (i) the person having control of the house, or
>
> (ii) a person who is an agent or employee of the person having control of the house;
>
> (d) that the proposed manager of the house is a fit and proper person to be the manager of the house; and
>
> (e) that the proposed management arrangements for the house are otherwise satisfactory."

10. A key provision in relation to the questions which arise in this case is that which defines the terms being used in respect of those running HMOs. It will be noted that a component element of the licensing provisions within section 64 is the notion of a "person having control" as part of the identification of someone who can be a manager of the HMO for the purposes of the grant of a licence. Pursuant to section 72 of the 2004 Act a further offence is created of failing to have a licence for an HMO when one is required. This offence can be committed both by a "person having control" and a "person managing" in respect of the HMO. The definition of both of these terms is set out in section 263 of the 2004 Act as follows.

> "(1) In this Act "person having control" in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
>
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises-
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from-
>
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

> (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
>
> (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which 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."

11. As set out above the claimant was charged with breaches of the Management Regulations. The power to create the Management Regulations is contained within section 234 of the 2004 Act. This power is set out in the following terms.

> "(1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations-
>
> (a) there are in place satisfactory management arrangements; and
>
> (b) satisfactory standards of management are observed.
>
> (2) The regulations may in particular-
>
> (a) impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it;
>
> (b) impose duties on persons occupying a house for the purpose of ensuring that the person managing the house can effectively carry out any duty imposed on him by the regulations.
>
> (3) A person commits an offence if he fails to comply with a regulation under this section.
>
> (4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation."

12. Regulation 1 of the Management Regulations identifies that they apply "to any HMO in England other than a converted block of flats to which section 257 of the Act applies". The Management Regulations contain a number of duties that are placed upon the manager of the HMO. For instance, under regulation 4 the manager is under a duty to take safety measures in respect of the premises, including ensuring that there is an unobstructed means of escape from fire, maintained in good order and repair. Under regulation 5 there is a duty to maintain the water supply and drainage relating to the premises, which is complemented by the duty under regulation 6 to supply and maintain the electricity and gas supply. It is unnecessary for the purposes of this decision to rehearse at length the many duties which are created by the Management Regulations.

What is of far greater importance is the way in which the legislation defines the person who bears the responsibility for these duties as the manager for the purposes of the Management Regulations. That definition is contained within the provisions of regulation 2(c) of the Management Regulations as follows.

> "2(c) "the manager", in relation to an HMO, means the person managing the HMO.
>
> Footnote 1: For the meaning of "person managing" see section 263(3) of the Act."

13. As noted above not all HMOs require a licence to be operated as such. Some, for instance by virtue of the number of occupiers and households they contain, are exempt from the licensing requirement. However, all HMOs are subject to the provisions of the Management Regulations. Thus, whilst the licensing regime under the 2004 Act provides regulation for most HMOs, and enables the local authority to prosecute for failure to apply for and obtain a licence by virtue of section 72 of the 2004 Act, or alternatively prosecute for failure to comply with a condition in the licence (a liability which can be imposed upon the licence holder or any person who has consented to be subject to the conditions pursuant to section 67(5)), the Management Regulations provide wider control in respect of all HMOs which fall within the statutory definition.

14. Turning to the question of asylum support and the duties of the HO, as a consequence of section 95(1) of the Immigration and Asylum Act 1999 the HO is required to provide or arrange for the provision of support for service users and their dependents "who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed". Regulation 5(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 requires the HO to offer the provision of support to a service user or their family member if it is thought that they are eligible. As set out above this accommodation is generally provided for free and the service user and their family has no liability to contribute towards the cost of its provision.

15. The possibility of a service user being accommodated in a HMO has been contemplated and reflected in the legislation relating to HMOs. Regulation 5(1)(b) of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 ("the Miscellaneous Provisions Regulations") specifically provides that a service user or a dependent of a service user who has been provided with accommodation under section 95 of the 1999 Act is to be treated as occupying those premises as their only or main residence for the purposes of section 254 of the 2004 Act, the section within the 2004 Act which defines premises to be treated as HMOs. Thus it appears to have been specifically considered that the pre-existing provisions relating to service user accommodation within the 1999 Act would need to be specifically included within the provisions regulating HMOs.

The District Judge's decision

16. The District Judge observed at paragraph 9 of her judgment that initially licences were applied for in the names of the freehold owners of the individual properties which were the HMOs the subject of the prosecution. However, she noted that it was the Council which insisted that the claimant apply for the licences in their own name. The District Judge also noted that the claimant had nominated itself as the manager for the purposes

of the licence. Within the papers for the hearing of this application there is a specimen of the licence applications which were made by the claimant, in this instance in respect of 29 Crombie Street, Swindon. Within the application the question is posed as to whether the applicant will "be solely in control of the HMO and hold the licence yourself", to which the claimant responded "yes". Furthermore, the application asked "Will you manage the HMO yourself?". The claimant again answered "yes" in respect of this question.

17. At paragraph 11 of the District Judge's judgment she noted that the claimant was being prosecuted for failure to comply with the Management Regulations in the capacity of manager of the properties concerned. At paragraph 12 of her judgment she recorded that the claimant asserted in the context of the application to dismiss that it was not capable of coming within the definition of a "person managing" set out in section 263(3) of the 2004 Act.

18. From paragraph 23 of her judgment the District Judge proceeded to address a number of questions which she formulated in order to provide structure to her decision. The first was whether the claimant was required to have an HMO licence which she confirmed was required, and as part of the licence application process the claimant needed to nominate a manager. The second question raised by the District Judge was whether the claimant came within the definition of a "person managing" set out in section 263(3) of the 2004 Act. Having set out the statutory definition the District Judge noted that the claimant did not receive payment from the persons in occupation of the HMO (the service users) but rather received payment from the HO. The District Judge then considered whether the HO was the agent or trustee of the service user in occupation, and concluded that the HO was clearly not the trustee of the service user and nor, on the facts, could the HO be said to be the agent of the service user since they had no liability to pay which could be assigned to the HO.

19. The District Judge noted that the freeholders of the properties could not bring themselves within the definition of "person managing" as they were receiving their rent from the claimant who was not in occupation of the premises. This led the District Judge to the conclusion that as the service user had no obligation to pay rent, and neither the owner of the property nor the lessee would receive direct or indirect payments from the occupant, they could never be a "person managing" for the purposes of the legislation. On the basis that the District Judge had formed the view that it was necessary for there to be a "person managing" in order for premises to be licensed it followed, in answer to the third question she posed, that no accommodation provided pursuant to section 95 of the 1999 act could ever be licensed as an HMO.

20. This latter conclusion led the District Judge to her fourth question, namely whether the court should adopt a purposive interpretation of section 263(3) on the basis that taking a literal interpretation as submitted by the claimant would lead to an absurdity. The District Judge accepted the contentions of the Council, that since the strict wording of the section produced the absurdity that accommodation for persons seeking asylum could never be licensed as an HMO it was necessary to look behind the strict wording of the statute and consider the parliamentary intention when enacting the legislation, using as appropriate the principles set out in *Pepper v Hart* [1993] AC 593.

21. The District Judge looked at Parliamentary material at the time when the 2004 Act was being passed, and noted that there had been some concern as to whether or not the

wording of the legislation was capable of encompassing arrangements for the provision of accommodation for service users. The District Judge observed that it appeared the bill had been amended to include within section 254(2)(e) additional wording so that it applied if "rents are payable or other consideration is to be provided *in respect of* at least one of those persons occupation of the living accommodation" (emphasis added). A complimentary amendment had not been provided for section 263(3), and no ministerial statement explained why this was the case. From this the District Judge concluded that it was the clear intention of Parliament that HMO accommodation provided to service users was to be fully licensed in accordance with the 2004 Act. Her conclusion that a literal reading of section 263(3) meant that the licensing regime under the 2004 Act being ineffective in relation to accommodation for service users was contrary to the intention of Parliament.

22. The District Judge went on to conclude that, although the doctrine in *Pepper v Hart* was untested in a criminal context, nonetheless given the specific circumstances of the case, including the fact that the claimant when applying for the licences had nominated themselves as the manager of the premises fully aware of the potential criminal liability for doing so, the court could have regard to the Parliamentary material in undertaking the construction exercise.

23. The final question which the District Judge posed was to ask what the purposive construction of section 263(3) ought to be in the light of the Hansard material. The District Judge concluded that in order to make the 2004 Act workable an option would be to read section 263(3) so that "person managing" is someone who receives payment "from or in respect of" persons in occupation. Such a reading would then cover the payments made by the HO in respect of the occupation of the premises by the service users.

24. As a consequence of these conclusions the District Judge reached the determination that the claimant fell within the definition of "person managing" because, applying the construction which the District Judge had arrived at, the claimant qualified by receiving payment from the HO in respect of the persons occupying the premises. As a consequence the District Judge concluded that the application to dismiss the prosecutions had to be refused.

<u>The relevant principles of statutory construction</u>

25. A useful introduction to the key principles of statutory interpretation is provided in the judgment of Lord Nicholls in the case of *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] AC 349. At page 396 G he observed as follows.

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective

> intention of the Minister or other persons who promoted the draft legislation. All of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when court say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

26. Lord Nicholls went on to note that an appropriate starting point is that the language used is to be taken to bear its ordinary meaning in the general context of the statute. The canons of statutory interpretation also include certain principles and presumptions, such as the principle that legislation must be read in a way which is compatible with the Human Rights Act 1998. In relation to any statutory criminal offence there is a presumption that a mental element is included. There are recognised aids to construction: sometimes these may be internal, such as other provisions within the same statute; sometimes they may be external, such as the background to the legislation and its legislative history. Lord Nicholls went on to consider the possible use of external aids in circumstances where the statutory language is unclear or gives rise to absurd results. He noted that the use of external aids should be undertaken with circumspection, in particular if they are being deployed to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. He also considered the potential use of parliamentary proceedings as an external aid as acknowledged by the principles set out in *Pepper v Hart.*

27. The Council draws attention to Section 13.1 of *Bennion, Bailey and Norbury on Statutory Interpretation* which addresses the presumption that an "absurd" result will not have been that which was intended by Parliament. The principle which is identified in the textbook is distilled in the following terms.

> "13.1 Presumption that "absurd" result not intended
>
> (1) the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) the strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.
>
> (3) the presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."

28. An example provided in support of the principle is *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811, a case which concerned section 77(5) of the Proceeds of Crime Act 2002 relating to tainted gifts. The provision defined tainted gifts as gifts which were made at any time after "the date on which the offence was committed". The

appellant had robbed a bank at 14.37 on the day in question and then at 16.15 the same day she gifted a portion of the proceeds of the robbery to her husband. It was argued in the confiscation proceedings that this could not come within the definition of a tainted gift because it was not made after the date on which the offence was committed. The Court of Appeal concluded that the literal meaning of the Act gave rise to absurd results on the basis that it appeared to provide a criminal with a day's grace to dispose of the proceeds of crime, and meant the treatment of a tainted gift would depend upon the time of day when an offence was committed. Macur LJ, giving the lead judgment in the Court of Appeal, adopted a purposive construction of this provision, reading it as though the date on which an offence was committed referred to the actual time of its commission, after which any tainted gift would fall for consideration for confiscation.

29. A further principle of statutory construction relevant to the arguments raised by the parties in this case is that the role of the court is not limited to construing legislation so as to resolve ambiguities in statutory language, but it can extend to correcting obvious drafting errors. In suitable cases this can lead to a reading of the legislation including the addition, omission or substitution of words. This principle was adopted by the House of Lords in the case of *Inco Europe Ltd v First Choice* [2000] 1 WLR 586 which concerned provisions of the Arbitration Act 1996 that Lord Nicholls concluded contained a drafting error in relation to its failure to make appropriate provisions for a right of appeal to the Court of Appeal. The statutory interpretation required to correct this drafting error involved the interpolation or writing in of words into the legislative provisions. Nonetheless, in the light of the clear error by the drafter of this legislation, Lord Nicholls concluded, in a judgment supported by the other members of the House of Lords, that this was the correct approach to the reading of the statutory provisions.

30. Lord Nicholls set out the principles upon which the court could act in the circumstances in the following terms.

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draughtsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words that Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment will cross the boundary between construction and legislation… In the present case these three conditions are fulfilled."

31. This principle was applied by Sales J (as he then was) in the case of *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872. Under the Immigration and Asylum Act 1999 civil penalties in the form of monetary fines were

introduced in relation to a carrier whose vehicle was found to contain clandestine entrants to the United Kingdom at the point of border control. After the Act was brought into force, the United Kingdom established border controls outside United Kingdom territory in France, in the form of immigration control zones. The appellant had civil penalties levied against him based upon the assumption that the penalty regime had been introduced not only in the territory of the United Kingdom, but also within the immigration control zones which have been established by the United Kingdom in France

32. A point of law arose as to whether or not, as a consequence of poor drafting, the legislation ought to have been brought into effect so as to apply not only to the territory of the United Kingdom but also to the immigration control zones in France. It was submitted by the Secretary of State that the interpretive approach set out in *Inco Europe* should be adopted by the court in respect of the failure to bring amendments to the 1999 Act into force in respect of the French immigration control zones.

33. In analysing the legal principles which were engaged in the *Inco Europe* principle Sales J observed as follows in his judgement:

> "42. For the purposes of the principle in Inco Europe, it is only if the legislative instrument has a clear, objectively assessed meaning, having regard to all the circumstances and all indicators of the legislators intention available to the person subject to the law (assisted as necessary by his legal advisers), and that meaning is contrary to the literal meaning of the text of the instrument, that it will be appropriate for the Court to give a rectifying interpretation to the instrument. Given the primacy ordinarily to be given to the language used in a legislative instrument as an indicator of the legislators intention, the countervailing objective indicators that, despite the language used, the legislators intention was different need to be very strong, as Lord Nicholls emphasised in Inco Europe. It must be clear that the true intention of the legislator, objectively assessed, was different from the language used by the draughtsman. It is only if the Court has no doubt that the draughtsman "slipped up"… i.e. that there was a mistake made in the language chosen by the draughtsman to give effect to the intention of the legislator, that it can be confident that the proper interpretation of the provision is given by other objective indicators of the legislators intention. This is an approach to interpretation of a kind which is not unique to legislative instruments, but is of general application in the construction of all sorts of instruments which are intended to have legal effects: compare, e.g. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, esp. at 797G per Lord Steyn.
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> 43. Although in this judgement I have used the expression "rectifying interpretation" as a convenient shorthand expression for the process of construction pursuant to the guidance in *Inco Europe*, I should make clear that properly speaking the court does not rectify or amend the legislative instrument. It gives it

> its true meaning, arrived at by the process of objective interpretation described in the authorities referred to above
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> ….
>
> 45. In deciding whether it is appropriate to identify the true meaning of a legislative instrument as supplemented by implication or by substitution of formulation in this way, it will be necessary to have regard to other relevant guides to interpretation which may apply. Of these, an important guide will be the principle that the language used in penal legislation is to be strictly construed, to which Lord Nicholls called attention in *Inco Europe* at P. 592 H, in the passage quoted.
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> 46. Again, this is not an approach which is unique to the *Inco Europe* type of situation. It is a general approach to interpretation of legislation, to be born particularly in mind when it is sought to argue for a construction by reference to aids to interpretation external the text of the legislation itself.…
>
> 47. The principal penal legislation is to be construed strictly is a long-standing one, of recognised constitutional importance… The rationale for this principle is that it is presumed within our constitutional system that the legislator intends that a person subject to a penal regime should have been given fair warning of the risks he might face of being made subject to a penalty.
>
> 48. But it is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention albeit it is itself an indicator of great weight. As *Bennion* says, at p.750, "In accordance with the basic rule of statutory interpretation a penal enactment will not be given a strict construction if other interpretive factors weigh more heavily in the scales";… If other objective indicators of legislative meaning and intent are sufficiently clear, and it is obvious to the requisite degree that the draughtsman has made a slip in the language he has used, a person subject to a penal regime may be taken to have been given fair warning even though the interpretation adopted by the court involves some implication of terms in, or substitution for, the text of a relevant legislative provision."

34. Having set out this analysis of the relevant principles established pursuant to *Inco Europe,* Sales J went on to conclude that on its true construction the relevant text in the Commencement Order should be read as including the immigration control zones in France within the regime of civil penalties. There could be no doubt as to the intention to impose penalties in respect of those passing through "immigration control" with a clandestine entrant. There was no basis to suggest that there was any plausible reason

that Parliament or the Secretary of State intended to narrow the operation of the regime so as to exclude the immigration control zones in France, including one in which it had operated prior to the commencement of the legislation in question. Given the nature of the clear and recognised policy behind the legislation it would have been irrational to do so. It was clearly not the intention of the legislators to effectively repeal a significant part of the pre-existing carriers liability regime in respect of the immigration control zone in which it was in force. The true effect of the legislation was clear, and it was that all of the immigration control zones in France should be included within the civil penalties regime.

35. In addition to these principles the Council draws attention to the case of *N and H v Lewisham Borough Council* [2015] AC 1259, in which at paragraph 95 Lord Carnwath expressed his view that there was, in that case, an additional basis upon which the decision of the Court of Appeal could be upheld based upon the use of settled practice as an aid to statutory interpretation. The essence of his conclusions in relation to the legitimacy of this approach was set out in the following paragraphs of his judgement.

> "94. Review of these authorities shows how varied are the contexts in which a settled understanding or practice may become relevant to issues of statutory interpretation. Concepts such as "tacit legislation" or "customary meaning" provide no more than limited assistance. The settled understanding may emerge from a variety of sources, not necessarily dependent on action or inaction by Parliament, or particular linguistic usage. Nor can the debate, exemplified by the difference 130 years ago between Lord Watson and Lord Blackburn, be reduced to one between principle and pragmatism, as Lord Phillips's PSC suggested. Rather it is about two important but sometimes conflicting principles-legal correctness and legal certainty. In drawing the balance between them, as in most areas of the law, pragmatism and indeed common sense have a legitimate part to play.
>
> 95. In my view this case provides an opportunity for this court to confirm that settled practice may, in appropriate circumstances, be a legitimate aim to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts. This should not necessarily depend on the degree or frequency of Parliamentary interventions in the field. As in the *Anglesey* case, the infrequency of Parliamentary intervention in an esoteric area of the law may itself be an added reason for respecting the settled practice. On the other hand it may be relevant to consider whether the accepted interpretation is consistent with the grain of the legislation as it has evolved, and subsequent legislative action or inaction may be relevant to that assessment."

The parties' cases in brief

36. The claimant contends that the conclusions of the District Judge were erroneous in a number of important respects. It was incorrect for the District Judge to conclude that the claimant was required to have an HMO licence. The licensing requirement under the 2004 Act applies to properties not persons.

37. Secondly, and more fundamentally, the District Judge was wrong to conclude that if a literal interpretation of section 263(3) was taken then no HMO accommodation for persons seeking asylum could ever obtain a licence, on the basis that no manager could be proposed as they could not meet the definition of a "person managing"; and no licence could be granted because without a manager the local authority could not be satisfied that the arrangements required by section 64(3) were in place. This analysis was erroneous because pursuant to section 64(3)(c) the proposed manager of the house includes either the "person having control of the house" or that person's agent or employee. There will always be someone, the freeholder of the property for instance, who fulfils the requirement of being a "person having control of the house", and thus the District Judge's conclusion involved a misapprehension in relation to the effect of the licensing requirements under the 2004 Act. As a result of this error there is no absurdity in the legislative regime of the kind which the District Judge envisaged, and therefore no justification for her approach to the construction of section 263(3).

38. The claimant's submissions focus on the provisions of regulation 2(c), on the basis that it was this provision which gave rise to the criminal liability in this case. The claimant notes that insofar as there was any case for "rewriting" the legislation this would be in connection with regulation 2(c), to make it include the "person having control", thereby matching the definition of the person who could be appointed "the manager" pursuant to section 64(3)(c) of the 2004 Act. However, this would not be a permissible exercise in the light of the clear terms of regulation 2(c) and the accompanying footnote.

39. Furthermore, it would be illegitimate to seek to change the ordinary meaning of section 263(3) in order to attempt to cure any problem with the Management Regulations as this would effectively be the tail wagging the dog. Moreover the 2004 Act clearly predated the Management Regulations, and so at the time when the Management Regulations were drafted it was well known that "person managing" had a particular meaning. The term "person managing" has other purposes within the legislative framework and reinterpreting it or changing it in this context may have unforeseen consequences.

40. The claimant contends that if, contrary to its primary submissions, reading section 263(3) and/or regulation 2(c) contrary to their literal meaning was to be contemplated the relevant techniques of statutory interpretation could not properly accommodate the extent and nature of the changes which would be required. Any change to regulation 2(c) which sought to incorporate within its meaning the separate statutory concept of "the person having control" would have a number of cogent objections ranged against it. Firstly, in the predecessor legislation to section 234 of the 2004 Act, section 13 of the Housing Act 1961, the regulations in respect of managing a house let as lodgings or occupied by members of more than one family were expressed to apply to the person managing the house who was defined as follows.

> "(2) for the purposes of the foregoing subsection and regulations made under this section, the person managing a house which, or part of which, is let in lodgings or which is occupied by members of more than one family shall be defined as-
>
> (a) the person who is an owner or a lessee of the house and who, directly or through an agent or trustee, receives rents or other payments from persons who are tenants of parts of the house, or who are lodgers, and
>
> (b) where those rents or other payments are received through another person as his agent or trustee, that other person, but the foregoing definition may be varied or replaced by regulations under this section."

41. Thus, the claimant submits that there is a legislative history to the use of the definition within section 263(3) of the 2004 Act in the form of the 1961 Act which should be respected rather than departed from. Secondly, the claimant contends that it would be far too much of a departure from the language of the regulations to interpret regulation 2(c) as including "the person having control" of the property. Thirdly, the claimant submits that bearing in mind that this is penal legislation a stricter approach to the construction of the legislation must be adopted. In that context, were the regulations to be read as including "the person having control", the liability under the Management Regulations would be enlarged so as to impose liability, for instance, on the freeholders of the premises in a way which could not possibly be foreseen from a literal reading of these provisions.

42. In relation to the conclusion of the District Judge as to how section 263(3) should be read so as to include "rents or other payments from *or in respect of*" the claimant submits that there is no basis for suggesting that the drafter of the legislation slipped up by omitting the words which are sought to be included. Nor is there any basis for concluding that this is the meaning which it was intended this provision should have throughout the 2004 Act.

43. Furthermore, the claimant points out that the solution proposed by the District Judge, and adopted by the Council, does not in truth resolve any gap which may be perceived in the coverage of the Management Regulations. Accommodation for service users may be provided to them within an HMO without any payment in fact changing hands. For instance, the HO might choose to provide the accommodation itself, either directly or by making agreements with freeholders, and there would be no one within the scope of the modified section 263(3) receiving payments so as to be caught by the definition.

44. Finally, the claimant observes that the District Judge made a clear finding of fact in paragraph 34 of her judgment that the person seeking asylum occupying the property had no liability to make any payment and therefore there was no basis for suggesting that the HO was the agent for the occupiers. The SSHCLG's case that there was some arrangement of agency involved in the provision of this accommodation was misconceived. Ultimately the literal meaning of the legislation was obviously to be preferred, leading to the conclusion that the claimant could not be a "person managing" and therefore could not be liable for the offences charged under the Management Regulations.

45. The submissions of the Council begin by focussing upon the contractual arrangements between the claimant and the intervener. Those contractual arrangements placed obligations on the claimant to meet the necessary standards relevant to the statutory scheme. For instance, within Annex B of the contract with the claimant there is a wide range of requirements in relation to the specification of the property to be provided to service users. Under clause 1.6.2 of the contract the claimant was required to ensure that any HMO property was licensed where applicable in accordance with statutory requirements. The detailed provisions contained within Annex B reflected topics covered in the conditions which were imposed under the licensing of the properties concerned. The Council draws attention to the evidence in support of the prosecution contending that there were multiple breaches of the licence conditions found by the council officers who inspected and investigated this case.

46. The Council relies on the purpose of the 2004 Act, which was designed to provide a new regime of housing control, including the assessment of the condition of residential property, and the enforcement of appropriate standards in that accommodation. The legislation did not provide any "carve-out" for accommodation provided to service users. On the basis that the 2004 Act was a new and comprehensive legislative framework the Council contends that little is to be learned from the 1961 Act in relation to the proper construction of section 263(3) of the 2004 Act.

47. The importance of the control provided by the Management Regulations is emphasised by the Council, on the basis that there are many HMOs which do not require to be licensed but which nevertheless are regulated through the provisions of the Management Regulations. In relation to these premises the use of either the requirement for a licence, or proceedings for breach of conditions on the licence, do not provide any means for the local authority to ensure that satisfactory standards of accommodation are provided. The mechanism whereby the standards of this accommodation, including such important matters as fire safety, energy supply and sanitation, are maintained is by the application and enforcement of the requirements of the Management Regulations.

48. The Council contends that there is a clear lacuna in the provisions of section 263(3) and that this is thrown into sharp relief by the factual circumstances of the present case. It is clear from the facts of this case that the claimant was, and intended itself to be, the responsible manager of the properties in question. That was the position which it said it held when submitting the licence applications. It was the factual reality of the position, as envisaged not simply by the licences, but also by the contractual arrangements which the claimant had entered into voluntarily with the HO. The clear purpose and intention of the legislation in this context must be that the claimant was to be criminally liable for failures in the standard of the accommodation which they were managing for the service users in occupation. Thus, applying a variety of the techniques available by way of statutory interpretation, the intention of Parliament could be achieved by adopting the proposed solution of the District Judge and reading section 263(3) as including "or in respect of" within section 263(3)(a).

49. The justification for this reading of the legislation can be found in the principle of statutory interpretation that meanings which are unworkable or impracticable, or which give rise to an absurd or impossible outcome, should be avoided. Furthermore, the principle of avoiding plain and obvious errors in legislation also supports this approach in respect of section 263(3). The Council submits that by relying upon the literal

meaning of section 263(3) the claimant is "chancing its arm", or seeking to take advantage of the error made by the drafter of the legislation when the context makes entirely clear that they should be held responsible for any breaches of the Management Regulations given their clear and unequivocal managerial role in respect of the properties concerned. The evidence of the standard practices involved in commissioning accommodation of this type for service users further reinforces the importance of the construction of the legislation for which the Council contends.

50. The SSHCLG also submits that section 263(3) should be interpreted so as to include the claimant within the definition of "person managing", but on the basis of a different analysis to that which was adopted by the District Judge and supported by the Council. The SSHCLG contends that on the facts of the present case, and based upon the arrangements put in place by the HO and the claimant to provide accommodation pursuant to section 95 of the 1999 Act, the HO is an "agent" for the occupying service user, such that for the purposes of the definition in section 263(3) the claimant can be taken to receive rent from the occupier of the premises.

51. Whilst the SSHCLG acknowledges that there is no contract between the claimant and the occupier pursuant to which rent is received, it is submitted that the term "agent" can arise in circumstances where even though there is no contract nevertheless some lesser fiduciary relationship between the principal and agent can suffice to give rise to a legal relationship. The SSHCLG submits that the HO has a relationship of incomplete agency with the occupying service user on the basis that his or her occupation is pursuant to a contract with the claimant which is dependent upon the occupier continuing to be a beneficiary of the asylum support regime, and the service user giving authority to the HO to procure property on their behalf.

52. There are, the SSHCLG submits, powerful reasons for adopting this wider meaning of the term "agent" in the current context. The property procured and paid for by the HO was for the benefit of the service user. The provisions of the 2004 Act are clearly designed to regulate those who own or control HMOs rather than anyone who is the agent of the occupier. Unless this wider meaning is given to the term "agent" it would be possible for a person to apply for a licence as a proposed manager for premises, but for there to be no "person managing" for a HMO housing service users at all.

Conclusions

53. The first question to be addressed is whether the District Judge was correct in her interpretation of section 263(3) of the 2004 Act. It appears clear that the District Judge reached the conclusion that there was a need to read section 263(3) with the interpolation of the words "or in respect of" as a result of her conclusion that without this interpretation the legislation was not capable of permitting the licensing of service user accommodation because there would never be a "person managing" those premises. There is, however, as the claimant points out, a flaw in that analysis. As a result of the provisions of section 64(3)(c) it is possible for a "person having control" of premises to obtain an HMO licence for premises, and so it is possible for arrangements which do not include the receipt of rent from the person in occupation to come within the scope of the HMO licensing regime. The District Judge's conclusion at paragraph 41 of her judgment that "the HMO legislation in the Housing Act is wholly ineffective in relation to [service user] accommodation" is not one which can be

sustained, and it does not provide a basis for embarking on a reconstruction of section 263(3) of the 2004 Act.

54. As the claimant points out, the provisions of section 64 are sufficient to enable a "person having control" or their agent or employee to apply for and hold a licence in relation to an HMO. Thus the definition of those who can hold an HMO licence includes a freeholder whose property is used as accommodation for service users, as well as a leaseholder who is receiving, or could receive, a rack rent. As a result of this the exercise upon which the District Judge embarked, including examining whether, pursuant to *Pepper v* Hart*,* there should be an examination of Parliamentary materials as an aid to interpretation and what is learnt by doing so, was not legitimate. The District Judge's basis for determining the outcome of the application to dismiss was erroneous and her conclusions cannot be sustained.

55. The Council has sought to sustain the District Judge's conclusion in a variety of ways. Firstly, by looking to the substance of the arrangements set up between the HO and the claimant and submitting that as a matter of custom and practice the claimant was operating as the manager of the premises, and therefore should be brought within the definition of "person managing". The Council argues that the claimant's submissions in support of the application to dismiss were, in effect, an illegitimate attempt to take advantage of clumsy drafting. The difficulty with these submissions is that they are neither founded on any patent defect in section 263(3), nor any impracticality or absurdity in this element of the legislation. When the legislative regime is read as a whole it is clear that there is a complete and coherent regime for the licensing of HMOs in the light of the breadth of the qualifying criteria contained in section 263(1) and (3). The need for a licence applies across premises on the basis of capturing both "persons managing" and " person having control". The coverage of the scheme (subject to the established exceptions as noted above) is full. With the requirement to obtain a licence comes the imposition of conditions and, through the enforcement of those conditions, the ability to control the standards of the accommodation provided pursuant to the licence.

56. It is clear that the provisions of section 263 are designed to provide complementary definitions of "person having control" and "persons managing". The definition of "persons managing" under section 263(3) is specific in its requirement of the receipt of payment of rent directly or indirectly from those who are in occupation of the premises. As such this definition complements the definition of "person having control" set out in section 263(1) which is based upon different criteria related to an entitlement to receive the rack rent for the premises. Thus, the literal reading of these provisions does not give rise to impracticality or absurdity: they bring within the scope of those responsible for the standard of HMO accommodation clearly defined classes of person related to the property. Whilst noting the concern of the District Judge that section 254(2)(e), the provision defining the "standard test" for a house qualifying as an HMO, was amended when the Housing Act was making its passage through Parliament to provide that that one of the requirements is "rents are payable of other consideration is be provided *in respect of* at least one of those persons' occupation of the living accommodation" (emphasis added), that does not justify the reading in of these additional words to section 263(3). The reason for this is that there is no error or defect in the provisions of that section which requires to be cured by this additional wording. The literal reading of section 263 as a whole does not give rise to any impracticality or

absurdity which could justify the kind of intervention contemplated by the District Judge and advocated by the Council.

57. A further point which requires consideration is that it was clearly within the contemplation of the drafters of the 2004 Act that there would be HMO accommodation which would not, as in the present case, involve the provision of rent by the occupier as part of the arrangements. Often these arrangements will be, as here, the provision of accommodation to discharge a statutory duty. As noted above, the provision of the accommodation in the present case relates to the duty placed upon the HO to provide housing as part of asylum support pursuant to section 95 of the 1999 Act. This kind of accommodation was specifically drawn into the regime of the 2004 Act by the 2006 Regulations which deem persons in occupation of housing provided by virtue of section 95 of the 1999 Act to be occupying that property as their only or main residence so as to ensure it is treated as an HMO.

58. This point does not, however, in any way undermine the analysis that has been set out above. It is clear that arrangements of the kind made in the present case, where no rent is paid by the occupier, can nonetheless involve a "person having control" and hence be subject to the licensing requirements under the 2004 Act. The existence of these arrangements is not, therefore, a reason to depart from the literal reading of section 263(3). Furthermore the literal reading is supported by the Explanatory Note to the statute. It is a conclusion which is clear without the need to have recourse to the earlier legislation in this area such as the 1961 Act. In any event there is force in the submissions made by the Council that the 2004 Act was designed to create a new legislative framework and any reference back to earlier legislation is of little assistance in relation to these questions.

59. It should be noted for the record that the claimant does not accept that it is a "person having control" under the legislation. The question of whether it is or not is a matter which, if necessary, is reserved for consideration and determination by the Magistrates' Court later in the proceedings.

60. The District Judge's conclusions cannot therefore stand and were reached on the basis of an error of law.

61. That is not an end of the matter since, as this is an application for judicial review, it is necessary to consider whether, pursuant to section 31(2A) of the Senior Courts Act 1981, the outcome for the applicant would have been substantially different if the error of law in terms of the approach to statutory interpretation had not been made. If not, then notwithstanding any error in the District Judge's decision relief should be refused.

62. As set out above the SSHCLG offers an alternative approach to the construction of section 263(3) which does not require the interpolation of any additional words, but rather proceeds on a different reading of the provision. In particular, the intervener contends that where section 263(3) refers to rents being received "through an agent" this can be read as including the arrangements between the HO and the service users: the HO are an "agent" for the service user such that the claimant receives rent as from the occupier.

63. There are a number of difficulties with this submission. The first is that, as noted above, the District Judge found as a fact that the HO were not the agent of the service user, and

this application is unsuited to the reopening of that finding, which was one which was clearly open to the District Judge on the basis of the material before her. Secondly, the language of section 263(3) makes clear that the agent for the purposes of the definition is the agent of the "person managing" and not of the those in occupation of the premises. It is the recipient of rent, or the agent of the recipient of rent, who is within the scope of the definition. Thirdly, there is no warrant for the breadth of the reading of the word "agent" for which the SSHCLG contends, when it is read in context. As the claimant points out, the effect of the SSHCLG's reading is that the HO would be criminally liable for any breach at the premises. Whilst the intervener contends that is not a concern, it is hard to discern that such an outcome was intended from the statutory language or the purpose of the legislation. The SSHCLG's alternative is not, therefore, a basis upon which the District Judge's decision can be sustained.

64. In written and oral argument the claimant accepts it may be that the real issue in this case relates to the way in which regulation 2(c) of the Management Regulations has been drafted and in particular its definition of the "manager" of the premises. Bearing in mind that the charges with which the court is concerned are made under the Management Regulations, the operation of these regulations is obviously central to the question of the claimant's liability. It is important to understand, as set out above, that the Management Regulations apply to all HMO premises whether or not they are required to be licenced by virtue of regulation 1. The structure of the Management Regulations is that they impose liability for breaches of the various requirements that they impose on the "manager" of the premises. Having done so, regulation 2(c) then defines the term "manager" as relating solely to a person within the definition of a "person managing" within section 263(3). As a consequence any HMO premises where there is only a "person having control" of the premises and no "person managing" are, on a literal reading, excluded from the operation of the Management Regulations and the need to comply with the standards which the regulations require. Whilst, therefore, for the reasons set out above, it is clear that HMO provision where there would be no payment of rent is intended to be within the scope of the regulatory regime, the way in which regulation 2(c) has been drafted gives rise to the absurd outcome that none of the premises with such an arrangement are covered by the Management Regulations.

65. The exclusion from the Management Regulations of all HMOs where there is no "person managing" but there is a "person having control" is entirely inexplicable. It is clearly intended in the provisions set out above in respect of accommodation provided by reason of section 95 of the 1999 Act that the occupiers of such premises should have the protection afforded by the HMO regime. It is equally unaccountable that it could have been the intention to exclude from the protection of the Management Regulations those who have HMO accommodation provided to them as a consequence of their vulnerabilities or impecuniosity, for example by charities. The omission of premises where there is a "person having control" but no "person managing" is undoubtedly an entirely unintended consequence of the drafting of regulation 2(c). There is nothing in the Explanatory Note for the Regulations which justifies or explains this anomaly. The truth is that there is no rational explanation for it. It is manifestly an error in the way in the Management Regulations have been drafted, which defeats the clear purpose of the Regulations which was undoubtedly to afford protection to all the occupiers of all HMOs through the imposition of duties on those responsible for their management. Again, the provisions of earlier legislation such as those in the 1961 Act do not gainsay these points.

66. As was accepted during the course of argument, the terms of section 234 of the 2004 Act are wide enough to enable the inclusion of both "persons managing" and also "persons having control" within the definition of "manager" for the purposes of the Management Regulations. In other words, the power to make regulations created by section 234 is sufficiently wide to impose liability for breach of any regulations made on both "persons managing" and also "persons having control". The error or defect in the drafting is not therefore explicable on the basis that any regulations made pursuant to section 234 could not impose liability on a "person having control".

67. The question which then arises is how the absurdity of the exclusion from liability under the Management Regulations in respect of "persons having control" of HMO premises might be cured. The simplest and most obvious remedy for the defect is to read regulation 2(c) as if it stated " 'the manager' means the person managing *or the person in control of* the HMO" and the footnote as reading "For the meaning of 'person managing' see section 263(3) *and 'person in control' see section 263(1)* of the Act". This reading would resolve the defect in the drafting and achieve the intention behind the Management Regulations identified by regulation 1 that they should apply to all HMO premises and not simply those where there is payment of rent directly or indirectly to a manager. There is no doubt reading the Management Regulations in the context of the statutory framework as a whole that they were intended to apply to all homes within the definition of an HMO and protect all of the occupants within them by the imposition of specific standard for the accommodation.

68. This reading meets the requirements of the approach to statutory construction established and applied in *Inco Europe* and *Bogdanic* for the following reasons. Firstly, it is clear that the intention of Parliament was that the Management Regulations should apply to all HMOs and not only those where there is a "person managing". As has already been noted, the legislative regime has provisions which specifically contemplate the inclusion of HMOs provided pursuant to arrangements which do not involve the payment of rent by an occupier, such as the provision of accommodation as part of asylum support to address the duty under section 95 of the 1999 Act. Examining the wider statutory context of the Management Regulations it surely was the intention of the legislators to ensure that they applied to all HMOs within the governing regime.

69. Secondly, it was an error or inadvertence which failed to give effect to the intention that there should be comprehensive coverage of HMOs for the purposes of the Management Regulations. There is no other feasible explanation either offered or available to explain the failure to draft the Management Regulations so that they covered premises with a "person having control" as well as those with a "person managing". The second criteria identified by Lord Nicholl in *Inco Europe* is therefore fulfilled. Thirdly, the reading proposed does give effect to the substance of the provision that Parliament would have made had it been aware of the error in the drafting which has occurred. The line between construction and legislation has not been crossed and the reading represents what Parliament intended to ensure was the coverage of the Management Regulations, namely all HMOs and not only those where a rent is paid by the occupier to an owner of leaseholder directly or through an agent. The reading is consistent with the remainder of the statutory framework and reflects the purpose of the legislation to create a system for the regulation of the standards of all HMO accommodation. The breadth of section 234, capable of supporting management regulations imposing liabilities on both "person having control" as well as "persons managing", is consistent with the

understanding that the legislation was meant to read so as to include both categories or types of managers.

70. The final issue to be considered is whether the principle requiring the strict construction of criminal statutes precludes the approach which has already been outlined. As Sales J observed in *Bogdanic,* this is a principle of long-standing constitutional importance, on the basis that if criminal liability is going to be imposed on a person they are entitled to be given fair warning of the need to comply with the relevant legislation so as to avoid incurring a penalty. However, as he also noted, it is not an absolute principle, but rather one of the indicators to be deployed in seeking to establish the correct interpretation of a statutory provision. If other objective indicators of purpose, intent and proposed meaning are sufficiently clear and weighty then it is open to the court to conclude that a person would, by means of these indicators, have received fair warning of the penal impact of the legislation, even where this involves a departure from the literal meaning of the language used in the statute.

71. In the present case, as will be apparent from the analysis set out above, it is very clear that the intention was not and cannot have been for a "person having control" of the premises to have no responsibility for any of the important requirements in respect of the condition of the premises, provided that person is not also a "person managing" the premises. A person within this definition is one of the types of person who is a candidate to be a proposed manager under a licence if the premises require a licence. The offence under section 72(1) of failing to have a licence for HMO premises which require a licence can be committed by "a person having control of or managing an HMO". It would be entirely anomalous if the type of managing person who is embraced by the scope of these provisions were not to be within the scope of the Management Regulations. This parity of approach is obvious, and sufficient to provide clear and fair warning to a "person having control", of the potential liability for failure to comply with the requirements of the Management Regulations in relation to the standards which they impose. Having taken account of the principle in relation to strict construction when interpreting a penal statute there is no reason to depart from the reading of the provisions of regulation 2(c) set out above.

72. Whilst not determinative, the facts of this case provide some perspective in respect of this issue of the foresight of potential liability. It appears that when the Council required the licence applications to be made by the claimant rather than the freehold owners of the properties the claimant chose to describe itself as being solely in control of the HMO premises and to accept that it would be managing the HMO itself. It does not require a great deal of imagination to conceive that if this was the claimant's understanding of the extent of its involvement in the running and supervision of the HMO that there was the potential for it to be liable if the requirements of the Management Regulations were not met. Whilst it must be noted that the claimant has left open the question of whether on the facts it was a "person having control", these observations provide some context from the circumstances of this case as to whether there could be considered to be fair warning of potential liability notwithstanding the literal reading of regulation 2(c) of the Management Regulations. It follows that whilst the District Judge's conclusions based upon her construction of section 263(3) of the 2004 Act cannot stand, the overall result at which she arrived, namely that the application to dismiss should be rejected, was correct. The outcome of the application would not have been substantially different if the error of law she committed not occurred, because there are other good reasons for

supporting her refusal to dismiss the prosecution. The case must continue, and amongst no doubt many other factual disputes, the question of whether the claimants are a "person having control" in relation to the premises in question will have to be considered. If the court is satisfied that they are, then they are capable of being liable for breaches of the Management Regulations, subject to the findings of fact which will have to be made in respect of the conditions of the premises. Ultimately, therefore, relief must be refused in relation to this application for judicial review for the reasons which have been given.

73. Before concluding this judgment it is must be noted, as it was at the hearing, that it was unfortunate that the issues in relation to the prematurity of this application were not grasped earlier. As was made clear in the case of *Platinum Crown Investments Ltd v North East Essex Magistrates' Court* [2017] EWHC 2761; [2018] 4 WLR 11, it is only in exceptional circumstances that judicial review should be afforded the flexibility necessary to consider what are in effect interlocutory decisions in a prosecution before the Magistrates Court. There are a number of reasons for this, which include for instance the existence of an alternative remedy in the form of maintaining the factual defence to the claim on the basis that the condition of the properties was not as alleged in the summons. It is said in support of determining the point now that had the claimant been successful in demonstrating that as a matter of law the prosecution was misconceived then the costs of the resolving these factual issues would have been avoided. However, as matters have turned out those costs have not been avoided as the matter will have to return to Magistrates' Court for the prosecution to be completed. The costs of this application have been incurred in addition. This case demonstrates the validity of the approach that applications for judicial review in relation to interlocutory rulings in the Magistrates' Court should be exceptional. Having reflected on that principle there are exceptional features in this case given the considerable numbers of service users in accommodation subject to the same arrangements as those which pertained here between the HO and the claimant, and it was on balance appropriate for this case to proceed in the way in which it has.

74. For the reasons set out above, whilst the reasoning of the District Judge cannot be supported, she was in substance correct to reject the application to dismiss the prosecution on the basis that it was legally misconceived. Applying the principles in section 31(2A) of the 1981 Act relief should be refused, and the matter should return to the Magistrates' Court for the question of liability in relation to the charges in the summons to be determined in the light of the conclusions on the relevant law which have been set out in this judgment.

75. In reaching that conclusion we have taken account of submissions advanced by the claimant following the confidential circulation of the draft judgment to counsel for editorial comments, in which the court was asked to re-open the hearing in relation to the application of section 31A(2A) of the Senior Courts Act 1981. The argument is that this court's analysis leads to the conclusion that the outcome in the Magistrates' Court would have been different, in the sense that the application would have been dismissed for different reasons. It is submitted that the court should make declarations to reflect this reasoning. Having considered these submissions, they can be dealt with appropriately and proportionately on the papers without reopening the hearing. For the reasons given above, the outcome would not have been substantially different had the court's construction of the legislation been adopted by the Magistrates' Court: the

application would still have been dismissed. There is no warrant for the grant of the declarations suggested by the claimant since the detailed reasons set out in the judgment provide a sufficient explanation of the position which will now be the basis for the future consideration of this case by the Magistrates' Court.