FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HMF/2022/0007**
Property	**:**	**The Gables, 2-4 Blackheath Park London SE3 9RR**
Applicants	**:**	**Kenya Jay Scarlett, Isabel Hannah Margaret Cullingford, Phoebe Cottam, Tom Shipman, Charlotte Roberts, Hector Cottam, Morag Dempsey**
Representative	**:**	**Mr G Penny, Justice for Tenants**
Respondent	**:**	**Lowe Management Limited**
Representative	**:**	**Mr M Croskell of counsel**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr S Mason BSc, FRICS**
Date and venue of Hearing	**:**	**15 August 2022, 10 Alfred Place and 30 November 2022, online**
Date of Decision	**:**	**6 January 2023**

DECISION

The application

1. On 6 January 2022, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 18 March 2022.

2. In accordance with the directions, we were provided with an Applicant's bundle of 369 pages, and a reply of six pages, and a Respondent's bundle of 183 pages. Both representatives also provided helpful skeleton arguments and, following an invitation, further written submissions.

The property

3. The property is a sizeable building previously used as an NHS residential home.

The hearing

Introductory

4. Mr Penny of Flat Justice represented the Applicants. The Respondent was represented by Mr Croskell of counsel. We thank both representatives for their thorough and helpful submissions, both written and oral.

5. On 15 August 2022, we heard oral evidence from each of the Applicants except Ms Dempsey, who was not able to be present. All of the Applicants had sworn witness statements in the Applicants bundle. Mr Lowe gave evidence for the Respondent. Two witness statements signed by him were provided in the Respondent's bundle.

6. We were unable to hear submissions on 15 August, and were only able to find a time to reconvene on 30 November 2020. On that day, we heard submissions in the morning.

7. Following the conclusion of this further hearing, we invited further written submissions on one issue (whether guardianship agreement created a lease or not), and received submissions from both parties.

The alleged criminal offence

8. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

9. The Applicants rely on the mandatory licensing scheme provided for in the 2004 Act and The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018, or, in the alternative, the additional licensing scheme introduced by the London Borough of Greenwich on 1 October 2017.

10. The Respondent accepted that the level of occupation of the property was such as to engage one or both of those schemes, but sought to rely, first, on the submission that the building was not an HMO for the purposes of the 2004 by virtue of paragraph 1(f) of schedule 14 to the 2004 Act; and, secondly, the defence in section 72(4)(a) was made out.

11. We established before listening to the parties' submissions on both that it was agreed that it was an element of the offence in section 72(1) that the building was an HMO, so the burden of proof in respect of the schedule 14 issue was on the Applicants (and to the criminal standard); and that the burden of proof of the section 72(4)(a) defence was on the Respondent (and subject to the civil standard).

The Schedule 14 issue

Agreed facts

12. The underlying facts stated here were not in dispute (or – see paragraph [15] below – it was accepted that they could not be seriously disputed given the burden of proof).

13. The freehold owner of the property during the relevant period was the NHS South East London Clinical Commissioning Group ("the CCG"). The CCG is a "health service body within the meaning of section 9 of the National Health Service Act 2008" (the criterion in schedule 14, paragraph 1(f)). During the relevant time, section 9(4)(zb) of the 2008 Act specified "a clinical commissioning group" as falling within the definition of a health service body (see the version of the 2008 Act in force from 1 April 2015 to 30 June 2022).

14. The NHS Greenwich Charitable Trust ("the Charitable Trust") acted as the agent of the CCG in relation to the sale of the property and the appointment of Lowe Guardians Limited ("Lowe") in respect of the property. Despite the name, the Charitable Trust is not an NHS Trust for the purposes of section 9 of the 2008 Act, and is not a "health service body" within the meaning of that section.

15. In respect of these facts, Mr Penny accepted the evidence of Ms Kerry Bourne as to the status and role of the Charitable Trust (or, at any rate, that the Tribunal could not conclude that, beyond a reasonable doubt, her evidence was *not* true). In her witness statement Ms Bourne states that she worked for a company engaged by the CCG to dispose of the property. She explains that there was no lease between the CCG and the

Charitable Trust, and the trustees of the latter managed the disposal of the property on behalf of the CCG.

16. The business model of companies providing guardian services is now well known. The guardians company enters into an agreement with the owner of an empty property under which the company provides people – the guardians – to live in the property. The primary objective from the point of view of the property owner is to prevent squatting or vandalism of their empty property. The guardians company obtains the rents or other payments made by the guardians themselves. There may be other financial arrangements between the parties to the agreement. The empty property is usually not configured for residential use, or if it is (as in this case), not in a form appropriate for the occupation of the guardians who are provided by the company. A necessary incident of the relationship is that the guardian company makes provision for appropriate living accommodation in the property. The nature of the agreement between the guardian company and the owner, and that between the guardian company and the resident guardians, in individual may vary, and some have been the subject of litigation.

17. The key provisions of the agreement between the Charitable Trust and Lowe are set out below at paragraphs [22] to [28].

The legislation

18. Shedule 14 is introduced by section 254, which deals with "the meaning of 'house in multiple occupation'". Paragraph 1(1) states "The following paragraphs list buildings which are not houses in multiple occupation for any purposes of this Act other than those in Part 1", echoing the language of section 254(5). Paragraph 2(1) reads

> "(1) A building where the person managing or having control of it is –
>
> ...
>
> (f) a heath service body within the meaning of section 9 of the Housing and Regeneration Act 2008."

19. Section 263 defines a person managing or having control of an HMO. The relevant sub-sections are 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 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."

20. During the course of submissions, we drew the representatives' attention to the explanatory note on section 263 published by the Government with the Act, which will have reflected the note on the relevant clause of the bill as it went through Parliament. As a matter of general practice, these notes are prepared by civil servants working on the civil service bill teams responsible for legislation, and are amended during the course of the legislative process as necessary. While generally drafted by a policy official, those officials will be supported by departmental Government lawyers (see *Westminster City Council v National Asylum Support Service* [200] 1 WLR 2956, paragraph [4]; and the section "Explanatory Notes" in Part B of the Cabinet Office Guide to Making Legislation, at https://www.gov.uk/government/publications/guide-to-making-legislation/guide-to-making-legislation-html).

21. As we stated when referring the representatives to it, such a note is not part of the Act and should not be treated as legislation, nor as an authoritative statement of the law. It may, however, be of assistance in determining the purpose of legislation. We reproduce it here on that basis:

> "Section 263 defines for the purpose of the Act that "person having control" is the person who receives (directly or as an agency or trustee) the market rents from the tenants for a given premises or is otherwise entitled to receive the rents if the premises were let (i.e. an owner) "Person Managing" is someone who receives the rents directly from the occupier (but "rent" includes ground rent), so such a person could be a managing agent."

<u>The Agreement</u>

22. The agreement is headed "Terms of business between 'LOWE Guardians limited' and 'NHS Greenwich Charitable Trust' in respect of the Building know as 'The Gables, 24 Blackheath Park, Blackheath, London, SE3 9RR'". The start date is given as that on which "the owner" (ie the Charitable Trust) signs the terms of business, and the "minimum contract period" is 26 weeks. Thereafter, there is provision for a notice period of at least 32 days' notice by the owner, which must expire on a Monday (clauses 1.1 to 1.3).

23. Under the heading "access to the property" at clause 1.6, the agreement states:

> "LG will manage all access to the Property, including that by the Owner.
> LG must be given at least 24 hours' notice prior to access, which is to avoid guardians reacting to an unrecognised individual."

24. There is a cross heading of "Management Fee", under which the agreement records that "LG will not charge an on-going management fee and will provide the Owner with a monthly report" (clause 3.2).

25. The agreement provides for Lowe to be responsible for fitting out the property "to a liveable standard" before the guardians start occupation (clause 2.3). There is provision for Lowe to conduct a fire risk assessment, and to ensure that there is a working alarm system and operational fire exits (clause 2.1). Lowe is responsible for paying for utilities (clause 3.3), council tax (clause 3.5) and waste disposal (clause 3.7). At the end of the main part of the agreement there are two tables, one headed "utility liability schedule" and the other "compliance liability". The first states that Lowe is responsible for paying the normal utilities and council tax, and "HMO licence". Under the second, Lowe is shown as responsible for the cost of various regulatory requirements (gas, fire risk, asbestos, electrics etc). Under "repairs and maintenance", the "owner" is responsible, except for "Minor repairs to lighting fixtures, bathroom repairs/leaks, locks and other general maintenance" and for damage to windows as a direct result of the negligence of a guardian.

26. The agreement provides for there to be to "maintenance plans", both of which (on our reading) presuppose that it is the Charitable Trust/CCG who will pay for repairs, with Lowe acting in a role similar to that of a residential managing agent.

27. Appended to the main agreement is a document headed "Standard Terms and Conditions". It states that, in the event of conflict, a term in the main agreement takes priority, but clearly is otherwise part of the agreement between the parties. Under the heading "Appointment and Licence", the document states "The Owner appoints LG as the sole and

exclusive provider of the Services at the Property and grants possession of the Property to LG."

28. Unlike in *Global 100 Ltd or Global Guardians v Hounslow* [2022] UKUT 259 (LC), [18], there is no term by which the "owner" grants any additional right needed to enable eviction of the guardians themselves.

The Respondent's case

29. While it was for Mr Penny to make us sure that the Respondent's factual case was not made, the result hinges on the proper interpretation of the relevant legislation and its application to the (agreed, as above) facts of the case. It is accordingly convenient to outline the Respondent's case in respect of the issue in advance of setting out Mr Penny's case.

30. The Respondent argues that the Charitable Trust acted as agent of the CCG. As freehold owner, the CCG would have been the person who received the rent "but for having entered in to an arrangement … with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents". The "other person" was Lowe, and the "arrangement" was the contract agreed on behalf of the CCG by its agent, the Charitable Trust, as a result of which Lowe received the rent. Accordingly, the CCG was a "person managing" the property, and so, by virtue of schedule 14(2)(f), the building was not an HMO.

31. Mr Croskell did not directly address us on the criterion that the "other person" with whom the arrangement was entered into has to be "not an owner or lessee of the premises", but it is implicit in his approach that the agreement between CCG (via the Charitable Trust) and Lowe was not a lease.

32. Further, at least in his further submissions following the hearing on 30 November, we understand Mr Croskell to be arguing that the CCG was a "person controlling" the property. He argues that "the CCG obtained a direct benefit pending sale by the service agreement with Lowe Guardians protecting The Gables". The result is that Lowe was the "'the rent collector' as described in *Cabo*, colleting such rent on its own behalf or on behalf of another". The reference is to *Cabo v Dezotti* [2022] UKUT 240 (LC), [44].

The Applicant's submissions

33. The Applicant submits that this approach misinterprets section 263.

34. Mr Penny made two submissions orally before us. His primary submission was that the schedule 14 exclusions operated in respect of individual legal persons, such that a building could be an HMO in relation to one person, and at the same time, not another person. As a

result, he argued, it was immaterial whether CCG satisfied one of the tests for control or management. What mattered was whether the Respondent did (and it did), so the building was an HMO in respect of the Respondent.

35. Mr Penny argued that the terms of section 254(5) supported his approach. The sub-section specifies that the schedule 14 categories act to exclude buildings "for any purposes of this Act". It was clear that more than one person could be managing or in control of a building at any one time. The drafter of schedule 14 must have been aware that that was the case, and so the schedule must operate with that in mind.

36. We should adopt a purposive approach to the interpretation of schedule 14. The schedule was a means to exempt public bodies for specific reasons. One of the "purposes" of the Act is that set out in section 72. That purpose related to the person in control or managing the building. So, he argued, we should apply the tests in section 254, incorporating schedule 14, where a person falls into the specific categories of a person managing or controlling the building. When investigating the question of whether the building was an HMO or not, we should only do so in relation to the controller or manager before us – here, Lowe.

37. Mr Penny accepted the suggestion that, when the property had been a functioning residential care home, if the CCG had appointed a managing agent to manage the property such that it satisfied one of the definitions in section 263, then the building would have been an HMO in relation to that managing agent. That, he said, may well have been the correct and intended approach.

38. As we understood it, Mr Penny's secondary submission was that it was only Lowe who satisfied either definition. No other body in the chain (and, specifically, not CCG) satisfied the definition.

39. This argument required Mr Penny to argue for the limiting of the hypothetical propositions in section 263. The first occurs in subsection (1), which refers to a person who "would" receive the rack-rent "if the premises were let at a rack-rent". The second arises in subsection 3(b), in relation to a person who "would" receive rent (simpliciter) or other payments "but for having entered into an arrangement … with another person … by virtue of which that other receives the rents or other payments".

40. Mr Penny argued that there were two significant differences between the criteria for control and management. The first, he said, was that a person managing must be an owner or lessee, which was not true of a person in control. The second difference is that the person receiving rent in relation to control must receive a rack-rent, whereas a manager is only required to receive rents (or other payments), not necessarily a rack-rent. We note at this point that we consider that the first of these

points is an error. The person managing is a person first specified as "being an owner or lessee", but subsequently the definition "includes, where those rents or other payments are received through another person as agent … that other person."

41. Lowe was a lessee, he argued, and it received, but did not pass on, the rack-rent. It was, therefore, a person having control. The Applicants made a similar argument in relation to Lowe in its reply, but made more of what was then the contested question of whether the Charitable Trust was the agent of the CCG. As we have noted, by the time we heard oral submissions, evidence of the Charitable Trust's agency status was available in the form of Ms Bourne's late witness statement, which, entirely realistically, given the standard of proof, Mr Penny accepted. Having said that, it is not clear to us that the agency issue really affects the force of the argument that Lowe was a controller or a manager of the property.

42. His argument in respect of the CCG was that the apparent hypothetical in section 263(1) did not amount to an invitation to the Tribunal to consider a purely hypothetical situation, but rather one strictly related to the actual legal agreements in place. He said that, for example, where a person employed another person to undertake management of a property, and arranges for that person to collect the rents, then the second person would be the person having control. If the person collecting rents passed the rents on to the owner, then the owner would be the person managing (ie as an owner or lessee).

43. What was covered by subsection (1), Mr Penny submitted, was the situation where the person either received a rack-rent, or (and this, on Mr Penny's account, was what the hypothetical proposition was aimed at) that person let the property at less than a rack-rent, but *could have* let it at a rack-rent.

44. Mr Penny argued that support for this approach was to be gained from *Cabo v Dezotti* [2022] UKUT 240 (LC), [41] and, particularly, [43]. In the first, the Deputy President, Martin Rodger KC summarises the effect of section 263(1) and (3), noting particularly that sub-section (1) concerns rack-rent, and subsection (3) only rents or other payments.

45. In [43], the Deputy President contrasts the ability to receive rents or other payments via an agent in the definition of a person managing, whereas, in respect of rack-rent in sub-paragraph (1), "[m]oney must come into the hands of the person who has control", rather than via an agent. Mr Penny argued that if stress is laid on the need for an actual rent collector to determine who is the person in control, then it would be difficult to establish who the actual rent collector would be if the hypotheticals into which one entered were allowed to grow too broad.

46. Mr Penny's account of the hypothetical in subsection (3)(b) was that it would cover a situation such as where an owner let to tenants who were obliged by the agreement between landlord and tenant to pay rent to the landlord, but there was a separate agreement with the landlord's creditors that the rents paid by the tenants would automatically be transferred to the creditors.

Determination: how should schedule 14 be interpreted?

47. The first question is the proper construction of schedule 14. If Mr Penny's analysis in his primary submission is right, then it does not matter whether the CCG is a controller or manager of the property. What matters is whether Lowe is a controller or manager. If it is, then it is capable of being guilty of the criminal offence, because schedule 14 does not bite in respect of it.

48. We reject Mr Penny's argument.

49. Both section 254(5) and paragraph 1 of schedule 14 specify a building is not an HMO "for any purposes of this Act" (other than, irrelevantly, part 1). Our view is that in this Act, and in most legislation, the word "any" necessarily encompasses "all". The phrase "any and all" is not used in legislation because one of those terms would merely repeat the other. Both terms aim to describe the entirety of the members of a set. It does not make a substantive difference if a statute says that all members of a set are excluded, or any given member of a set is excluded. "Any purpose", or, as here, "any purposes", of an Act means the same as "all purposes" of an Act.

50. It is not contested that more than one person can be in control of, or managing, a building, as those terms are defined in section 263.

51. It follows that, where paragraph 1 states that the list in schedule 14 is of "buildings which are not houses in multiple occupation for any purposes of this Act", and paragraph 2(1) introduces this part of the list as a "building where the person managing or having control of it is –", a building is not an HMO for all relevant purposes if a person appearing on the list is *a* controller or manager of the building, even if other persons, not on the list, are also controllers or managers. A building cannot, accordingly, be an HMO in respect of one controller or manager, and not an HMO in respect of another.

Determination: was the CCG a controller or manager of the building?

52. Mr Croskell relies on the CCG alone as being the person on the schedule 14, paragraph 2 list as a health service body. There is no dispute that it is (or rather, was) such a body. Given the conclusion we come to above, the issue is whether it was a controller or a manager within the terms of section 263. If it was, the building was not an HMO. Mr Penny's second submission was that it is not.

53. Mr Croskell's primary submission was that the CCG was a "person managing" the property under section 263(3)(b), on the basis that the service agreement amounted to the agreement "by virtue of which" Lowe (the "other person") received the relevant "rents or other payments", as set out in that subsection.

54. The four criteria for this status to be made out are summarised in *Cabo* at paragraphs [54] to [58]. The first is whether the putative managing person was not receiving rents or other payments from those in occupation, the second was that that person would have received them, had it not entered into the agreement, the third was that the other party to the agreement was not an owner or lessee of the property, and the fourth that the other party received the rents or other payments "by virtue of" the agreement.

55. We consider that the first, second and fourth criterial are clearly made out in this case. The CCG did not receive rents or payments from the occupying guardians (first criterion), but Lowe did (the second criterion), and they did so by virtue of the agreement (fourth criterion).

56. However, Mr Penny argues that the third criterion was not made out. The provision in the agreement at clause 1.6 (paragraph [23] above) grants exclusive possession to Lowe, including against the owner. That the requirement for 24 hours' notice by the owner to gain access was explained as necessary to avoid guardians "reacting" to an unknown person does not, he argued, detract from the grant. We add that the express term in the contractually incorporated standard terms and conditions document that Lowe is granted possession further supports the argument for exclusive possession (see paragraph [27] above).

57. Clauses 1.1 to 1.3 (paragraph [22] above) provide a term.

58. We agree with Mr Penny. Insofar as we understand it, Mr Crosskell's only counter-argument was that the nature of the agreement was for the provision of guardianship services, not a grant of a lease. That accurately describes how the agreement is headed, and, to a significant degree, how it is structured. However, if, objectively, an agreement grants exclusive possession for a term, then it grants a lease, whatever terminology it uses: *Street v Mountford* [1985] 1 AC 810.

59. As Mr Penny argues, the Upper Tribunal found that a lease existed as a result of a broadly similar agreement in *Global 100 v London Borough of Hounslow and Others* [2022] UKUT 259 (LC) (at paragraph [50], upholding the First-tier Tribunal's finding at paragraph [25]). As Fancourt J said in that case, "the service to be provided to [the building owner], protection and security for the Property, was a by-product of [the Guardian company's] intended exclusive beneficial use of the Property".

60. Unlike in the *Hounslow* case, however, there was no direct payment such as would constitute rent from Lowe to the CCG. Mr Penny, in his further submissions, argues that "[s]hould the Tribunal consider that a rent is a necessary element of a tenancy, the Applicants submit that the services provided by the Respondent represent an in-kind rent." We doubt that the detailed distribution of repairing and maintenance responsibilities, and the provisions in respect of utilities, set out in the agreement could properly be construed as rent. But in any event, we are bound by the interpretation of *Street v Mountford* in *Ashburn Anstalt v Arnold* [1989] Ch 1, to the effect that the former case did not, despite its apparent terms, stipulate that rent was a requirement of a tenancy.

61. We conclude, therefore, that, having granted a lease to Lowe, the CCG could not be a "person managing" the property under section 263(3).

62. We now turn to whether the CCG was a person having control under section 263(1).

63. As the Deputy President emphasised in Cabo, an important difference between the criteria for a person having control and a person managing a building is that in the case of the former, the provisions utilise the concept of a rack-rent (defined as in section 263(2)), whereas the latter refers to "rents or other payments".

64. More than one party can be entitled to a rack-rent, but, as again noted in *Cabo*, this is so where there is a chain of leases and subleases at different times (see *Cabo* paragraph [49], citing the UT decision in *Rakusen v Jepsen and others* [2020] UKUT 298 (LC) and *London Corporation v Cusack-Smith* [1955] 337, 357-8). That did not apply to the facts in *Cabo*, where there was no such chain.

65. As the Deputy President makes clear in paragraph [50],

> "*London Corporation* … was not about what qualified as the receipt of that [rack-]rent and nothing in it (or in *Rakusen*) dealt with a situation where property was managed on behalf of an owner by an agent which collected the rack-rent and then distributed it. The FTT did not find that Top Holdings, or Mr Grasso, were tenants of Ms Cabo paying rent to her. They were managing the Property on her behalf, and sums which they collected from Ms Dezotti and other occupiers of the Property before passing it on to Ms Cabo, however much they were, could not cause her to be a person having control of the Property. Indirect receipt is not enough for the purpose of section 263(1)."

66. There was, in *Cabo*, a person in receipt of rack-rent. The Deputy President was accordingly only concerned with the main part of section 263(1) – where a person receives the rack-rent. In that context, the

Deputy President emphasised the importance of actual receipt of the money comprising the rack-rent in identifying the controller.

67. The position is different in this case. As we have found, the CCG let the property to Lowe on a lease; but it clearly did so not at a rack-rent (indeed, we think, not at a rent at all). That then raises the hypothetical proposition in the second part of section 263(1). Where a property is let, but not let at a rack-rent, the (or a) person having control is the person "who would so receive [the rack-rent] if the premises were let at a rack-rent".

68. In our view, the person who would have received the rack-rent, had the property been let at a rack-rent, is the CCG. This conclusion, which seem clear to us on the words of the statute, is supported by the explanatory note we quote at paragraph [21] above. That describes the hypothetical proposition as applying to a person who "is otherwise entitled to receive the rents if the premises were let (i.e. as an owner)." It uses the term "entitled", which we think is what the drafter means by referring to the person "who would so receive"; and the note says "i.e." the owner, not "e.g." the owner. The note suggests to us that the very point of the hypothetical proposition is to include an owner who could let premises at a rack-rent, but does not.

69. It follows that the CCG was a person in control of the property, and that, as a result the building is not an HMO. Accordingly, it did not require an HMO licence, and the criminal offence was not committed by Lowe.

70. Our approach to the hypothetical proposition in section 263(1) is in line with that urged on us (for different reasons) by Mr Penny – in this case, it applies to a letting of the property, but a letting that is not at a rack-rent. We do not have to decide if it also applies to a situation where there is no letting at all, but if there were, then the owner would receive the rack-rent, if let at one, such as to make the owner a person in control.

71. It can be seen that our reasoning both that the CCG *was not* a person managing the property, and that the CCG *was* a person in control of the property, relied on our conclusion that the CCG granted Lowe a tenancy. If we are wrong about the existence of the lease, then (with the caveat that our other reasoning is correct), the same final conclusion would follow, except on the basis that the CCG was a person managing, not a person controlling, the property.

72. This outcome could be described as infelicitous, in that, purely from the point of view of effective regulation of shared housing accommodation, it is difficult to see why an empty property that happens to be owned by a health service body (or any of the other categories of owner in paragraph 2 of schedule 14) should be wholly exempted from the

legislation controlling HMOs for that reason alone. That, however, is the law as it seems to us to be. And it is not an outcome that we could characterise as absurd or irrational. It is understandable that the Government department responsible for the legislation would have sought to have over-determined the exemption of buildings relating to other government departments' concerns as a matter of policy, in principle leaving their regulation to other structures.

The temporary exemption issue

73. In the light of our conclusion above, we deal briefly with the Respondent's argument that the defence in section 72(4)(a) is made out.

74. Section 72(4)(a) provides that it is a defence that "a notification has been duly given in respect of the house under section 62(1)". Section 62(1) states "This section applies where a person having control of or managing an HMO which is required to be licences under this Part … but is not so licenced, notifies the local housing authority of his intention to take particular steps with a view to securing that the house is no longer required to be licenced." The remaining sub-sections make provision for local housing authorities to serve a temporary exemption notice (TEN), for, standardly, three months, or longer in exceptional circumstances, and for other related purposes.

75. Mr Croskell relies on one or more of three emails as constituting a notification under section 62(1).

76. The first is dated 2 November 2020. It was sent to a general HMO licencing address at the Council, and was headed "TEN Query – The Gables Blackheath". After relating that Lowe had recently taken on the building and are placing guardians "while it is up for sale", the email outlines the accommodation and facilities being provided and says "While we understand a property of this type would normally require an HMO, would we be able to apply for a temporary exemption in the short time while we attempt to ascertain our expected length of time in the building?"

77. The second email is dated 26 November 2020, and is headed "H.A 2004, HMO Licensing – The Gables Blackheath". It is addressed to a named officer of the authority. After relating the safety etc steps taken by Lowe it states:

> "The property is owned by Greenwich Charitable Trust, and we've been led to believe this may make it exempt from requiring an HMO, can you confirm whether this is incorrect? If so, by looking through the online application, I cannot see where to make a request for a temporary exemption. Are you saying we are required to make the application, and

> associated payment, before we can request an exemption? If so, is this payment refunded once exemption is granted?
> All we're requesting for the moment is temporary exemption notice whilst we ascertain how long we're required to be in the property, and once known then apply for the HMO licence if needed. If we are expected to be in the property for more than a couple of months, do you offer an HMO licence on an annual basis?"

78. The final email was sent on 8 January 2021, and is in the same chain as that above. It refers, first, to the writer having tried, but failed, to speak to the officer to whom it is addressed, and asks for answers to the second email. It repeats that a buyer has been found, and refers to uncertainty as to whether Lowe would continue to provide guardians to a buyer.

79. Eventually, it appears that the Respondent formally applied for a temporary exemption notice on a form provided by the Council, paying the fee demanded, and receiving the notice, after the relevant period for this application.

80. Mr Croskell's submission is that all of the information necessary was set out in these emails – that a buyer for the property was being sought, and that that step was with a view to securing that the property would no longer require a license.

81. We reject this submission.

82. The defence in section 72(4)(a) requires a less determinate step to be taken than that in section 72(4)(b) (a defence where "an application for a licence has been duly made"). There are extensive provisions in the 2004 Act as to the use of forms, the payment of fees, and procedural matters in relation to licence applications (see particularly sections 63 and 71 and schedule 5), whereas there are (largely) no parallel requirements in respect of notifications under section 62(1).

83. However, the requirement is for a *due notification* of specific matters. It is a requirement on the controller or manager, not a requirement that the specific matters are merely known, or should be known, to the local housing authority.

84. First, the Oxford English Dictionary's first meaning for "notification" is "the action of notifying or making known", "notifying" is the action to notify as a transitive verb, that is "to inform (someone), to give notice to". In our view, a notification necessarily involves telling someone something. In each case, these emails are not directed at telling the authority or its officer something, but rather asking it, and her, questions. In each case, an answer is requested. While a notification

under section 62(1) does not require specific formalities, it has to look like a notification, not look like a question (albeit a question arising as a result of described circumstances).

85. Secondly, while the fact that the property is for sale is referred to in the emails, it is not specified as a "particular step" being taken, as required by the subsection. Rather, it is merely presented as the context of Lowe's query to the Council.

86. Finally, insofar as a basis for seeking a temporary exemption is given in the emails, it is to allow Lowe time to ascertain how long they will be in operation there, which is not a step with a view to securing non-licensable status at all.

Further observations

87. The Upper Tribunal has demonstrated on a number of occasions that it is prepared to make determinations of the amount of an RRO, where it allows an appeal by an applicant against a decision of a First-tier Tribunal, in order to better inform First-tier Tribunals and potential parties of the proper approach to the calculation of RROs. With that in mind, we make the following brief observations on the evidence relating to the conduct of the parties, in case it is of assistance to the Upper Tribunal in the event that we are wrong in concluding that no criminal offence was committed, and the Upper Tribunal wishes to make its own order.

88. The first is that we did not consider that there was any real adverse conduct by the Applicants that should affect an RRO.

89. Secondly, there had been challenges to the Respondent's fire safety provision in the Applicant's witness statements. By and large, we do not think that these challenges survived the Respondent's cross examination of the witnesses. Supported by photographic evidence, the Applicants conceded (properly and reasonably) that, for instance, there were fire blankets in the kitchens, and that a cooker affected by a fire (which, on the evidence, was the result of negligent operation by a guardian) had been rapidly replaced.

90. Thirdly, we thought that the Applicants' case in relation to bullying or inappropriate behaviour by the head guardian was largely made out. Although the allegations against the head guardian made by most of the Applicants were somewhat vague, those made by Mx Scarlett were specific and we considered serious.

91. The head guardian is appointed by Lowe, and has a role in terms of liaison between the guardians and Lowe, an express role in inspecting the property in the agreement between Lowe and the CCG/Charitable Trust, and is allocated a budget. We note that the office appears in

other cases involving guardians, so seems to be a feature of this market. We therefore thought it appropriate that misconduct by the head guardian should count as misconduct of the Respondent.

Rights of appeal

92. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

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

94. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

95. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 6 January 2023

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

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

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	Act	*section*	*general description of offence*
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house

	Act	*section*	*general description of offence*
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if –

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in this table.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

(a) the rent in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account –

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.