
GARDEN COURT
CHAMBERS

Property Guardians and the Law

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30 March 2022

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Property guardians: then and now

The Observer
Renting property

Property guardian schemes offer quirky homes at low rents. But not for long

'Property guardians' can save a packet by moving into vacant buildings but they can't expect any security themselves

Graham Norwood

Sun 10 Jan 2010 00.06 GMT

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Andy Fairclough is happy to have revived his new-found living space.

A guardian in *The Guardian*, 2010

Property guardians: then and now

> Fairclough, 39, and from Sheffield, pays £50 a week to live in a 5,964 square foot church hall in north London, which he guards and maintains. He is a professional musician and uses the space and acoustics to rehearse on his piano.
>
> *The Guardian*, 2010

- Started by Camelot in the Netherlands in the 1990s, for as little as £20 p/w.
- Mr Fairclough's rent from 2010 (adjusted for inflation): £300 pcm for the whole church hall.
- Maria Laleva's rent in 2019: £400 pcm for a single room in a shared office space.

Property guardians: then and now

> 19 For the purpose of providing the guardian services GGM agreed to provide reliable, vigilant and socially responsible working people to occupy the property. Each guardian would live in their own lockable space. That would create an orderly environment of the shared space and also ensure

Lewison LJ

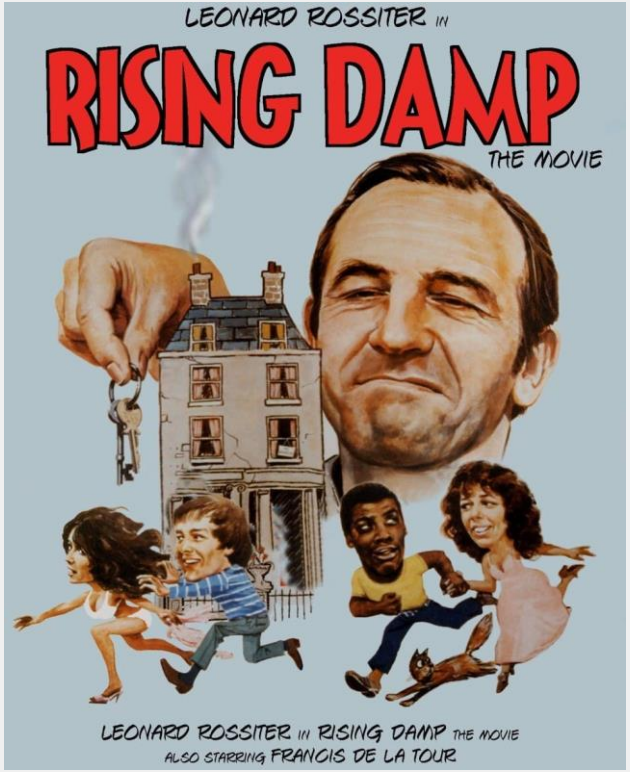
- Guardians must be working people: prohibition on benefits recipients.
- Artists and creatives, or hard-working wage-earners?
- Surely UC recipients – without work commitments – would be better-placed to provide the guarding 'services' that are supposed to be at the heart of the contract?

Property guardians: then and now

> Policies vary from building to building but some firms expect guardians to pay a deposit of up to £500 and to buy a fire extinguisher and fire blanket, as well as contributing a small sum towards insurance. Depending on the type of property, guardians may also have to provide a bed, although the firm ensures basic temporary shower and kitchen facilities are installed if they do not already exist.
>
> *The Guardian*, 2010

- Genuine service to the landowner.
- Compare *Global 100*, where the landowner was *paid* £600 pcm for *receiving* the guardians' services.
- Over-stuffed buildings – compare whole church halls to the facts of recent cases.

Running from the law



Running from the law

- The big issue: assured shorthold tenants, or mere licensees?
- Are the three ‘hallmarks’ of a tenancy present?
- *Street v Mountford* (1) payments of rent; (2) for a period; (3) with exclusive possession.
- Guardianships almost always involve payment for a period, so ‘exclusive possession’ is the battleground.
- Property guardian companies have ‘borrowed’ contractual clauses from historical, authoritative ‘exclusive possession’ cases – albeit from different contexts.

Running from the law

- Moving people around: *Westminster v Clarke* [1992] 2 AC 288, HL (a council homelessness hostel, where the occupiers shared rooms).
- Access: *Crancour Ltd v Da Silveasa* (1986) 18 HLR 265, CA (a housekeeper had access to lodgers' rooms in a shared house).
- Access: *Huwlyer v Ruddy* (1995) 28 HLR 550, CA (the lodgers' bed linen was changed and their rooms were cleaned for them).
- Guardian companies have taken these 'winning' clauses, and incorporated them into their own contractual agreements with the occupiers.

The rent is too damn high!

The rent is too damn high!

- To meet the 'rent =/< 30% of income' standard of affordability, Global 100's occupiers at Stamford Brook would need an annual salary of at least £16,000.
- This is more than the average salary for part-time workers (£13,803), so guardians probably need to be full-time workers, rather than not a low-waged creatives.
- £400 pcm is also much more than a single room at a social rent, and many of our clients already struggle to pay social rents.
- Guardians' rents would not count as 'low rents' – and escape statutory protection – under the Housing Act 1988 definition…

The rent is too damn high!

- ‘Tenancies at a low rent’ are excluded from being ASTs (HA 1988 schedule 1, para 3A).
- ‘Low rent’ definition not updated since 1990, but in today’s money (i.e. if it had kept pace with inflation) the value would be about £200 pcm.
- Global 100 were charging more *double* the statutory ‘low rent’ (if adjusted for inflation) - £400 pcm.
- ‘Low rent’ definition could be a useful tool for statutorily exempting ‘guardianships’ from AST protection .

Conclusion - guardians deserve better

- Fairly similar security to ASTs now, but post-Renters Rights Bill a gulf could open up.
- Housing conditions appears to be a real problem.
- A national living wage?

Sham agreements

Stephen Cottle

Garden Court Chambers

30th March 2022

Common Intention

- Lewison LJ observed that this requirement is of considerable importance- : [2021] EWCA Civ 1835 @ [50] . In the Hitch case, which he relied on for this proposition, sham documents appeared to demonstrate there was no liability to capital gains tax and no obligation on any UK person to meet development gains tax. The IRC finding of sham was upheld .

- But the Supreme Court has previously rejected the submission that every instance of sham, required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. See Autoclenz Ltd v Belcher [2011] UKSC 41, where a unanimous court held that a misrepresentation is not always required as shown by cases such as Street v Mountford [1985] AC 809 and Antoniades v Villiers [1990] 1 AC 417.

- See also Bankway Properties Ltd v Pensfold-Dunsford [2001] 1 WLR 1369, per Arden LJ at paras 42—44.where relevant contractual provisions were not effective to avoid a particular statutory result. The Court observed that inconsistency, or repugnancy, and pretence are alternative bases for their decision in Antoniades v Villiers [1990] 1 AC 417”

Different formulations of a sham

- A conventional sham is an arrangement involving an intentional mismatch between the ANR (apparent nature of the relationship) and the TNR (true nature of the relationship), so as to give a false impression to third parties or a Court. “the parties were … doing one thing and saying another” (Sir Thomas Bingham MR in Belvedere Ct v Frogmore Developments Ltd [1997] QB 858 at 876D

- Thus, the transactional relationship “while professing to be one thing … is in fact something different” (Lord Fraser in Ramsay v IRC 1982 AC 300 at 323; The mismatch between the ANR and the TNR has been described as the situation where “the outward and visible form does not coincide with the inward and substantial truth” (Megarry J in Miles v Bull at 264D;

- Lord Templeman found it necessary to reformulate the concept in AG Securities (where at 462H he said it would have been better if he had used the word "pretences-if the true legal effect of the arrangement entered into is that the occupier of residential property has exclusive possession of the property for an ascertainable period in return for periodical money payments, a tenancy is created, whatever the label the parties may have chosen to attach to it.

Policy issues pulling in opposite directions

- The proposition that an Effective-Avoidance Intent does not of itself render a transaction a sham is a strong theme in the authorities concerning a vast range of scenarios. However, Lord Simon in Johnson v Moreton, remarked " that if there is one economic and social relationship which lacks the pre-requisites for operation of beneficent laissez fair it is that of landlord and tenant. That is true because different considerations apply where a person seeking residential accommodation may concur in any expression of intention in order to obtain shelter"
- "in this particular field, in which there is enormous pressure on the homeless to agree to any label which will facilitate the obtaining of accommodation, (labels) give no guidance at all"- per Donaldson LJ Aslan v Murphy 1990 1 WLR 766
- In an employment case, Elias J once said, "if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, *the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship* (otherwise, he observed, armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts) See Consistent Group Ltd v Kalwak [2007] IRLR 560)

Have regard to the real transaction

- The courts have long been concerned with unconscionable evasion of acts of parliament – as Lord Esher MR put it in In re Watson 25 QBD 27, 33, "the court ought never to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the real truth of the matter".

- Thow aside the cloak and have regard to the real transaction, it can be submitted that the duty of the court is to look behind the form of the agreement and ascertain its real substance ; to see if the label is nothing more than a mask to conceal the reality.

- The critical question is, to quote Lord Oliver of Aylmerton in A. G. Securities & Antionades [1990] 1 A.C. 417 , 466, 'not simply how the arrangement is presented to the outside world in the relevant documentation, but what is the true nature of the arrangement.'

- Subsequent conduct cannot assist in construing the agreement, but it can help to determine whether the agreement was or was not genuine and gave effect to the true intention of the parties.

A fork is a fork- what happened?

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

- In Melluish (Inspector of Taxes) v BMI (No.3) Ltd [1996] A.C. 454 , cited in my case of Elitestone v Morris , it was stated that the subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold, *any more than the subjective intention of the parties can prevent what they have called a licence from taking effect as a tenancy, if that is what in law it is*: see Street v. Mountford [1985] AC 809 .

Further reading

- Examples of sham- I am indebted in my preparation of this talk to the hard work done by Fordham J in his review of 23 different cases on sham, see Isle Investments Limited v Leeds CC [2021] EWHC 345 (Admin).

- Emphasis on intention is gaining traction in the light of a trilogy of Supreme Court cases that have revisited basic principles for interpretation of a contract. See "A Question of Taste: The Supreme Court and the Interpretation of Contracts" from May 2017 in which Lord Sumption discussed Rainy Sky v Kookmin Bank [2011] 1 WLR 2100; In Arnold v Britton [2015] A.C. 1619 and In Krys v KBC Partners [2015] UKPC 46. In that case a majority of the Privy Council declined to depart from the natural meaning of the language simply because the result might be regarded as one-sided or unfair, and suggested that in the face of sufficiently clear language even an absurd result might have to be accepted.

- The point is that parties should not be allowed to contract out of security of tenure where Parliament intended it to apply.

Has it been put to bed & the type of property

- The matter has now been said to have been put to bed, but it isn't because whether or not there is a pretence is a question of fact requiring careful consideration of the individual facts of the case - this might start with the extent to which the occupier provides guardian services?

- Consider also the different properties subject of the various PG claims:- Ingrestre Court in Soho, the former nursing accommodation in Stamford Brook Avenue, the 174,000 square feet of office space at Ludgate House. What are the contingencies affecting the long term and short term, future plans for the property ? Are the owners ambitions dependent on still to be adopted development plans and many years off, or could it be used next week for return to use as nurses accommodation?

- Where the circumstances show that the occupant is the only occupier realistically contemplated and the premises are inherently suitable in the long term only for single occupation, there is, generally, very little difficulty. Such an occupier normally has exclusive possession, unless the owner retains control and unrestricted access for the purpose of providing attendance and services.

The right to claim possession

- In Countryside Residential (North Thames) Ltd v T (A Child) (2001) 81 P. & C.R. 2, CA, the claimant developers had secured options to buy land and had been granted a licence to enter it to carry out investigatory works to ascertain its suitability for development. The Court of Appeal held that the developers did not have an interest which entitled them to bring possession proceedings. It held that while a contractual right to occupy land, or possession with effective control, entitles a person to bring possession proceedings, a mere right of access does not.

- In 2001, a local authority granted Alamo Housing Co-operative, see 2003 HLR 62, a lease of a number of properties to provide temporary accommodation for persons in housing need, a curious term of which conferred on the co-operative, a continuing right to possession of the premises for the purpose of evicting the defendants. This was held to be sufficient to enable it to bring possession proceedings, even though apart from that, the co-operative had no legal estate in the properties.

- Was that consistent with possession being a necessary remedy to vindicate and give effect to such rights of occupation as the Co-operative enjoyed?

Dutton for review by the Supreme Court or not ?

- Hill v Tupper (1863) 2 H&C 12 is clear authority for the proposition that a contractual licence is good as between the grantor and the grantee as a contract, but does not confer any right on the grantee to take legal action in respect of any action by any third party which, if carried out by the grantor, would amount to an infringement of the contractual rights granted.

- See further the discussion in the recent case of Brake & Ors v Chedington Court Estate Ltd [2022] EWHC 366 (Ch) where it was observed @[160] that Manchester Airport plc v Dutton [2000] QB 133 is inconsistent with long-standing decisions of the English courts.

- Chadwick LJ's dissent in Dutton he stated :- "It has long been understood that a licensee who is not in exclusive occupation does not have title to bring an action for ejectment (possession)… The licence in the present case, as it seems to me, is a clear example of a personal permission to enter the land and use it for some stipulated purpose. In my view, it would be contrary to what Windeyer J [in Radaich v Smith (1959) 101 CLR 209, 222] described as 'long established law' to hold that it conferred on the airport authority rights to bring an action in rem for possession of the land to which it relates"

Thank you

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