



# Property guardians: reigniting the lease/licence battle?

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## ABSTRACT

This article analyses recent English decisions reviving the need to consider the lease/licence dichotomy and conclusiveness of the parties' agreement in the new context of property guardianship as an alternative to private renting. It argues that context has proved instructive in interpreting the parties' agreement elsewhere in the case law and offers a way forward in the hard cases amid the ongoing search for doctrinal clarity and justification. A compound subjective–objective approach appreciates the underlying purpose of the parties' relationship and justifies why no intention to grant the right of exclusive possession can be present, thereby precluding a tenancy. The article briefly considers reforms to rental accommodation previously suggested by the Law Commission and, in light of the continued need to prove the status of lessee, argues that they should be revisited in order to protect those living in temporary accommodation.

**Keywords:** property guardians; property; housing; leases; licences; exclusive possession; intention; interpretation.

## INTRODUCTION

In recent years, the English County Court<sup>1</sup> and High Court<sup>2</sup> have respectively considered the legal status of property guardians. The cases illustrate how property guardianship has now become mainstream as an alternative form of urban, 'meanwhile' housing/living. Despite being low-level decisions, *Roynon* and *Khoo* are both of significance as they offered the first substantive opportunity for the courts to consider property guardians' legal status amid a changed housing landscape – guardians having until now existed in the grey area between leases and licences. However, that the cases reached contrasting conclusions means clarity remains elusive.

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1 *Camelot Property Management Ltd v Roynon* (Bristol County Court, 24 February 2017) (*Roynon*).

2 *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QBD) (*Khoo*).

Given the increasing use of property guardians as a housing alternative, there is a pressing need to resolve their status. The struggle in the relationship between landlord and tenant is being revived – a struggle thought to have been settled following *Street v Mountford*<sup>3</sup> where a true construction of the agreement coupled with exclusive possession, for a term certain (or periodic), and (usually) at a rent reveals whether a tenancy exists.<sup>4</sup> However, these requirements require qualifying by reference to what else was said in the case, as well as surrounding authorities. The qualification is particularly acute when resolving the tension between finding exclusive possession while also giving effect to the parties' agreement in the way they intended.<sup>5</sup> Ockham's razor presents itself as the court is required to explain the simultaneous veracity of the parties not appending their own label to the agreement while at the same time, where there is exclusive possession, there can be no tenancy if the parties do not intend to create one.<sup>6</sup> The legacy-factors of vigilance against sham transactions in the residential context find their expression in *Roynon* and *Khoo* respectively, if inconsistently, and are sensitive, given that property guardianship lies between providing temporary accommodation in fulfilment of a wider commercial purpose. The hybrid nature of property guardianship requires a careful assessment of the application of the *Street* criteria as further coloured by *Bruton v London & Quadrant Housing Trust* where the non-estate-owning intermediary trust was still held to have conferred a tenancy.<sup>7</sup> Similarly, in the property guardianship scheme, the guardian company often has not been granted an estate in the land in its own right and, relative to the proprietor, a guardian *can* be a tenant for the purposes of the legislation.<sup>8</sup> The court is caught between an interventionist pursuit of achieving long-standing social policy/distributive justice goals versus regulation of a private, consensual and contractual bargain. In addition to this are the contentions between effect and substance; distinguishing between what is genuine from what/when it is not; and the struggle between pragmatism and principle. Common to both *Roynon* and *Khoo* was a less than full consideration of the existing jurisprudence beyond *Street* and *Bruton*. This article offers a way forward by situating property guardianship within the existing purpose-driven approach found in other contexts

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3 [1985] AC 809 (HL).

4 Ibid 818C, 818E, 826G, 827A–B (Lord Templeman) .

5 *Newham LBC v Hawkins* [2005] EWCA Civ 451 (CA), [36] (Arden LJ).

6 S Bright, 'Street v Mountford revisited' in S Bright (ed), *Landlord and Tenant Law Past, Present and Future* (Hart 2006) 21.

7 [1999] UKHL 26, [2000] 1 AC 406.

8 Housing Act 1988, s 21; Protection from Eviction Act 1977, s 3 provides minimum notice period for licensees.

within private law, where the words of the parties' agreement and their effect coincide in the context of fulfilling a genuine (outer) purpose. The article argues that the impact of the language of sham/pretence has been blunted in the aftermath of *Street*, and clearer articulation of the categories of cases is needed which in certain circumstances aligns with the parties' written agreement. The article acknowledges the limitations and drawbacks of adopting a *laissez-faire* approach; the coda suggests legislative reform has now become more urgent to maintain realising housing law's aims amid an increasing shift towards formalism.

## CONTEXT

The premise of property guardianship is simple: property becomes vacant (often subject to seeking planning permission and (re)development), thus risking vandals/squatters and the concomitant expense of eviction proceedings. Instead, the owner licences day-to-day management to a guardian company which in turn installs individuals to occupy and guard the property 'round-the-clock'. Property guardianship originates from the Netherlands where it is an accepted alternative to traditional renting. With a number of central 'players' in the sector, the scheme has gained traction in England since the early-2000s as an emergent form of insecure low-cost housing.<sup>9</sup> Property guardianship has attracted frissons of media excitement as a solution to the desperate shortage of affordable housing, providing security for proprietors in urban contexts. The benefits of the scheme centre upon the relatively inexpensive rents payable, comparably larger living space, and greater autonomy and flexibility compared to traditional private rental.<sup>10</sup> Despite these benefits, recent scholarship has located property guardianship within the theoretical framework of precarity.<sup>11</sup> The transitory nature of dwelling that property guardianship entails is suffused with a temporal precarity and the elusive promise of security – in the narrow and wide senses of tenure and affectively in respect of place in society. As Ferreri et al elucidate, precarity is embodied within property law: its etymology deriving from *precarius*, referring

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9 M Ferreri, G Dawson and A Vasudevan, 'Living precariously: property guardianship and the flexible city' (2016) 42 *Transactions of the Institute of British Geographers* 246–259.

10 C Clemons, 'Property Guardians, London: The State of Housing in Transient Places' (MSc thesis 2014) (on file with author) 24–25 and 53.

11 C Hunter and J Meers, 'The "affordable alternative to renting": property guardians and legal dimensions of housing precariousness' in H Carr, B Edgeworth and C Hunter (eds), *Law and the Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (Hart Publishing 2018) 65–86.

to property ‘held by tenancy at will, uncertain, doubtful, suppliant’.<sup>12</sup> That precariousness’s origins are spatialised and operationalised in relation to a tenancy coincides with the courts’ attention on the legal status entailed by the scheme, and which needs resolving.

## **ROYNON AND KHOO**

### **The Facts**

The facts in both cases can be briefly put. The contention made by each guardian was that the guardian company could not evict them in reliance on the notice period set out in the respective agreements.

#### *Roynon*

Camelot Property Management Ltd (CPML) and Camelot Guardian Management Group Ltd (CGML) sought possession of the Broomhill Elderly Persons Home in Bristol. Bristol City Council engaged Camelot in 2013 to install guardians, and in January 2014 the defendant moved in. A notice to quit was served in May 2016 and, after refusing to leave, possession proceedings were initiated. In order to determine whether the court could grant an order for possession, it needed to be ascertained – as a preliminary issue – whether Mr Roynon was a licensee or an assured shorthold tenant, and whether the lease had in fact been determined.

#### *Khoo*

*Khoo* concerned an appeal against the finding that the defendant was a licensee. CGML having sought possession of the property in Soho, central London, claimed the guardian was a trespasser. At first instance it was found that *de facto* exclusive possession was enjoyed – however, it was also found that the occupation of the property was not a tenancy, but a licence as described.<sup>13</sup> In August 2017, the owners, Westminster City Council, gave notice it would need the property back in order to begin redevelopment. One month’s notice was given that the licence would end on 11 October 2017, but Mr Khoo remained in occupation as the sole occupant at the time possession proceedings ensued. It was not disputed that if a tenancy arose it was an assured shorthold tenancy (AST), and that if it was found to be an AST it had not been determined and the claim for possession should be dismissed.

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12 Ferreri et al (n 9 above) 249.

13 *Khoo* (n 2 above) [1].

## The decisions

To understand the decisions is to start with the occupation agreement where the labels employed can obscure the substance of the relationship. In recitals to the standard-form terms and conditions, the following is provided:

1.3 Camelot provides services to property owners to secure premises against trespassers and protect them from damage (among other things) and has agreed to provide such services to the Owner in respect of the Property

1.4 *To enable Camelot to provide those services* the Owner has agreed that during the period permitted by Camelot's agreement with the Owner *Camelot shall be entitled to grant temporary non-exclusive licences to share occupation of the Property which do not confer any right to the exclusive possession* of the Property or any part of it

1.5 *Camelot is not entitled to grant possession or exclusive occupation*<sup>14</sup> of the Property or any part of it to any other person. It merely has the power to grant licences for non-exclusive occupation of the Property.<sup>15</sup>

Further,

The parties agree that this agreement is not intended to confer exclusive possession upon the Guardian nor to create the relationship of landlord and tenant between the parties and the Guardian shall not be entitled to an assured tenancy or a statutory periodic tenancy under the Residential Tenancies Act 2004 or to any other statutory security of tenure now or upon the determination of the Licence.<sup>16</sup>

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14 It is not immediately clear why 'exclusive' is used to describe the *occupation*, but not possession. It does not follow that exclusive possession and exclusive occupation are the same thing: *Westminster Council v Southern Railway* [1936] AC 511.

15 Emphasis added. NB the agreements were available on CPML's website and were accessible/accessed by the author on 16 November 2018, but now non-extant. A search at Companies House indicates resolutions were passed to wind up CPML and CGML in April 2017 and November 2019 respectively.

16 Emphasis added. It is not particularly clear why an Irish Act is referred to here given the disputes' locus was England. No reference is made to this in either case, but were this to have been addressed, it might give credence to the pretence argument: a term inserted with no intention of being operated by (one of) the parties (*Street v Mountford* (n 3 above) 825H; *AG Securities v Vaughan*; *Antoniades v Villiers* [1990] 1 AC 417, 462H (Lord Templeman), 470A (Lord Oliver)).

*Roynon*

Whilst headed ‘licence’, the agreement nevertheless created a tenancy. The agreement stated that Camelot may ‘from time to time *designate* [parts of the Property] as being available for *shared* residential use of the Guardian’ and referred to the Guardian ‘*shar[ing]* the occupation’ and not conferring ‘a right to use any specific room’.<sup>17</sup> The reality was different from that envisioned, however. Guardians had a choice of room to occupy and no other guardian would have keys to access the chosen room. However, while the aim and reality did not marry, these of themselves did not make exclusive possession axiomatic.<sup>18</sup> The relationship encompassed a reading of the agreement which contained a number of obligations owed by the guardian (no smoking; no overnight guests; no inviting more than two guests at any one time; no leaving of guests unsupervised). Camelot sought to rely on this as showing no right to exclusive possession and no ability to exclude the world at large from the property.<sup>19</sup> While these obligations placed ‘significant limitation’ and ‘onerous restriction[s]’ upon the guardian, they were not incompatible with exclusive possession.<sup>20</sup>

HHJ Ambrose refused to accept the argument that because there was no express reservation of a right to inspect the property, this was indicative of a licence and did not satisfy exclusive possession.<sup>21</sup> The judge reasoned that, while a tenancy agreement may typically contain an express right for the landlord’s limited entry to inspect the property, it does not mean that in the absence thereof the arrangement is to be viewed axiomatically as a licence.<sup>22</sup> That Camelot carried out these inspections was also not incompatible with exclusive possession. Therefore, the guardian did have exclusive possession and enjoyed a monthly, periodic AST.<sup>23</sup>

*Khoo*

Butcher J held that the agreement did properly constitute a licence. Construing the agreement as one referring to a right in respect of the property ‘as a whole, not a room or other part of the Property’ meant, on a natural meaning of the words, that the occupation could not entail a right of exclusive possession of any part of the property.<sup>24</sup> This

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17 *Roynon* (n 1 above) [30], emphasis added.

18 *Ibid* [33], [36].

19 Cf *Westminster City Council v Clarke* [1992] 2 AC 288 (HL).

20 *Roynon* (n 1 above)[39], [41].

21 *Ibid* [44].

22 Cf *Street v Mountford* (n 3 above) 818C (Lord Templeman).

23 *Roynon* (n 1 above) [48]–[52].

24 *Khoo* (n 2 above) [21]–[22].

flowed from the series of clauses referring to shared occupation with other guardians, the personal nature of the occupation, and CGML's reserved right to alter the extent and location of the living space. Some disquisition followed as to the precise nature of the obligations guardians owed, and it was concluded that these would be so 'unusual' as to be inconsistent with enjoying exclusive possession over the property to have a tenancy.<sup>25</sup> Where there was a provision that there would always be enough living space for at least one room each, this was only a management device to prevent introducing more guardians than there were rooms rather than providing a room exclusively for each guardian.<sup>26</sup>

Butcher J also found that the way in which the room was 'let' did not raise enough significance as to 'relevant context' to constitute exclusive possession for the purposes of a tenancy. Just because it was envisaged that a particular room was to be made available, it did not follow that the terms of the agreement should be construed in a way the language itself did not point toward. The parties' agreement had to be read holistically in light of the scheme *per se* which maintained from the outset that it did not lie in the gift of Camelot to grant exclusive possession over any part of the property – itself only holding a licence. The agreement describing the parties' relationship was a true bargain not containing any element of sham or pretence, which ordinarily connote elements of dishonesty.<sup>27</sup> While at first instance the agreement was inferred as 'almost certainly intentionally misleading' on the part of CGML, this was an inference that could not be safely drawn to overcome the presumption that the parties intended their agreement to be taken at face value.<sup>28</sup>

## DISCUSSION

While property guardianship's existence has been 'pre-legal', it has now been thrust into the classic lease/licence dichotomy. *Roynon* and *Khoo* speak to the characterisation of the 'rough-and-ready grasp of the empirical realities of life' and conceptual model of property as fact.<sup>29</sup> In the property guardianship context, this is reflected in English law's primitive focus on possession. However, the inconsistencies between *Roynon* and *Khoo* speak to a lack of doctrinal clarity, making

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25 Ibid [23].

26 Ibid [24].

27 Ibid [19].

28 Ibid [37]–[38].

29 K Gray and S F Gray, 'The idea of property in land' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press 1998) 15, 18–20.



it practically difficult to pinpoint the court's foci when ascertaining the proper nature of the parties' relationship.

### Exclusive possession

*Roynon* and *Khoo* remind us that, while the parties may describe their agreement as a licence, this description cannot alter its substance. Their diametrically opposed conclusions illustrate the continuing elasticity in interpreting exclusive possession and centres particularly upon justifying those circumstances where it is appropriate to deny the right.<sup>30</sup> The undercooked analysis of what exclusive possession means is not new, and principled clarification is needed. What lacks in linguistic deftness has some metaphorical truth where Gray and Gray refer to the schizophrenic approach of property law's logic,<sup>31</sup> and finds its expression in possession's meaning oscillating between question of fact and law.<sup>32</sup> In the lease/licence context allowing the court to use subsequent conduct to aid its construction of the agreement, this deems the right to have arisen by fact, rather than lying in grant.<sup>33</sup> Such an outlook is described by Crawford as reflecting an expressive theory of possession, justified from observing the interaction of people with things as a 'social fact'.<sup>34</sup> However, notwithstanding this attempt to theorise possession as essentially fact-based, it still remains that possession is rights-based too.<sup>35</sup>

That guardians are exhorted to treat the property 'as if ... their own' connotes the air of control and exclusory power, but this is to confuse a behaviourist attitude towards exclusive possession such that it is being strained to fit the doctrinal requirements. While uninterrupted enjoyment can be evidence of the fact of exclusive possession (as in *Roynon*), this commits to the tautology of exclusive possession arising simply through an exercise that often conflates occupation

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30 *Street v Mountford* (n 3 above) 817E, 817G, 826G–827B.

31 K Gray and S F Gray, 'The rhetoric of realty' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003) 204, 221.

32 *Bruton v London & Quadrant Housing Trust* (n 7 above) 413G–H (Lord Hoffmann). In *Khoo* (n 2 above) reference is made to the first instance judge's finding that *de facto* exclusive possession and the right thereof was enjoyed (at [2]).

33 *Street v Mountford* (n 3 above), 819E–F cf *Onyx v Beard* [1996] EGCS 55 (Ch) (HHJ Hart QC): 'The correct characterisation of the relationship is, of course, entirely independent of the results which flow from it.' Further, discussion in *AG Securities v Vaughan*; *Antoniades v Villiers* (n 16 above) 464A (Lord Templeman), 469C (Lord Oliver).

34 M Crawford, *An Expressive Theory of Possession* (Hart 2020) 7.

35 S Green and J Randall, *The Tort of Conversion* (Hart 2009) 86.



with possession.<sup>36</sup> If factual exclusive possession were the only determinant, then this risks assuming the thing that is being proved. The conception of possession across property law requires not only factual possession but also the requisite intention to possess (*animus possidendi*).<sup>37</sup> Goymour suggests the *Bruton*-tenancy (present in *Roynon*) is an example of original, relative title arising from the fact of possession.<sup>38</sup> Recent cases follow in the vein of *Bruton* where original, relative title through the fact of possession is enough to defend an application for rectification of the Register.<sup>39</sup> However, while there is utility in this approach, it is not justified in all cases. From an orthodox perspective, the derivative nature of the lease speaks to the consensual dependency upon which possession exists in this *particular* context and where property guardianship is not quite of the ‘self-help’ ilk as adverse possession. Thus, *de facto* possession should only be a step along the way of assessing whether a tenancy exists rather than being the inexorable touchstone some cases suggest it is. What is needed is a regularising of the dependency upon which exclusive possession hangs in a tenancy and which *Khoo* seeks to restore. Even if there is occupation of land, this is not synonymous with its control; and, if such aspects of control associated with ownership are absent as a matter of fact, then this should be influential that no right has been granted.

*Street* avers that where the *only* circumstances are that residential accommodation is offered then a tenancy arises.<sup>40</sup> In *Street*, Lord Templeman accepts that the statute is ‘irrelevant’ to determining the effect of the parties’ agreement, nor too will it (there the Rent Acts) alter the effect of the agreement.<sup>41</sup> Notwithstanding the canonical quasi-statutory status as a major premise affecting later cases, his Lordship’s reasoning suffers from ambiguity. The jurisprudence is replete with minor premises deriving from *Street*, but what of those cases that cannot be straightforwardly described as ‘ordinary’ residential accommodation?<sup>42</sup> What of those cases where the very essence of

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36 P Vincent-Jones, ‘Exclusive possession and exclusive control of private rented housing: a socio-legal critique of the lease–licence distinction’ (1987) 14(4) *Journal of Law and Society* 445, 449; S Bright, H Glover and J Prassl, ‘Tenancy agreements’ in E Simpson and M Stewart (eds), *Sham Transactions* (Oxford University Press 2008) 105, 112.

37 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, [40] (Lord Browne-Wilkinson), [71] (Lord Hope).

38 A Goymour, ‘*Bruton v London & Quadrant Housing Trust*’ [2000]: relativity of title, and the regulation of the “proprietary underworld” in S Douglas, R Hickey and E Waring (eds), *Landmark Cases in Property Law* (Hart 2017) 161ff.

39 *Eg Rashid v Nasrullah* [2018] EWCA Civ 2685.

40 *Street v Mountford* (n 3 above) 827A–B.

41 *Ibid* 819G.

42 After *Crancour Ltd v Da Silvaesa* (1986) 18 HLR 265, 280 (Gibson LJ).

the occupation would be undermined?<sup>43</sup> The reasoning in *Roynon* succumbs to this major premise without further analysis. Despite the disconnect between the agreement and reality of the occupation, the latter should not of itself be enough to enjoy the right of exclusive possession, yet there was still a tenancy on the basis the agreement was misleading.<sup>44</sup> The reasoning in *Roynon* enters into a disquisition that narrowly focuses on the clauses concerning the horizontal relationship with fellow guardians, whereas consideration also needed to be given to the vertical relationship vis-à-vis the guardian company. The former would give *carte blanche* to individuals arrogating to themselves control when the sphere of regulation lies properly in a vertical manner. As to the vertical regulation in *Roynon*, the ability of the guardian company to allocate a room is adverted to as conferring exclusive possession of a room, but overlooked (having earlier in the judgment acknowledged clauses elsewhere, albeit – which is also part of the problem – without comment) permissively reserving a power to alter the extent and scope of the accommodation,<sup>45</sup> and can be contrasted directly with the defensible, inductive reading of the living-space alteration clause in *Khoo*, going to the control retained by the guardian company.<sup>46</sup>

If we consider the impact of *Bruton*, the reasoning of Lord Hoffmann there suffers from the same problem of circularity as that in *Street*. While the parties are free to describe their agreement as they wish, meaning and classification are separated in his Lordship's *dicta*, but meaning and classification cannot be easily divorced in the way averred by his Lordship. If the meaning is reflective of the parties' intentions, then so too can (/should) there be accommodation of the effect (barring any sham/pretence) it creates. The unremarkable/superficial elements of control in any agreement will be seen through by the courts,<sup>47</sup> but the nature of the property guardianship scheme should entail a more nuanced consideration, and the reasons for denying control provide a way forward for ascertaining status. As discussed above, the properties are atypical in their accommodation, often not envisaging dwelling for residential purposes. Nevertheless, the ability of the guardian company to install fellow guardians into these atypical buildings takes property guardianship and questions of control beyond previous cases concerning rights of entry/inspection and sharing/installation. This is one reason why the argument that there was exclusive possession of *the whole property* in *Khoo* foundered – if so, only arising by fact (as

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43 As discussed in *Khoo* (n 2 above) [26]–[29].

44 *Roynon* (n 1 above) [33].

45 *Ibid* [30].

46 *Ibid* [22].

47 *Ibid* [39].

the last remaining occupant) rather than lying in grant. Whether or not there is a legitimate reason to deny exclusive possession by retaining control through the reserved right to install others to share in the occupation invites rehabilitating *dicta* earlier in *Marchant v Charters* where Lord Denning justifiably sought to explain how various factors will influence the decision: all the circumstances require bearing in mind and thereby avoid ascribing exclusive possession not borne out by the parties' common, substantive intention.<sup>48</sup> As Barak elucidates in the search for the norm within the text of the parties' agreement, there are two meanings present in its interpretation – semantic (subjective) and legal (objective).<sup>49</sup> Wholly subjective then wholly objective methods of interpretation can be traced in the development of the lease/licence jurisprudence, but what is needed is space for a compound, integrated subjective–objective approach that can give effect to common authorial intent where appropriate.<sup>50</sup>

The question remains how room can be made for pragmatism given the way in which the law has become increasingly trammelled. As ever, ascertaining the status of an occupier of land depends on whether an internal route is taken to considering the effect of the agreement on its face or an external route is opted for encompassing subsequent conduct.<sup>51</sup> Here, internal and external can take on a wider meaning to speak to the narrow, internal approach of housing law vis-à-vis the wider, holistic approach that appreciates the overlapping juncture, contexts and axioms (but not necessarily opposition) of property, contract and housing law together, where all bear upon regulating jural relationships respecting land.

### **Which surrounding circumstances?**

Albeit the parties cannot append their own conclusive label, the parties' bargain in the agreement, if informed by genuine surrounding circumstances, should be treated as indicative of the nature of their relationship and that no right of exclusive possession was conferred. The distinction between contractual licence and tenancy that Lord Templeman is concerned not to undermine is itself undermined by *dicta* stating that exclusive possession is not of itself conclusive but depends on a number of fact-specific issues.<sup>52</sup> The difficulty lies, given the narrow articulation in both *Street* and *Bruton*, in knowing which of these surrounding circumstances are genuine enough to displace

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48 [1977] 1 WLR 1181, 1185F–G.

49 A Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 3, 6–7.

50 Ibid 32–33.

51 *After Welsh Development Agency v Export Finance Ltd* [1992] BCLC 148, 186.

52 *Street v Mountford* (n 3 above) 823D.

the (effective) presumption of tenancy and which the courts need to approach inductively. While there is the need to remain astute so as not to make the distinction between lease and licence wholly unidentifiable, it is also necessary to give effect to the purposes for which the parties have mutual understanding and a common intention, and which will not always point in the direction of sham. As recent cases have shown, the textual and contextual dynamics both inform interpreting the nature of the parties' relationship.<sup>53</sup>

Surrounding contextual issues informed the decisions, *inter alia*, in *Hunts Refuse v Norfolk*<sup>54</sup> and *Onyx v Beard*<sup>55</sup> respectively, where the analysis could not be stripped away from context and for which a wide view beyond a surface, factual exclusive possession is required. In *Hunts Refuse*, a clause referring to the grantor's reasonable access for the extraction of minerals was to be read not as the reservation of the right of entry, but as a covenant allowing the grantor to exercise the right. The deed did not circumscribe the grantor's continued right to excavate minerals from the land. In *Onyx*, the purpose of the occupation providing land for a social club meant a tenancy was unsustainable; the desire to make the premises available to staff was incompatible with granting an interest in the land. There was nothing in the surrounding circumstances to displace the centrality of the grant of an exclusive licence only (construing *Street v Mountford* narrowly). It was recognised that the club in *Onyx* enjoyed a conceptually different exclusive occupation over the land which further fed into the consideration that while 'there can be no tenancy without exclusive possession, there may still be a licence even though the licensee enjoys de facto exclusive possession'.<sup>56</sup> References to *de facto* exclusive possession are unhelpful in serialising the exclusive possession criterion when, rather, the consideration is composite.<sup>57</sup> In *National Car Parks Ltd v Trinity Development Company (Banbury) Ltd*,<sup>58</sup> clauses requiring the occupier's reasonable assistance allowing the grantor to resurface the land were to be read as obligations under a covenant.<sup>59</sup> These were included to secure the grantee's co-operation rather than reserving a right of re-entry. This might have been a stretch in construction too far, but the requirement of co-operation was held

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53 *Arnold v Britton* [2015] UKSC 36, [14]ff (Lord Neuberger); *Wood v Capita Insurance Services* [2017] UKSC 24, [13] (Lord Hodge): 'textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation'.

54 [1997] 1 EGLR 16.

55 [1996] EGCS 55.

56 *Woodfall: Landlord and Tenant* 28th edn (Sweet & Maxwell 2019) [1.023].

57 Vincent-Jones (n 36 above) 452.

58 [2001] EWCA Civ 1686.

59 *Ibid* [35] (Arden LJ).

to amplify the retention of control over the land rather than belonging exclusively to the occupant. While the consideration focuses upon substance not form, it did not follow that what was said is irrelevant to the considerations.<sup>60</sup> While not of itself determinative, how the parties express their agreement is relevant and instructive in determining its substance and should be a starting point for the court's holistic consideration.<sup>61</sup>

These cases are indicative of the difficulties attached to transposing the *Street* criteria to the commercial/quasi-commercial context where the court should not be so overzealous that it reconstructs the bargain into something the parties themselves did not intend.<sup>62</sup> Indeed, because of the ability to obtain legal advice, the proclivity toward finding a tenancy cannot easily apply to commercial parties.<sup>63</sup> In the context of property guardianship – straddling the boundary between residential occupation in fulfilment of an overarching commercial purpose – the question can be legitimately posed as to how the court negotiates the *Street*-mandated vigilance to fulfil a social purpose, while also seeking to give effect to the bargain from a results-based, purpose-driven perspective. The difficulty is coloured by Lord Templeman's narrow dichotomy of status in the residential context as between tenant or a lodger, dependent upon the provision of attendance and services to denote the latter, but to still connote residential occupation as only falling within these categories and to found tenant status by process of elimination requires a more fulsome consideration. The risk of, at best, a premature (at worst, arbitrary) foreclosure of analysing the purpose is present in Lord Hoffmann's observation that classification does not depend upon an intention additional to that in the agreement itself (the 'relativity point').<sup>64</sup> However, not all residential cases are redolent of the 'landlordism' which requires protecting against.

*Roynon* and *Khoo* both differ considerably from, for example, *Clarke*, where the 'totality, immediacy, and objectives of the powers exercisable by the council' to temporarily house homeless individuals (and the extensive controls over what went on in the hostel) amplified the legitimacy of not granting the right of exclusive possession.<sup>65</sup> It is a paradigm example of how the nature and furtherance of the statutory

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60 Ibid [26] (Arden LJ).

61 Ibid [28] (Arden LJ), [42] (Buxton LJ).

62 M Haley, 'Licences of business premises: contract, context and the reach of *Street v Mountford*' (2013) 64(4) Northern Ireland Legal Quarterly 425, 426.

63 *Clear Channel UK Ltd v Manchester CC* [2006] 1 EGLR 27, [28]–[29] (Jonathan Parker LJ).

64 *Bruton v London & Quadrant Housing Trust* (n 7 above) 413G.

65 *Westminster City Council v Clarke* (n 19 above) 300H–302C and 302A (Lord Templeman).

duty to house the homeless in hostel accommodation was categorically reflected in the restrictive contractual terms.<sup>66</sup> It is understandable that the courts are reluctant to sanction a licensor's charter in the private sector. However, a results-based, purpose-driven approach does exist in the private sphere as gleaned from all the admissible evidence and draws parallels with the approach in the public sector, and so the categories referred to in earlier cases should not be exhaustive of the type of surrounding circumstances preventing exclusive possession. When thinking about the purpose property guardians serve in filling a real, temporary need to secure property, this should be borne in mind such that the agreed contract was 'real' and did what it set out to do.<sup>67</sup> While not easy to gainsay what a court will decide in the residential context, it may require revisiting the types of exceptional categories identified in *Bruton v London & Quadrant Housing Trust* in the Court of Appeal:<sup>68</sup> that property guardians' occupation may be referable to some other *legal* relationship and can draw upon the extensive jurisprudence determining whose occupation is ministerial. The service occupancy cases show how the primacy of the fulfilment of obligations owed for the discharge of duties *qua* employer/employee will render the occupation a licence.<sup>69</sup> In this way, the agreement and its outworking are attributable to the mutual understanding of the superior purpose, akin to the juridically recognised exceptions of 'other legal relationships' to which property guardianship can be admitted, reflecting how the occupation entails the *absence* of exclusive dominion and control.

Property guardianship entails dwelling in the guarded property as a consequence of the overarching, commercial purpose of providing security for the proprietor.<sup>70</sup> One explanation of property guardians' status can be seen, by analogy, via *Camden LBC v Shortlife Community Housing*<sup>71</sup> where the overarching purpose of providing temporary housing in local authority property stock to a co-operative justified the licensor/licensee conclusion. Underlying the concept was achieving maximum usage of the stock to provide housing in the interim period before redevelopment. Licences rather than tenancies were granted to facilitate a quick turnaround so the property could be handed back to the proprietor, and for occupants to be rehoused elsewhere.

66 W Barr, 'Leases: rethinking possession against vulnerable groups' in E Cooke (ed), *Modern Studies in Property Law* vol IV (Hart 2007) 119, 137.

67 *MacNiven (Her Majesty's Inspector of Taxes) v Westmoreland Investments Limited* [2001] UKHL 6, [2003] 1 AC 311, [40]–[41] (Lord Hoffmann).

68 [1998] QB 834, 843C–D (Millett LJ).

69 *Glasgow Corporation v Johnstone* [1965] AC 609; *Norris v Checksfield* [1991] 1 WLR 1241 cf *Smith v Seghill Overseers* (1874–75) LR 10 QB 422.

70 *Khoo* (n 2 above) [25].

71 (1992) 25 HLR 330.



A true construction of the ‘terms of the documents, *the purposes of the transactions, and the surrounding circumstances*’ meant the professed intentions were conclusive of the parties’ true intentions to not grant exclusive possession of the flats.<sup>72</sup> The label bore no disguise, but spoke to the reality that the council needed to retain possession; the designation of shared communal spaces or reservation of the right to introduce new occupants did not constitute a sham, but ensured that the premises remained under the council’s control to fulfil its objectives.<sup>73</sup> To not be cognisant of all the circumstances feeding into the professed intention would rewrite the parties’ intentions in favour of some other ‘truth’ – replacing wholesale the commercial sense of the bargain which would not be the appropriate means to fulfilling the common purpose.<sup>74</sup>

Amplifying the absence of intention to grant exclusive possession in *Camden* was the paramountcy of occupation in relation to rate relief. Rate relief was granted on the basis that the co-operative was in occupation and its charitable status conferred entitlement to relief from the rateable valuation.<sup>75</sup> The co-operative could not rely on its members’ individual dwelling in the premises to attract the domestic rate. A similar point can be made with guardianship, and the conclusion drawn in *Camden* has been considered in the Valuation Tribunal for England.<sup>76</sup> In *Ludgate* the guardian company (VPS) accommodated guardians to reside in the property, but that was not the primary purpose: it was the relationship between proprietor and VPS which determined the valuation.<sup>77</sup> The purpose of VPS’s licence was that the company would in turn licence guardians to fulfil the provision of security. That the guardians were living in the premises was ‘an *additional object ... to achieve that purpose*’ and therefore did not constitute separate hereditaments.<sup>78</sup> The incongruence between the nature of the building and the legal framework Ludgate House sought to impose meant the guardianship scheme precluded the premises from being occupied for domestic purposes. Admittedly, this will be a relevant factor if the premises guardians occupy is not residential, but nevertheless can be instructive in the court’s consideration of the nature, mode and purpose of occupation.

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72 Ibid 345 (Millet LJ) (emphasis added).

73 Ibid 345–347.

74 Ibid.

75 Ibid 334. The council’s continued claim of housing subsidy meant it could not have taken the properties out of its direct control (at 346).

76 *Ludgate House Ltd v Ricketts & London Borough of Southwark* [2018] 584029623163/537N10 (VTE) reversed *Ludgate House Ltd v London Borough of Southwark* [2019] UKUT 278 (LC).

77 Ibid [40].

78 Ibid (emphasis added).



It is worth again revisiting *Bruton* which looms so large in the property guardianship context. There, a short-life scheme similarly breathed new life into land use. However, despite acknowledging the outer purpose, this was not a special circumstance sufficient enough to justify departing from the *prima facie* agreement of the right of exclusive possession. That the only limitations upon the occupation were for inspections amplified the ongoing paradox that insertion of these terms reflects a need to reserve the limited right of control that, without which, would pass as part of the possessory rights' bundle to the temporary 'owner'. If we draw upon the latest decision in the *Ludgate House* litigation, this time in the Court of Appeal, then *Bruton* may possibly be vanquished owing to the way in which the retention of control operated on the facts.<sup>79</sup> The courts have hitherto been focused on the actual exercise of the retained rights of control envisaged in the agreement and using the absence of such as evidence of sham/pretence, whereas the test should be focused on the effect of such control (where provision is made) *if* exercised and whether it would intervene with the actual occupation of the land concerned (compared with the more superficial control in the contract alighted upon in *Roynon*). It is not unforeseeable that the test of control in *Ludgate* (CA) may incentivise grantors to embark upon moving occupants around and interfering with their rights to the use and enjoyment of the property in order to circumvent the legislation, but, as this article considers, whether such attempts are brazenly motivated by avoidance or whether genuine should turn on context and by looking closely at the nature of the property in question.

The relevant background needs to be viewed against the reality of the guardian scheme *per se* and how 'essential to [its] operation' that (similar to *Camden*) premises be returned swiftly and very well at short notice.<sup>80</sup> The scheme (like *Ludgate House*) serves a commercial purpose, and its continued operation requires giving expression to the agreement taking 'both a textual and contextual approach'.<sup>81</sup> The argument here is not to suggest that all agreements should be found to be licence agreements, but rather that the default starting position should not presume/infer that the agreement was a pretence and cannot be justifiable in every case. While not going back to the bad days of awarding marks for drafting, the words should be given their ordinary effect where there is no ambiguity.<sup>82</sup>

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79 *London Borough of Southwark v Ludgate House Ltd* [2020] EWCA Civ 1637 (Ludgate (CA)).

80 *Khoo* (n 2 above) [28].

81 *Ibid* [29]; S Bright, *Landlord and Tenant Law in Context* (Hart 2007) 60.

82 *Malenesian Mission Trust Board v Australian Mutual Provident Society* [1996] UKPC 53, [8] (Lord Hope); Bright et al (n 36 above) 105, 116.

Lord Templeman's reasoning in *Street* has led to interpreting the requirements of a lease in serial fashion rather than as a composite consideration of the true nature of the agreement. Serialisation maintains the spirit of the decision, but in overlooking/diminishing certain other aspects of the reasoning compartmentalises the *indicia* such that the first consideration becomes the fact of exclusive possession and then sham, but this is not the proper test. While sham/pretence empowers the court to declare ineffective certain terms in the agreement at the time the case comes to court, the doctrine requires vigilance, and it should not axiomatically follow that non-operation of a clause is evidence of not intending to be bound at all. While there may be an incongruence between the agreement and what occurs (or is yet to) on the ground, it should not mean the occupier has the *right* to exclude the world at large to give rise to a tenancy. Rather, the starting point should be to consider that the agreement reflects the rights and obligations envisaged by the parties and should not be easily disregarded.<sup>83</sup> Background facts can be instructive in ascertaining whether the right of exclusive possession has been granted, and a results-based approach, revealed by the contract's terms, can offer a way forward for the sake of doctrinal coherence. The integrated-compound approach of subjective–objective intention uses background, agreement and effect as mutually reinforcing each other and can be both influential and (barring sham/pretence) conclusive of status. Formalism and realism can often be viewed as competing paradigms – as though the written agreement is divorced from the reality of what the parties wanted to create. The issue in the property guardianship context is that the realism is not solely that there is residential accommodation (a consequence), the realism is that both parties are aware of the nature and purpose of the occupancy and finds its expression in/given effect by the formal agreement which should take the court away from the cynicism of fork and spade. The *Bruton*-approach in its avowed adherence to *Street* closes off the possibility of considering the nuances of the agreement to over-generalise rather than facilitating the parties' own 'local law' accommodating purpose as part of the regulatory sphere.<sup>84</sup>

Interestingly, *Bruton* features attempts (albeit slender) by Lords Slynn and Jauncey to engage with the *dicta* of Slade LJ in *Family Housing Association v Jones*<sup>85</sup> where 'misgivings' about the

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83 *AG Securities v Vaughan; Antonides v Villiers* (n 16 above) 475E (Lord Jauncey): '[I]t would not be right to look at the agreements without regard to the circumstances which existed at the time when they were entered into.'

84 J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* 3rd edn (Oxford University Press 2016) 98.

85 [1990] 1 WLR 779.

consequences of the decision would diminish the choice available to providers in the short-life context to best achieve the temporary accommodation purpose.<sup>86</sup> Cognisance of the need to contribute to the efficacy of the parties' purposes should lead the court to give effect to the 'other interest' where the agreement negatives conferring the right of exclusive possession.<sup>87</sup> This 'statement of principle' (as Slade LJ describes it) would be regarded as too pragmatic given that those cases following *Street* and *Bruton* are too far gone to not look beyond the fact that the provision is residential (albeit temporary). The 'expectation gap' within the agreement is (too readily) in-filled with language of 'effect' that functions rather deductively: for the sake of a clearer taxonomy and a 'socially desirable and eminently sensible' jurisprudence,<sup>88</sup> it will be necessary for the courts to avoid continuing to conflate achieving a certain stated, common purpose with those labelling cases overtly attempting to contract out of statute to allow the agreement to stand on its own merits. This would be consistent with *Street* and retains construing the meaning and effect of the agreement to ascertain the proper status of the occupant. The 'purpose-driven' approach would be inductively congruent with *Street's* articulation of surrounding circumstances/relevant background and would approach the nature and mode of occupancy through a lens of complementarity. It may be too early to tell, but when read together, *Khoo* and *Ludgate* (CA) may illustrate the development of a jurisprudence where the agreement, its effect and nature of occupancy coincide to justify the finding that no exclusive possession is enjoyed by a property guardian given the ministerial, outer purposes of the scheme, and this is both justified and defensible. However, the approach advocated here, while beneficial for doctrinal clarity, would leave property guardians themselves more, not less, vulnerable in the search for the pinnacle of protection provided by legislation.

### CODA

Returning to a *laissez-faire* liberalism needs weighing against the social purpose of curtailing freedom of contract in the housing sphere. A pragmatic approach as advocated thus far would be a considerable setback for the protections built up through successive Rent Acts (though itself set back by deregulation in the 1980s). *Khoo* and *Ludgate* (CA) take deregulation even further; meanwhile cases in the aftermath

86 Ibid 793B–D and 793F–G cf *Eastleigh Borough Council v Walsh* [1985] 1 WLR 525. Slade LJ's misgivings had existed for some time: [1985] 49 P & CR 324, 332.

87 *Ogwr Borough Council v Dykes* [1989] 1 WLR 295, 302 (Purchas LJ).

88 After *Bruton v London & Quadrant Housing Trust* [1998] 3 WLR 438, 440B (Sir Brian Neill).

of *Khoo*<sup>89</sup> – with similarities to property guardianship – illustrate the risks of prematurely departing from paternalism. In *Del Rio Sanchez*, a university student entered into a licence agreement (so-called) to occupy a room paying a monthly ‘membership fee’ (ie rent), and a ‘joining fee’ for this purported ‘accommodation club’ (ie the deposit). The judge found the claimant had been granted exclusive possession of the room and that the labels used in the agreement were a sham.<sup>90</sup> In a case such as this, it is easy to see why the court will intervene – this was a labelling case: terms contrived to call a five-pronged instrument a spade and exploit a claimant of considerably less bargaining power. An entirely liberal approach by common law across the rental sector would mark a new-old orthodoxy pre-dating *Street*. Perhaps the way forward lies in the Law Commission’s previously recommended ‘consumer protection’ approach and which, when reflected upon in light of property guardianship, would be timely. The stated aim ‘*focuses on the contract* between the landlord and the occupier’ and approaches the protective regulation in accordance with fairness and transparency rather than depending on the fine technicality between lease/licence status.<sup>91</sup> The simplicity and clarity of reform would bring about (a) the removal of the ambivalence and constructive ambiguity in proving exclusive possession to (b) instead place singular emphasis on the contractual agreement between landlord and occupier for the purposes of fulfilling their statutory obligations.<sup>92</sup> Despite the call for reform, and compared to Wales<sup>93</sup> and Scotland,<sup>94</sup> English law remains the outlier. Given the increasing usage of property guardians, the implications of these reforms are clear: all that would suffice is a contract providing ‘evidence of what the parties agreed’ – the right to occupy premises as a home.<sup>95</sup> The occupant would be granted either a fixed term or periodic standard contract, and two months’ notice would have to be given if seeking to recover possession. For property guardians, the benefits are clear: doing away as a matter of law with the minimal, four-week notice period contained in most guardian agreements. The proposals would capture the reality of the occupation by recognising

89 Eg *Del Rio Sanchez v Simple Properties Management Ltd* (Central London County Court, 24 February 2020).

90 Ibid [59].

91 Law Commission, *Renting Homes* (Law Com No 297, 2006) [1.5] (emphasis added).

92 The centrality of the lease/licence would be retained only insofar as the proprietary character of the parties’ relationship is called into question (Law Commission, *Renting Homes 1: Status and Security* (Law Com CP No 162, 2002) [9.39]–[9.40]).

93 Renting Homes (Wales) Act 2016.

94 Private Housing (Tenancies) (Scotland) Act 2016.

95 Law Commission (n 91 above) [3.34].

that (albeit temporary in nature) it is occupied as a home, and not solely for the instrumental purpose of providing security for the proprietor. A consumer approach would at least make a significantly clearer advance for those occupying under a rental agreement by removing the hurdle of having to first prove a landlord and tenant relationship.

## CONCLUSION

This article has considered two contrasting cases which offered the first opportunity for the courts to assess property guardians' status in light of the *Street v Mountford* settlement, as impacted by *Bruton v London & Quadrant Housing Trust*. *Khoo* and *Roynon* illustrate how the courts are still working through the finer implications of Lord Templeman's criteria and the perennial tension between pragmatism and principle in giving effect to the parties' agreement, yet in the context of providing residential accommodation, albeit temporarily. Significantly, both judgments illustrate an incomplete analysis of the case law on exclusive possession, and, as a result, the continued fluidity towards factual/legal possession. This article has discussed how a greater degree of nuance can accommodate the parties' complementary purposes and maintain fidelity with the empiricism of English land law which looks at the position on the ground between the parties. In the reality of the *Bruton*- and orthodox tenancy co-existing, taking a compound-integrative approach allows for an appreciation of the purposes underpinning the agreement and a broader, inductive approach to the surrounding circumstances to further support the parties' agreeing to the non-conferral of exclusive possession and justifiable creation of a contractual licence. However, as reform remains elusive and questions concerning property guardianship's place in wider housing law remain outstanding,<sup>96</sup> status still requires to be proved, and guardians can have no property in the very thing they are said to be protecting.

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96 *Ludgate* (CA) (n 79 above) [86]–[89] concerning the issue of illegality and property guardianship operating as an unlicensed house in multiple occupation (HMO).