



LAW RESEARCH BRIEFING #2

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# Resolving the status of Property Guardians

Homes (Fitness for Human Habitation Act) 2018.

Basic Decencies for Property Guardians



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## 1. Minimal Decencies for Lessees, and for Property Guardians too?

In the midst of the housing crisis, when many young people face rising rents in major cities, alternative forms of accommodation have emerged. Property guardianship is one example, where disused buildings are converted into residential quarters, and let out temporarily until the owners make further plans for the buildings.

The arrangement helps keep squatters out, offers young people sometimes more affordable rent and allows the owners to avoid paying the higher rates imposed on empty buildings. It might sound like a win-win situation for tenants and building owners, but in a sellers' market, where tenants are easy to find, landlords can be less concerned with keeping their accommodation in good order.

The UK government passed the Homes (Fitness for

Human Habitation) Act in 2018, giving tenants in England and Wales the right to demand a basic standard of accommodation. This builds on tenants' existing rights, which include deposit protection and a minimum two month notice period.

The difficult question is whether these protections apply to property guardians too. Unfortunately the law as to whether property guardians are tenants, with these protections, or licensees, with considerably fewer protections, remains unclear. It was developed in a very different context in the 1980s and is now being applied in these circumstances. This briefing note explains the problems with the law and identifies options for judicial and legislative reform.

## 2. Lease or Licence?

The business model for property guardianship requires the managers of the guardianship to be able to empty the building of tenants as quickly as possible. One also suspects that, given these arrangements, the managers would prefer not to spend much money on conversion and repairs. The practice has thus been for property guardianship companies to ask guardians to sign agreements purporting to be licences. However, there is a serious tension in this position. Given Parliament has legislated for these protections, why should the property guardian companies be allowed to contract out of them?

The law dividing lease (or tenancy) from licence is as follows. Formally, for there to be a lease, there must be exclusive possession of the land at a rent for a

term. This clearly includes conventional residential letting arrangements and clearly excludes mere occupation such as staying at a hotel or hostel. The difficulty is the in-between situation of property guardianship. It is hard to see which side of the line property guardianship falls because the residents' possession may not be so exclusive. Indeed, in one property guardian case, *Camelot Guardian Management Ltd v Khoo* (24 February 2017, Bristol County Court), the resident was declared a tenant, but in another, *Camelot Property Management Ltd v Roynon* [2018] EWHC 2296 (QB), the resident was declared a licensee.

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### 3. Approach taken by the Courts

Doctrinal analysis of these cases and their antecedents reveals the roots of the problem. Up until the 1990s, the cases concerned landlords who wished to avoid security of tenure and rent control, which were still widespread at the time. Then, landlords inserted artificial clauses, such as obligations to vacate the premises during certain hours, in order to avoid granting exclusive possession.

The courts were astute to these pretences and struck them down. They gave weight to the true relationship between landlord and resident; if it looked like a conventional residential tenancy, then it was treated as one. However, in recent times, the courts appear to be moving back to the pre-1980s position and favouring freedom of contract, where if the parties wish to make such a bargain, then it is not for the courts to interfere.

Thus in *Khoo*, the court accepted clauses that demanded Camelot be notified if the resident wished to sleep away from the building for more than two nights out of seven as genuine, thus precluding a grant of exclusive possession. However, in *Roynon*, a different court took a much more sceptical view of such devices.

The research reveals the root of the problem. In the cases where the law was settled in the 1980s, it was not settled well enough. The House of Lords did not favour one approach over the other, merely stating that both were relevant. It is therefore not surprising that different judges are weighting the different approaches differently.

### 4. Resolving the Problem

Before considering the two routes to resolution, one must consider a very big intrusion into the housing law landscape. The present Conservative government has indicated an intention to reform the Housing Act 1988 and re-introduce a form of security of tenure. It is clear, that without an exception, this would destroy the property guardian business model.

The traditional route to solving issues such as the lease/licence distinction is through appeal, here to at least the Court of Appeal and probably the Supreme Court. This route faces two problems. First, litigation is expensive and disproportionately so compared to the value of the individual claims at stake in property guardian cases. Second, while legal aid is available for housing cases, it is strictly controlled and limited. While there are provisions making it available in such public interest cases (because the individual is being co-opted into remedying the general law for the benefit of the public), it is not clear whether the Legal Aid Agency would grant this funding.

In any event, litigators should be aware of the root cause and related doctrinal issues, discussed in full in Derek Whayman, 'Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction' (2019) 83 Conv 47, and, in the appropriate case, plan for longer and more detailed argument and the higher costs this will generate.

The alternative route is via legislation. The legislation to reform the Housing Act 1988 could take into account the uncertainty and declare that residents in property guardian arrangements are indeed tenants. This would give them the right to the basic human decency of accommodation fit to live in, as well as the other basic protections. A difficult decision would have to be made about security of tenure, however. If Parliament wishes to preserve the property guardian business model, it could make an exception. Then, doing this via detailed legislation, rather than the blunt tool of classing residents as licensees, would allow fine-tuning. Then, the other protections aimed at domestic residents would be preserved for property guardians even if security of tenure is not.





## RECOMMENDATIONS

- ◆ Legal Aid funding should be made available to the right litigant in order to have the law settled. This is public interest litigation, and since our common law system effectively co-opts the public into taking the initiative and risk in sorting the law out, it is only right that public funding should be made available.
- ◆ Housing lawyers should be aware of the doctrinal issues raised in this note and discussed in detail in Derek Whayman, 'Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction' (2019) 83 Conv 47 when dealing with property guardian cases.
- ◆ Legislators should be aware of these and other issues around property guardianship and ensure that any forthcoming legislation to reform the private rented sector takes them into account.

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Derek Whayman, 'Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction' (2019) 83 Conv 47

Derek Whayman, 'Property guardians live in legal limbo – despite new law to protect tenants from exploitation' *The Conversation*, 9 April 2019, <https://theconversation.com/property-guardians-live-in-legal-limbo-despite-new-law-to-protect-tenants-from-exploitation-114943>

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