



Neutral Citation Number: [2021] EWCA Civ 1835

Case No: B5/2021/1543

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Luba QC
G00WT956

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2021

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LORD JUSTICE SNOWDEN

Between :

GLOBAL 100 LIMITED

**Claimant/
Appellant**

- and -

MARIA LALEVA

**Defendant/
Respondent**

Nicholas Grundy QC and Sean Pettit (instructed by Kelly Owen Ltd) for the Appellant
Mark Wonnacott QC and Nick Bano (instructed by Edwards Duthie Shamash) for the
Respondent

Hearing date : 25 November 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Friday 3 December 2021.

Lord Justice Lewison:

1. The issue on this appeal is whether HHJ Luba QC was wrong to reverse the decision of DJ Parker that a claim by Global 100 Ltd (“G100”) against Ms Laleva for possession of 14-16 Stamford Brook Avenue “the Property” “was not genuinely disputed on grounds which appear to be substantial.”
2. The case came before us in the form of an application for permission to appeal and an application to cross-appeal, with the appeal and cross-appeal to follow if permission is granted.
3. There is, however, a further procedural wrinkle. Since the hearing before HHJ Luba a second action was brought against Ms Laleva by NHS Property Services Ltd, which owns the property. An order for possession has been made against her. In those circumstances it could be said that the appeal is now academic.
4. In *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1580, [2012] 1 WLR 782 Lord Neuberger MR set out the principles applicable to appeals which have become academic. He said at [15]:

“... save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean “may”) be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.”
5. At the outset of the hearing, we informed the parties that we considered that the appeal and cross-appeal satisfied these criteria. The first of them also corresponds to the second appeals test. We therefore granted permission both to appeal and to cross-appeal.

The procedure

6. The claim was brought under the procedure laid down by CPR Part 55. CPR Part 55.1 contains a definition of “a possession claim” in the following terms:

“a claim for the recovery of possession of land (including buildings or parts of buildings)”
7. Part 55.2 provides that the procedure under that Part must be used where the claim includes (among other things) a claim by a licensor (or former licensor). When the claim is issued the court will fix a hearing date. Part 55.8 provides:

“(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may—

 - (a) decide the claim; or
 - (b) give case management directions.

(2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated.”

8. Before going into the remaining issues it is important to establish what is the test to be applied under rule 55.8 (2); both by the judge who conducts that hearing, and also any appellate court which is asked to overturn the decision of a first instance judge. This is a question on which HHJ Luba QC said in terms that a “clear steer” from this court would be helpful to first instance judges.
9. HHJ Luba held that the threshold which a defendant must surmount “must be a relatively low one”. He reached that conclusion in part from the contrast between grounds “which *appear*” to be substantial (which is what the rule provides) and grounds “which *are* substantial” (which is not what the rule provides). He also reasoned that a low threshold was supported by the rule (CPR Part 55.7) that a defendant who has not filed a defence may still “take part in any hearing”. So far as the latter point is concerned, in my opinion that is simply a matter of timing. It may be procedurally unfair to decide a case against an occupier who turns up unannounced at a hearing without having filed a defence, but who tells the district judge that there is (or may well be) a substantive defence which he wishes to advance. But that does not tell you much, if anything, about the test to be applied once an occupier *has* filed a defence.
10. That was in effect the position in *Birmingham City Council v Stephenson* [2016] EWCA Civ 1029, [2016] HLR 44 (a judgment of mine with which Moore-Bick LJ agreed; and which HHJ Luba cited in support of his conclusion). *Stephenson* was a very different case from this one. The evidence before the district judge in that case was that Mr Stephenson had paranoid schizophrenia, which could be alleviated by medication, but which he was not taking. The council began possession proceedings against him on the ground of noise nuisance. The council acknowledged that he had “mental health” issues. By the time that the matter came before the district judge (following one adjournment) Mr Stephenson had only just managed to make contact with a solicitor. The solicitor asked for a short adjournment in order to file a pleaded defence. It was that opportunity which Mr Stephenson was denied by the refusal of the adjournment. In other words, the district judge simply refused to allow Mr Stephenson even to articulate what might have amounted to a defence. I held that he had made no allowances for Mr Stephenson’s mental health problems; and that there was potentially a real question whether the possession proceedings were a proportionate means of pursuing a legitimate aim (in which event the burden of proof would have been on the council). That case did not consider what the appropriate threshold in a case in which a defence has actually been put forward. I do not consider that it is of any relevance to the question before us, where a defence has been pleaded. The question in this case is what test is to be applied in evaluating that defence.
11. I turn, then, to the phrase used in the rule: “genuinely disputed on grounds which appear to be substantial”. The judge emphasised the word “appear” but does not seem to have given any weight to the word “substantial”. Under rule 10.5 (5) of the Insolvency (England and Wales) Rules 2016 a court may set aside a statutory demand in bankruptcy if “the debt is disputed on grounds which appear to the court to be substantial”. That phrase is strikingly similar to that which is used in CPR Part 55.8 (2). The predecessor of rule 10.5 was considered by this court in *Collier v P & M J Wright*

(*Holdings*) *Ltd* [2007] EWCA Civ 1329, [2018] 1 WLR 643. Arden LJ discussed the meaning of the phrase in some detail. She expressly disapproved an earlier case which had held that the threshold under the rule was lower than the threshold required to resist summary judgment under CPR Part 24. She said at [21]:

“If the test in [that] case ...were applicable, the court would have to apply a lower threshold than real prospect of success, and that would mean that it would be enough on an application to set aside a statutory demand if the dispute were merely arguable. However, that approach would give no real weight to the word “substantial” in the rule 6.5(4) ; nor would it give any meaning to the word “genuine” in para 12.4 of the practice direction. In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation... But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue.”

12. Mr Grundy QC did place some emphasis on the adverb “genuinely”. He suggested that that might import a test that was higher than the test applicable to an application for summary judgment. In that connection it is pertinent to refer to the decision of this court in *Ashworth v Newnote Ltd* [2007] EWCA Civ 793, [2007] BPIR 1012 (to which Arden LJ referred in *Collier*). In that case Lawrence Collins LJ said:

“[32] Prior to the CPR it had been held that the “bona fide disputed on substantial grounds” test in the context of a winding up petition could be satisfied even if the debtor could not resist summary judgment under Order 14: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197. But in that context the distinction has not survived the CPR. In *Re The Arena Corporation Limited* [2004] BPIR 415, 433 Sir Andrew Morritt V-C said that in the context of winding up proceedings the test is whether the debt is bona fide disputed on substantial grounds, which, for practical purposes, is synonymous with “real as opposed to frivolous.” See also *Hofer v Strawson* [1999] 2 BCLC 336; *Guinan III v Caldwell Associates* [2004] EWHC 3348 (Ch), [2004] BPIR 531.

[33] It seems to me that a debate (see e.g. *Kellar v BBR Graphic Engineers (Yorks) Ltd* [2002] BPIR 544, 551) as to whether there

is a distinction between the “genuine triable issue” test for cross-claims and “real prospect of succeeding on the claim” (i.e. on the cross-claims) involves a sterile and largely verbal question, and that there is no practical difference between “genuine triable issue” and “real prospect” of success and certainly not in this case.”

13. Mr Bano, who argued this aspect of the appeal for Ms Laleva, placed some reliance on the decision of the Supreme Court in *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15, [2015] AC 1399. That was a case in which the defendant to a possession claim asserted that the claim amounted to discrimination on the ground of disability. That is a particular context (as in *Stevenson*) in which the court needs to be very cautious. He referred to Lord Neuberger’s judgment at [60] in which his Lordship said that the problem facing a landlord who attempted to obtain summary judgment in a discrimination case was a practical one rather than one of principle. The reason for that was that there might be disputed facts or assessments which could not be dealt with summarily. In addition in paragraph [59] of his judgment Lord Neuberger acknowledged that, even in a discrimination case, a landlord *could* obtain summary judgment. Lady Hale dealt with the question of summary judgment at [35] and [36]. She agreed with this court that the court can deal with possession claims summarily “without the summary judgment provisions of CPR Part 24 being invoked”. If that is the case (and I respectfully agree that it is) then it is inconceivable that a different test would be applied under CPR Part 55.8 (2) from that applicable to an application under Part 24.
14. In my judgment the test for summary judgment is the same test as that which applies to the required threshold under CPR Part 55.8 (2). Were the test to be a lower test, it would be a waste of resources (both the parties’ resources and the court’s resources) to give directions for trial on the basis of a defence (whether pleaded or not) that would not survive an application for summary judgment. Were it to be a higher test, it is difficult (if not impossible) to formulate it with any precision. The question, then, is whether the defendant has shown a real prospect of success in defending the claim. The principles applicable to an application for summary judgment are well-settled (see for example *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 539 (Ch)); and I need not set them out here.
15. We were, of course, shown high authority for the proposition that an appellate court should not interfere with a case management decision unless the decision is plainly wrong in the sense that it is outside the generous ambit where reasonable decision makers may disagree: *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495. But I do not consider that a decision that a defendant has shown no real prospect of success in defending a claim is a case management decision. Rather, it is an evaluation of the merits of a potential defence.
16. Although an appeal court must respect the decision of the first instance judge, the first instance judge is not exercising a case management discretion. The question for the appeal court is not whether the first instance judge wrongly exercised a discretion; but whether the first instance judge was wrong in their evaluation of the merits of a defence.

The background facts

17. The Property in question is owned by NHS Property Services Ltd. It has been used in the past to accommodate NHS nursing staff, although at the time of the events with which we are concerned its last use had been use as offices. By 2016 the Property was empty.
18. In March 2016 NHS Property Services entered into a written agreement with Global Guardians Management Ltd (“GGM”) for the provision of what were described as property guardian services. According to the agreement the purpose of supplying guardians is to secure a vacant building against squatters, vandals and dereliction. The agreement stated:

“The quality of our guardians is high due to our rigid vetting process. This enables us to be able to supply immediate occupation of a void property with no hesitation... When you need our guardians to vacate the property this is arranged by our Building Managers who return the building clear and empty with all keys to your chosen contact.”
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 that there was a guardian presence evenly distributed across the Property. The guardians would occupy under weekly licences which would state that no tenancy was to be created. GGM would manage all access to the property, including that by the owner and their contractors. GGM was responsible for council tax. GGM would return to the owner £600 per month of the Property guardian fees. Upon termination of the agreement between GGM and the owner, the guardians would vacate the property.
20. On 19 January 2018 GGM entered into an inter-company arrangement with G100. The arrangement recorded that GGM provided services to property owners to secure premises against trespassers and protect such premises from damage. To assist it in providing those services GGM granted G100 the right to grant temporary, non-exclusive licences to persons selected by G100 to share occupation of such part or parts of the property as G100 might from time to time specify. The grant of the licence from GGM to G100 conferred on G100 “such rights to manage protect and occupy the premises as are required for the proper protection of the properties through their residential guardians”. It also purported to confer on G100 “sufficient interest in the properties for G100 to bring claims for possession if required against the Guardians who whom it has granted licences.”
21. On 16 or 17 April 2020 G100 and Ms Laleva entered into a written agreement, described as a temporary licence agreement. The agreed purpose of the licence was described as follows:

“G100 is an approved supplier of “Guardians” who, in order to perform their Guardian Functions to protect vacant properties from intruders, anti-social behaviour and metal theft, must occupy certain properties as designated by G100.

The Guardian is an individual who is willing to pay a weekly licence fee for use and occupation of the designated space in order to perform the Guardian's Functions."

22. Clause 1.1 of the agreement stated that the Guardians are allocated properties "from which they perform those Guardian functions which necessarily required them to occupy their designated space with others for the period of the agreement." Clause 1.3 gave G100 the right to alter the extent and location of the living space. Clause 1.5 stated that the agreement did not give the guardian a right to use any specific room as living space within the property. Clause 4 provided for the guardian to be given one set of keys to the Property and to his or her allocated space. Clauses 4.1 and 4.2 required the guardian to sleep at the Property for at least five nights out of seven; and to ensure that they or at least one other guardian was at the Property for at least one hour in every twenty four; and that at least one guardian was in the Property at any time. Clause 4.3 required the guardian to share "amicably and peacefully" with such other persons as Global 100 should permit to make use of the Property.
23. Clause 7.3 provided that the agreement could be terminated by G100 on giving 28 days' notice. The Guardian had a similar right to terminate. Clause 7.6 provided that on termination of the agreement the guardian "shall immediately cease to be entitled to the use of the Property... and shall restore the Property leaving it clean and tidy, removing all of the Guardian's belongings and shall return keys to G100 immediately".
24. The Schedule to the agreement specified the non-exclusive shared occupation of premises known as and located at 14-16 Stamford Brook Avenue.
25. On 3 September 2020 NHS Property Services gave notice to GGM terminating the agreement. On 1 October 2020 it entered into an agreement with GGM which provided:

"To the extent that such a right does not already exist on an ongoing basis under the terms of the agreement ... NHS PS Ltd hereby grants GGM Limited a right of possession of the Property for the sole purpose of enabling eviction of GGM's former licensees and any other person occupying the Property."
26. The claim form was issued on 7 October 2020. G100 is the sole claimant. The defendants to the claim were 10 named persons (and persons unknown). The particulars of claim alleged that GGM had been licensed under the agreement with NHS Property Services to provide guardian services; and pleaded the inter-company agreement under which G100 provided those services. They also alleged that on various dates G100 entered into agreements with the defendants to perform guardian services at the Property; and that those agreements had been terminated.

The defence

27. The defence as pleaded takes a number of points, only some of which are of continuing relevance to this appeal. Although it admits that GGM entered an agreement with NHS Property Service "in respect of a guardianship arrangement" it asserts that Ms Laleva is entitled to an assured shorthold tenancy.

28. Ms Laleva entered into occupation of the Property on 29 September 2019 and moved to the room that she currently occupies on 17 April 2020 (which is the last of the two days on which the licence agreement was signed). She pays a “rent” of £92.31 per week and was granted exclusive occupation. The defence goes on to plead what is alleged to be the “factual reality”.
29. I summarise the defence as follows. The Property was a purpose-built residential building designed and constructed to be let as individual residential units of accommodation. Ms Laleva has exclusive possession of a numbered lockable room. She was required to seek G100’s permission to move room. Although she shares communal space she has exclusive possession of her own room which she herself selected. She was entitled to decide whether to admit G100’s agents when they visited the premises. The clauses of the agreement are not incompatible with “exclusive occupation” in that G100 does not exercise such degree of control over the use and occupation of the premises as would be incompatible with exclusive occupation.
30. In the alternative it is alleged that the written agreement was a sham arrangement in consequence of the pleaded factual realities; and its purpose was “to create the appearance of a personal licence”.
31. The defence also challenged G100’s right to bring possession proceedings at all, because it had no sufficient interest in the land and the remedy sought exceeded its rights as pleaded.

The judgments below

32. The district judge decided:
 - i) That G100 had been granted sufficient right to pursue the possession claim and that in any event Ms Laleva was estopped from denying its right.
 - ii) The agreement and its terms (together with “contextual information” about the background) supported the proposition that it created a licence.
 - iii) There was no arguable defence that it was a sham.
33. On appeal HHJ Luba took a different view. He held:
 - i) G100 had sufficient interest to bring the claim.
 - ii) He declined to decide whether Ms Laleva was estopped from denying that interest.
 - iii) The threshold for defending a claim under Part 55.8 was “a relatively low one”; and that unless the points pleaded by the defence were unarguable, then the case should not be summarily decided.
 - iv) The district judge was wrong to decide that the defence “did not even *appear* to raise substantial grounds for defending the claim.”

Is the written agreement a licence or a tenancy?

34. I propose first to consider whether the agreement as drawn creates a licence or a tenancy, leaving aside for the time being the question of sham.
35. The starting point is *Street v Mountford* [1985] AC 809. Lord Templeman said:
- “Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But 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.”
36. This approach is not peculiar to the question whether an agreement creates a licence or a tenancy. In *Secret Hotels 2 Ltd v HMRC* [2014] UKSC 16, [2014] 2 All ER 685 the Supreme Court approved an observation of mine in an earlier case:
- “The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.”
37. As well as what is written on the page, the court may consider the circumstances in which the agreement was made. In *AG Securities v Vaughan* [1990] 1 AC 417, 458 Lord Templeman put it this way:
- “In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation.”
38. If, as a matter of interpretation, the rights and obligations created by the agreement confer on the occupier the right to exclusive possession, for a term at a rent, then in all

likelihood a tenancy has been created. But exclusive possession is not necessarily conclusive as Lord Templeman explained in *Street v Mountford* at 818:

“There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier.”

39. Moreover, sole use is not the same as exclusive possession as Blackburn J explained in *Allen v Liverpool Overseers* (1874) L.R. 9 Q.B. 180, 191-192 (approved in *Street v Mountford*):

“A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.”

40. The distinction between exclusive occupation and legal possession is well-established, even outside the context of lodgers in lodging houses; and may be relevant even where the occupier is in sole occupation of a self-contained dwelling for which they pay: see *Stewart v Watts* [2016] EWCA Civ 1247, [2018] Ch 423 (occupier of an almshouse).
41. The surrounding circumstances include the reason why the occupier has been let into occupation. In *Westminster CC v Clarke* [1992] 2 AC 288 the House of Lords considered a hostel for the homeless. Mr Clarke had the sole occupation of a room in the hostel and claimed to be a secure tenant of it. In explaining why he did not have exclusive possession, Lord Templeman said:

“From the point of view of the council the grant of exclusive possession would be inconsistent with the purposes for which the council provided the accommodation at Cambridge Street. It was in the interests of Mr. Clarke and each of the occupiers of the hostel that the council should retain possession of each room... If the occupier of a room had exclusive possession he could not be obliged to comply with the terms and the conditions of occupation.... In the circumstances of the present case I consider that the council legitimately and effectively retained for themselves possession of room E and that Mr. Clarke was only a licensee with rights corresponding to the rights of a lodger. In reaching this conclusion I take into account the object of the council, namely the provision of accommodation for vulnerable homeless persons, the necessity for the council to retain possession of all the rooms in order to make and administer arrangements for the suitable accommodation of all the occupiers and the need for the council to retain possession of

every room not only in the interests of the council as the owners of the terrace but also for the purpose of providing for the occupiers supervision and assistance.”

42. In the present case the purpose of G100 in allowing Ms Laleva (together with others) into occupation was to provide guardian services to NHS Property Services. It was essential, in order to fulfil that purpose, that G100 should be able to hand back the Property as and when NHS Property Services required it. Those who occupied the various rooms in the Property were chosen by G100. They were not a self-selected group.
43. Turning to the substantive terms of the agreement, there are a number of points to be made. First, the purpose of the agreement was set out at its inception. It was to enable the provision of guardian services which required Ms Laleva to occupy the designated space in order to perform those services. Second, that was repeated in the preamble to clause 1 and in clause 1.1. Clause 1.3 entitled G100 to alter the location and extent of the living space, which is, in itself, inconsistent with the grant of exclusive possession. That, in turn was reinforced by clause 1.5. Third, clause 4.3 required amicable and peaceful sharing of the property with others selected by G100. Fourth, the description of the rights granted was “non-exclusive occupation” of the whole property, not any particular part of it.
44. As I have said, the nature of the agreement was the provision of the guardian services. Occupation of the property by Ms Laleva and others was necessary in order for those services to be provided. That is reinforced by clauses 4.1 and 4.2 of the agreement which required Ms Laleva to sleep in the property for at least five nights out of seven; and to ensure that she or at least one other guardian was in the property at any given time. Those obligations were necessary in order to perform the guardian services.
45. One classic situation in which a person who is apparently in exclusive possession of residential property does not acquire exclusive possession in law is that of a service occupier. A person who lives in a house will not have exclusive possession of it if either (a) it is essential to the performance of his duties that he should occupy the particular house or a house within a particular perimeter; or (b) he is required by contract to occupy the house and by so doing he can better perform his duties to a material degree: *Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708. That proposition has been applied to the case of property guardians, even though they are not, strictly speaking, employees of the company providing the guardian services to the property owner: *Ludgate House Ltd v Ricketts* [2020] EWCA Civ 1637, [2021] 1 WLR 1750 at [66]. The essential elements of service occupation were described in *Smith v Seghill Overseers* (1875) LR 10 QB 422, 428 (approved in *Street v Mountford*) by Mellor J:
- “Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant.”
46. In this case it was necessary for the provision of the guardian services that Ms Laleva should occupy the Property.

47. As this court held in *Leadenhall Residential 2 Ltd v Stirling* [2001] EWCA Civ 1011, [2002] 1 WLR 499 at [22]:

“... there is no defined list of special cases in which a person who is let into, or allowed to remain in, another's property, with exclusive possession and paying for his occupation may be a licensee rather than a tenant.”

48. In my judgment, on the proper interpretation of Ms Laleva's agreement considered in the light of the surrounding circumstances and the purpose of the agreement, the argument that it created a tenancy rather than a licence has no real prospect of success.

Is there a real prospect of establishing that it is a sham?

49. The classic exposition of what amounts to a sham is that of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB, 786, 802:

“I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a “sham,” with whatever legal consequences follow from this, *all the parties thereto* must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a “shammer” affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged “sham.” So this contention fails.” (Emphasis added)

50. It is of considerable importance that the intention must be a common intention, shared by all the parties to the agreement: see *Hilditch v Stone* [2001] EWCA Civ 63, [2001] STC 214 at [69].
51. I am prepared to assume that Ms Laleva has a real prospect of establishing that, as far as she was concerned, her intention was to obtain a tenancy rather than a licence, even though she accepts that the purpose of the agreement was the provision of guardian services. But does she have a real prospect of establishing that G100 shared that intention?
52. As Neuberger J pointed out in *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at [46] there is a strong presumption that parties to what appear to be perfectly proper agreements on their face intended them to be effective and that they intend to honour and enjoy their respective rights and obligations.
53. Mr Bano suggested that some of the rights purportedly conferred by the licence agreement had never been exercised. This is not a pleaded allegation. But even if it were the fact that rights have not actually been exercised is no evidence of a sham.

Many agreements contain a large variety of rights which are not in practice exercised (and in many cases the parties hope that they will never have occasion to exercise them). But the fact that such rights are not exercised does not mean that they do not exist as a matter of reality: see for example *Ludgate House* at [43] and [77].

54. In *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB), [2019] HLR 26 Butcher J considered a guardianship agreement very similar to the one in our case. One of the arguments raised was whether the agreement was a sham. I agree entirely with the way in which Butcher J dealt with that question:

“[34] I consider that a case that there was a relevant sham or pretence in the present case was not made out. In entering into the Agreement, as both parties knew and must be taken to have intended, the basis of the arrangement was that CGML was providing some protection to temporarily-vacant premises against vandals and trespassers by arranging for accommodation by Guardians. As I have set out above, it was essential to such an arrangement that the Guardians should not have tenancies. The inference I would draw is that CGML did indeed intend, when entering into the Agreement, that its terms would be enforceable by and capable of being enforced against it. It was in its interests that they should be.”

55. He added:

“[36] This is not a case where there is "an air of total unreality" (to use the expression of Lord Oliver of Aylmerton in *AG Securities v Vaughan* at 467H) about reading the Agreement as meaning what it says in the light of the circumstances in which it was entered into. Those circumstances include that this was an unusual arrangement whereby office accommodation would be occupied by a number of different people who might be entire strangers to each other at the outset of their occupation, where their presence was desirable because of concerns as to the security of the premises, and where it was essential that the building should be capable of being restored to its owner at short notice. Given those matters, I cannot for my part see how it can be concluded that the true bargain was not that in the Agreement or that there was a sham or pretence. Nor do I see a basis for considering that there was any element of dishonesty on the part of CGML.”

56. On the contrary, the very purpose of the arrangement between NHS Property Services and GGM was so that the latter could provide guardian services to the former. It was essential, in order to fulfil that purpose, that GGM should be able to hand back the Property as and when NHS Property Services required it. There is no basis on which it could successfully be argued that the arrangement between NHS Property Services and GGM was a sham (even if such an allegation had been pleaded). The inter-company arrangement between GGM and G100 was made in furtherance of that arrangement. Given that it is common ground (expressly admitted in the defence) that the purpose of the agreement between G100 and Ms Laleva was also that she would occupy the

Property in order to facilitate the provision of guardian services by G100, the unreality is in the contention that the agreement was a sham, for all the reasons that Butcher J gave.

57. In my judgment the argument that the agreement was a sham has no real prospect of success.

Is Global 100 entitled to the order?

58. Both judges found against Ms Laleva on this question, which she raises by way of cross-appeal. We were shown a number of cases decided by this court in which it has been held that a person who has no more than a licence over land is entitled to use the procedure under CPR Part 55 (or its predecessor) in order to eject a trespasser. It was those cases on which HHJ Luba relied in rejecting this ground of appeal.
59. Mr Wonnacott QC argued the cross-appeal on Ms Laleva's behalf. In a characteristically erudite and forceful argument, he submitted that these cases were wrong as a matter of principle, logic, history, statute and authority. I hope the following summary captures its essentials. The essential difference between a licence and a tenancy is that a tenancy confers a possessory interest in land, whereas a licence does not. Only someone with a possessory interest is entitled to bring an action for possession. The remedies of a licensee lie purely in contract. Thus a licensee is not entitled to bring a claim in nuisance (which is an interference with the possession of land): *Hunter v Canary Wharf* [1997] AC 655. Nor can a licensee bring a claim in trespass: *Hill v Tupper* (1863) 2 H & C 121. If a licensee cannot complain of trespass, it follows that he is not entitled to bring a claim for possession. The old action of ejectment got its name not because the claimant wished to eject the defendant from the land, but because the claimant asserted that he had himself been wrongfully ejected from the land which he, the claimant, rightfully possessed: *Commonwealth of Australia v Anderson* (1960) 105 CLR 303. Back in the mists of time, questions of title to land were determined in the so-called "real actions". The action of ejectment, which was a developed form of the writ in trespass, was available only to leaseholders. In order to overcome procedural complications of the old real actions the action of ejectment was pressed into service by freeholders. This involved inventing a make-believe lease so that the nominal plaintiff was a fictitious leaseholder (usually called Doe or Roe). Thus the action would be titled "Doe on the demise of" the real plaintiff. The need for these fictions was abolished by the Common Law Procedure Act 1852; and the action was thenceforth described as an action for the recovery of land. But the substance of the cause of action was not changed then, and never has been. A trespasser has title simply by virtue of his possession; and anyone who seeks to dispossess him must show a better title. The trespasser is therefore entitled to require a claimant to prove his title; and that title must be a title to possession. Accordingly, since G100 does not have a possessory interest, it is not entitled to bring the action at all. Procedural convenience cannot override substantive law.
60. I express no view, one way or the other, about whether Mr Wonnacott is right in the case of a person who has entered and remains on land without any consent, except to say that at this level of the judicial hierarchy the argument is a difficult one to sustain in the face of case law which binds us (see, in particular, *Manchester Airport plc v Dutton* [2000] 1 QB 133; *Alamo Housing Co-Operative v Meredith* [2003] EWCA Civ 495, [2003] HLR 62; *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR

504; *Vehicle Control Services Ltd v HMRC* [2013] EWCA Civ 186, [2013] RTR 24). That, however, is not this case for two reasons.

61. The principle of estoppel as between landlord and tenant has been settled for centuries. In that context the title by estoppel that the landlord has is a title in fee simple: *Bell v General Accident Fire and Life Assurance Corporation Ltd* [1998] L & TR 1. But it is not a principle that is confined to the relationship of landlord and tenant. One striking illustration is the relation between a patentee and a licensee permitted to work the invention. Lord Blackburn explained in *Clark v Adie (No 2)* (1877) 2 App Cas 423, 435:

“The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot shew anything of the sort; it must be taken as against him that the lessor had a title to the land. Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The two cases are very closely analogous; in analogies there are always apt to be some differences, but I know of none in this. ... If he has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might shew that the patent was as bad as any one could wish it to be, the licensee must not shew that.”

62. The licensee was not, therefore, entitled to contend that the patent was invalid. A similar principle applies as between bailor and bailee.
63. If a person with no interest in land purports to grant another a tenancy of it, that person (if let into possession) is estopped from disputing the grantor's title. If the grantor subsequently acquires title, then the estoppel is, as the old phrase puts it, “fed”. This means that the landlord by estoppel is treated as if he had always owned the estate out of which the lease could have been granted. The tenant thereupon acquires the interest in the land which the transaction purported to grant him and which, up to that time, rested purely in estoppel.
64. The first reason why Mr Wonnacott's broad submission does not apply to this case is that this is a case in which GGM granted G100 a right to possession for the purpose of bringing claims for possession against guardians to whom it had granted licences. Even if that was not effective as at the date of the inter-company agreement between GGM and G100, GGM subsequently acquired a right to possession granted by NHS Property

Services before the date of issue of the claim form. As at the date of the inter-company arrangement, G100 would have been estopped from challenging GGM's title to grant it that right, and the subsequent grant of that right by NHS Property Services would have fed the estoppel.

65. Mr Wonnacott said that the agreement between NHS Property Services and GGM of 1 October 2020 was ineffective to create a right to possession. Possession is exclusive; and it is not possible to create a qualified right to possession by restricting it to the sole purpose enabling eviction of former licensees. But there are two answers to this argument. The first is that in *Alamo* precisely this form of clause was held by this court to be enough to entitle the claimant in that case to maintain an action for possession under Part 55. The second is that, like any agreement, the agreement should be interpreted if possible so as to make it effective. Mr Wonnacott accepted that it was possible to grant a right of legal possession (in the ordinary sense) with restrictions on what the possessor could do with the right. In my judgment that is how the agreement should be interpreted in this case.
66. Nor do I accept Mr Wonnacott's submission that if the owner of land grants another a contractual right to have possession of land it must be a tenancy of one kind or another. Not only is it contradicted by what Lord Templeman said in *Street v Mountford*, it is also inconsistent with the decision of the Supreme Court in *Manchester Ship Canal Co Ltd v Vauxhall Motors Ltd* [2019] UKSC 46, [2020] AC 1161.
67. Second, and independently, this is a case in which Ms Laleva was given the right by G100 to enter into occupation of the Property, yet on termination of her right she claims to be entitled to dispute G100's right to remove her.
68. The principle of estoppel as between landlord and tenant applies equally to a licence of land as between licensor and licensee. In *Government of the State of Penang v Oon* [1972] AC 425, 433 Lord Cross of Chelsea, giving the advice of the Privy Council said:
- “There is no doubt that under English law as it stood in 1872 and stands today there was and is no difference as regards the matter in hand between a tenant and a licensee. Each is estopped from denying the title of the person from whom he accepted the tenancy or licence so long as he remains in possession under it but each is permitted to deny that title as from the time that he is no longer in possession under it. Counsel for the defendants was unable to suggest any plausible reason for drawing the distinction between tenant and licensee for which he contended ... The person who is not permitted to deny his licensor's title is a person who 'came upon' the land under the licence and those words themselves suggest that he is still upon the land.”
69. The claim under consideration in that case appears to have been no more than a claim for a declaration. But in the course of his opinion, Lord Cross expressly approved the earlier decision of the Board in *Terrunanse v Terrunanse* [1968] AC 1086. In the course of that case Lord Devlin said at 1092:

“This form of estoppel, although it has since the decision in *Doe d Johnson v Baytup* been extended to licensor and licensee and

other similar relationships, originated out of the relationship of landlord and tenant.”

70. Lord Devlin’s statement is a clear one. The principle applicable to landlord and tenant applies to licensor and licensee. It is clear that the cause of action in that case was a claim in ejectment made by the chief priest of a temple. Although he had certain rights over the temple, there is no finding that they amounted to a possessory interest in the land. Nevertheless the occupying licensee was estopped from challenging his title to possession of the land.

71. *Doe d Johnson v Baytup* (1835) 3 Ad & El 188, to which Lord Devlin referred, is a decision of the Court of King’s Bench. It was a claim in ejectment by the fictional Doe under a fictional lease granted by Mrs Johnson, the widow of a former occupier. A house was put up to let; and the keys were left with Mary Batcomb for her to show prospective tenants the house. She gave permission to Miss Baytup to get vegetables from the garden; and for that purpose Mary Batcomb lent her the keys. Miss Baytup used them to get into the house and refused to leave. The jury found that Mrs Johnson had no title to the land. Nevertheless she (or the fictitious Doe) succeeded in the action for ejectment. Lord Denman said at 191:

“In this transaction the defendant waived any title which she might previously have been able to assert. She held possession through a licence, whether for a longer or a shorter time is immaterial. *She cannot claim against the party by whom she was let in; that party, as between them, has the title.*” (Emphasis added)

72. Littledale J said:

“Possession having been fraudulently obtained, if the title is to be disputed, the lessor of the plaintiff may insist upon being first put into the situation in which she was before the possession was taken.”

73. I do not, however, regard the fact that possession had been fraudulently obtained affects the principle.

74. Patteson J said at 192:

“The rule, as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant.”

75. Coleridge J said:

“There is no distinction between the case of a tenant and that of a common licensee. The *licensee, by asking permission*, admits that there is a title in the landlord.... Here is a party quietly in possession. The defendant comes and asks for the key. If she had intended to make a claim of title, she might have come as a trespasser to disseise, and, having entered, might have stood

upon her right. But here that was not done; and under the circumstances of this case, the defendant, before she could dispute the title, was bound to put the lessor of the plaintiff in the situation in which she stood before the leave was granted.”

76. The claim in ejectment therefore succeeded. Miss Baytup was estopped from disputing that Mrs. Johnson had the requisite title, because she (Miss Baytup) had been let into possession by Mary Batcomb as agent for Mrs Johnson. The critical point is that the act of asking permission to come in gives rise to the estoppel. The title (or the lack of it) in the licensor is simply irrelevant. Moreover, as everyone knew, the fictitious lease to Doe was precisely that: a mere fiction.
77. Mr Wonnacott placed some reliance on the statement in the licence that GGM provides “guardian management services to property owners”. That, he said, meant that Ms Laleva was not prevented from asserting that the (unnamed) property owner was the correct claimant. But in my judgment that is not correct. The fact that there is a property owner in the background does not tell you anything about the interest which GGM or G100 had. As I have said, as between Ms Laleva and G100, it is not a relevant question. Moreover at the time when Ms Laleva was granted the licence G100 was, to all intents and purpose, in control of the Property. It was G100 who selected the occupiers and who managed the Property. Its right to do so is irrelevant to the position as between it and Ms Laleva.
78. Of course, it goes almost without saying that the fee simple title by estoppel is not binding on anyone who is not estopped. Consequently the true owner would be entitled to show that he had a better title than either of the estopped parties. That, in my judgment, is the context in which *King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54 was decided. That case stands for the proposition that a licence granted by a freeholder to place advertisements on the flank wall of a building does not bind a subsequent tenant of the building. In other words, the tenant, as a third party to the relationship between licensor and licensee, was entitled to challenge the effectiveness of the licence by showing that he had a better title than the licensee.
79. The fact that there is an estoppel means that, as between claimant and defendant, whether the claimant does or does not have a possessory interest in the land makes no difference. Either way, the defendant is unable to set up an alternative title whether in herself or a third party. That is entirely consistent with the bedrock principle of relativity of title which pervades English land law. The policy underlying the principle was well stated by Martin B in *Cuthbertson v Irving* (1859) 4 H & N 742, 758 (affirmed (1860) 6 H & N 635):

“This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of this lessor, really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it.”

80. Here Ms Laleva has enjoyed everything that the licence purported to grant her. Having done so, she must now perform her part of the bargain by leaving the Property.
81. HHJ Luba declined to decide this point, largely, as I read his judgment, because an estoppel ought to be pleaded. But all that needs to be pleaded are the relevant facts. In this case the only relevant facts are that G100 granted Ms Laleva a licence by virtue of which she was permitted to live in the Property in order to perform the guardian services. The estoppel thus created is no more and no less than one of the legal consequences of that arrangement. It is not an estoppel which depends on reliance or detriment. As Lord Hoffmann put it in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, 416 it is not the estoppel which creates the relationship, but the relationship which creates the estoppel. The grantor's title or lack of title is irrelevant.
82. In my judgment, therefore, G100 was entitled to use the procedure under CPR Part 55 (which is a summary version of the old claim in ejectment) against Ms Laleva. Whether it would have been able to do so against a pure trespasser is not the question.

Result

83. I would allow the appeal and dismiss the cross-appeal

Lady Justice Macur:

84. I agree.

Lord Justice Snowden:

85. I also agree.