UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – houses in multiple occupation - landlord & tenant – rent repayment order – person having control – appropriate person to repay rent – ss 61(7), 72(1) and 73(5) Housing Act 2004 – appeal dismissed.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN **URBAN LETTINGS (LONDON) LTD** **Appellant**

and

LONDON BOROUGH OF HARINGEY **Respondent**

Re: 8A, 8B, 8C Grand Parade,
Green Lanes,
London
N4 1JX

His Honour Judge Behrens

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
24 February 2015

Archie Maddan (instructed by Anthony Gold Solicitors) for the Appellant
Christopher Cooper (instructed by London Borough of Haringey) for the Respondent

The following cases are referred to in this decision:

London Corporation v Cusack Smith [1955] AC 337
Pollway Nominees v Croydon LBC [1987] AC 79
Truman, Hanbury,Buxton v Kerslake [1894] 2 QB 774
White v Barnet LBC [1990] 2 QB 328

DECISION

Abbreviations

1. In this decision I shall adopt the following abbreviations:

CPR	Craven Park Road LLP
FTT	First Tier Tribunal
HMO	House in Multiple Occupation
RRO	Rent Repayment Order
the 2004 Act	The Housing Act 2004
the local authority	London Borough of Haringey
the premises	8a,8b, and 8c Grand Parade Green Lanes London N4 1JX
ULL	Urban Lettings (London) Ltd
ULM	Urban Land (Management) Ltd
UT	Upper Tribunal

Introduction

2. On 8th April 2014 the Property Chamber of the FTT made a RRO against ULL under s 73(5) of the 2004 Act in the sum of £16,000 in respect of the housing benefit that had been paid to ULL in respect of the premises. It was not in dispute that the premises comprised an unlicensed HMO. In the same decision the FTT dismissed similar applications against CPR and ULM.

3. This is an appeal by ULL against that decision. Permission to appeal was granted by the FTT on 10th June 2004. In granting permission the FTT commented that the points at issue are of potentially wide implication.

4. The principal ground of appeal is that ULL is not an "appropriate person" "having control of a HMO" within the meaning of the 2004 Act. It is further argued that the FTT erred in finding that ULL had committed an offence under s 72(1) of the 2004 Act. In the result it is argued that the RRO should not have been made.

5. The local authority seeks to uphold the decision.

The facts

6. There is no dispute as to the primary facts which can be taken from paragraphs 3 – 5 of the FTT's decision

7. The premises comprise four stories. The ground floor is used for commercial purposes. Each of the three remaining floors is registered under a separate Land Registry Title and let on a 125 year lease by the freeholder Mrs Hussein. CPR is the current tenant in respect of all three leases.

8. Each of the three upper floors has been converted into 4 self contained residential units. Each of the 12 self contained units was sublet by CPR's predecessor in title to ULL for a term of just over 3 years from March 2011. There are communal areas (corridors and steps) which are not sublet to ULL and are therefore retained by CPR.

9. Each of the leases lets the premises for the purpose of subletting for residential accommodation and specifies that the landlord's consent for such subletting is not required. A monthly rent of £585.33 is payable by ULL to CPR in respect of each of the 12 units. A Management Company, ULM, a company in the same group and with the same directors as ULL, acting as agent for ULL let each of the 12 units to the ultimate occupants at a rent of between £780 and £800 per month.

10. It is not in dispute that each floor of the premises is an HMO under s 257 of the 2004 Act. It is not in dispute that each floor requires a licence and that no such licence exists.

The Statutory Provisions

11. The FTT incorporated as the Appendix to its decision ss56, 72 – 74, 257 of the 2004 Act. The relevant parts of those sections are:

> 61 (7)….In this Part the "person having control" in respect of a section 257 HMO is –
>
> > "(a) in relation to an HMO in respect of which no person has been granted a long lease of a flat within the HMO, the person who receives the rack rent for the HMO whether on his own account or as an agent or trustee of another person..."
>
> 72 (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse--

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

73 (5) If--

(a) an application in respect of an HMO is made to [the appropriate tribunal] by the local housing authority or an occupier of a part of the HMO, and

(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),

the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the [relevant award or awards of universal credit or the] housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters--

(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),

[(b) that--

(ii) housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO,

during any period during which it appears to the tribunal that such an offence was being committed,] and

(c) that the requirements of subsection (7) have been complied with in relation to the application.

(7) Those requirements are as follows--

(a) the authority must have served on the appropriate person a notice (a "notice of intended proceedings")--

(i) informing him that the authority are proposing to make an application under subsection (5),

(ii) setting out the reasons why they propose to do so,

(iii) stating the amount that they will seek to recover under that subsection and how that amount is calculated, and

(iv) inviting him to make representations to them within a period specified in the notice of not less than 28 days;

(b) that period must have expired; and

(c) the authority must have considered any representations made to them within that period by the appropriate person.

(10) In this section--

"the appropriate person", in relation to any payment of [universal credit or] housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation;

263 (1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

The decision of the FTT

12. It is not necessary to analyse the whole of the decision of the FTT as there is no cross appeal by the local authority against the dismissal of the claim against CPR and ULM.

13. In paragraphs 22 to 25 of its decision the FTT decided that CPR, ULL and ULM were each in receipt of the rack rents and thus persons having control of the premises. It followed that each had committed an offence under s 72(1) of the 2004 Act. It specifically rejected an argument on behalf of ULL based on the fact that it received rent for the rooms and not the common parts. It could see no difference between the rack rents for the rooms with rights of access through the common parts and the rack rent for each HMO as a whole. The common parts could have no rental value of their own and thus the combined rents are in fact the rack rents for the HMO.

14. In paragraph 32 of its decision the FTT regarded it as clear that the payments of housing benefit to which ULL was entitled fell squarely within the definition of periodical payments.

15. In paragraph 57 of its decision the FTT assessed the sum of £16,000 as being reasonable in all the circumstances for ULL to repay which it described as “the vast majority of housing benefit retained by ULL”

Submissions

Mr Maddan’s submissions

16. In substance Mr Maddan took two points in support of the appeal.

17. First, he submitted that the FTT's finding that ULL was a person having control of the premises was wrong.

18. He challenged the rejection of the argument relating to the common parts and suggested that the FTT's decision had unwelcome consequential effects especially in relation to the parts of the HMO over which the person had in fact no control.

19. He pointed out that it was unlikely that ULL would be able to obtain a licence. It was likely that the local authority would insist on conditions in relation to the structure and or the common parts. ULL would be unable to comply with those conditions and thus unable to obtain a licence.

20. Second he submitted that the FTT erred when it decided that ULL had committed an offence under s 72(1) of the 2004 Act. The decision that an offence had been committed was contained in paragraphs 22 to 26 of the decision. The FTT did not consider whether ULL might have a statutory defence under section 72(5). It is suggested that this vitiates the decision. The FTT ought to have considered and taken into account the fact that the local authority considered that ULL was not a suitable licence holder and the conditions that the local authority might have imposed if they had granted a licence.

Ms Cooper's submissions.

21. Ms Cooper invited me to uphold the FTT's decision substantially for the reasons it gave. She invited me to consider the purpose of Part 2 of the 2004 Act and its purpose.

22. She submitted that the FTT was fully entitled to hold that ULL was in receipt of the rents for the HMO. ULL was in receipt of the rents for each of the 12 units and they had granted rights of access over the common parts. She submitted that the construction adopted by ULL would drive a coach and horses through the enforcement provisions of s 73(5) of the 2004 Act. In particular no-one would be liable for an RRO even though the premises were unlicensed and rent /housing benefit had been received. ULL would not be liable because it was not "a person in control of the premises"; CPR would not be liable because (in accordance with the finding in paragraph 41 of the decision) it is not an appropriate person.

23. There were two answers to Mr Maddan's second submission. First it was not suggested to the FTT that ULL had a defence under s 72(5) of the 2004 Act. As a statutory defence it had to be raised. As it had not been raised the FTT were fully entitled not to deal with it. In any event the proposed defence was bound to fail. The fact that the local authority would or might not regard ULL as suitable or might grant a licence subject to conditions that ULL might not be able to comply with was not a "reasonable excuse" within s 72(5) of the 2004 Act. There was

an obligation on a person in control of an HMO to obtain a licence. If for whatever reason a person was not a suitable person or could not comply with the licence conditions it should not be in control of the HMO.

Discussion

24. It is convenient to deal with Mr Maddan's second submission first as it can be dealt with quite shortly. In my view Ms Cooper's submissions are plainly correct and unanswerable. This appeal is a review of the decision of the FTT. If the statutory defence was not raised before the FTT the FTT was not obliged to deal with it. Equally it cannot possibly be a reasonable excuse to an offence under s 72(1) of the 2004 Act to suggest that no licence would be granted to ULL because they were unsuitable or could not comply with the conditions. The purpose of the licensing regime is to prevent unsuitable persons being in control of HMOs and to ensure that the persons in receipt of the rents are in a position to comply with the conditions.

25. As I indicated during the course of argument Mr Maddan's first submission raises a by no means straightforward question of construction which, as the FTT recognised when it granted permission to appeal, has potentially wide implications for local authorities.

Policy of Part 2 of the 2004 Act

26. Part 2 of the 2004 Act introduced a mandatory licensing scheme for HMOs. Ss 55 – 60 set out rules determining which HMOs are within Part 2. It is not in dispute that each of the 3 floors of the premises is an HMO within Part 2.

27. Under s 61 there is a requirement (subject to exceptions that are not relevant) that every HMO within Part 2 must be licensed. Under s 61(4) the local authority are required to take all reasonable steps to ensure that applications are made to them for licenses in respect of HMOs in their area that are required to be licensed.

28. Ss 63 – 68 deal with the grant and refusal of licences. Amongst other matters the local authority have to be satisfied that the house is reasonably suitable for multiple occupation or can be made so suitable by the imposition of conditions. The conditions may include conditions as to the management use and occupation of the house concerned and its condition and contents. There is no minimum period for which a licence may be granted. It cannot, however be granted for more than 5 years.

29. Under ss 69 and 70 there is power to vary or revoke licences. There are provisions in Schedule 5 which deal with appeals against licence decisions.

30. Ss 72 and 73 are within a subheading entitled enforcement. S 72 creates a number of criminal offences in relation to the licensing of HMOs. They include the offence under s 72(1) of having control of an HMO without a licence, and (under s 72(3) failing to comply with the condition of the licence.

31. S 73 is concerned with the civil consequences of operating unlicensed premises, RROs. It is to be noted that applications can be made by either the local authority that has paid housing benefit or by the occupier although different conditions have to be satisfied in the case of a claim by an occupier.

32. It seems to me to be plain that the legislative policy behind the detailed provisions in Part 2 was to require HMOs to be licensed to ensure that the premises were suitable for multiple occupation, that the licensee was a fit and proper person and that the management arrangements were satisfactory and to provide both criminal and civil sanctions if the provisions were not complied with.

Appropriate person

33. Where an application is made by the local authority for the RRO the FTT have to be satisfied of the matters set out in s 73(6) of the 2004 Act. There are 2 matters in s 73(6). First the FTT has to be satisfied that the appropriate person has (within a specified period) committed an offence under s 72(1). Second (subject to compliance with s 73(7)) that during the period which it appears that the offence has been committed housing benefit has been paid in respect of periodical payments in connection with the occupation of a part or parts of the HMO.

34. There is a definition of "the appropriate person" in s 74(10) as the "the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation".

35. It was found by the FTT that housing benefit was paid in respect of the persons occupying the units. It was also found that ULL was the person entitled to receive periodical payments (rent) in connection with those persons. Neither of these findings could be challenged. It follows that the FTT were entitled (indeed bound) to find that ULL was within the definition of the appropriate person.

36. The crucial question, however, is whether the FTT were right to find that ULL had committed an offence under s 72(1) of the 2004 Act.

Person having control of an HMO

37. Subject to the statutory defence in s 72(5) which, for reasons already given, cannot be relied on by ULL in this appeal two conditions had to be satisfied before the FTT could be satisfied that ULL had committed an offence under s 72(1):

1. that ULL was a person having control of an HMO

2. that the HMO was required to be licensed and was unlicensed.

S61(7)

38. The second condition was common ground between the parties. Thus the sole question was (and is) whether ULL satisfied the first condition. S 61(7) contains the definition of person having control of a s 257 HMO for the purpose of Part 2. The crucial words are:

> the "person having control" in respect of a section 257 HMO is … the person who receives the rack rent for the HMO whether on his own account or as an agent or trustee of another person.

39. It is immediately to be noted that the definition in s 61(7) is different from the definition in s 263(1) which is set out above. That definition is in two parts. The first part is substantially to the same effect as s 61(7). However it is to be noted that there is a definition of rack rent which applies to s 263(1) but not to s 61(7). However the second limb of s 263(1) includes a person who would receive the rack rent if the premises were let at a rack-rent. This second limb is not, of course, included in s 61(7) of the 2004 Act.

Authorities

40. There are no authorities on s 61(7). However both Counsel helpfully referred to a number of cases some of the highest authority where the relevant statutory provision included the equivalent of the second limb of s 263(1).

41. Ms Cooper referred me to the decision of the House of Lords in *London Corporation v Cusack Smith* [1955] AC 337. It is not necessary to refer to this case in detail because there is no dispute between Counsel as to its effect. The case was concerned with a statutory definition of owner which was "a person ... who ... is entitled to receive the rack rent of the land or, where the land is not let at a rack rent, would be so entitled if it were so let. ..."

42. Ms Cooper drew my attention to part of the speech of Lord Reid at p 357 where he said:

> A, the freeholder, may let to B for a rent of £100 which is a rack-rent at the date of B's lease, and later B may sublet to C for a rent of £200 which is a rack-rent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rack-rent of the land. … I am therefore of opinion that there can be more than one "owner" under the first limb of the definition, and that if the freeholder lets at a rack-rent he is and remains an "owner" no matter what his tenant may do.

43. Mr Maddan expressly accepted that more than one person can be entitled to receive the rack rent for the premises in a case such as this where there are leases and subleases.

44. Both Counsel referred me to the decision of the House of Lords in *Pollway Nominees v Croydon LBC* [1987] AC 79. In that case the plaintiff was the freeholder of a purpose-built block of 42 flats, 10 of which were let on a block letting and 32 of which had been sold off on long leases of 99 years at ground rents which were, in total, considerably less than a rack rent for the building as a whole. Under the terms of the leases the plaintiff was responsible for keeping the building in repair but was entitled to recover the cost of doing so from the lessees by way of a service charge. The local authority considered that substantial repairs were required to bring the building up to a reasonable standard and accordingly served a notice on the plaintiff pursuant to s 9(1A)[a] of the Housing Act 1957 requiring the plaintiff to carry out specified repairs to the building. The plaintiff applied for and was granted a declaration, inter alia, that the notice to repair was invalid, because the plaintiff was not the 'person having control' of the building for the purposes of s 9(1A) and was therefore not the person required to carry out the repairs.

45. The relevant clause was s 39(2) of the 1957 Act which was to the same effect as ss 263(1) and (2) of the 2004 Act. The local authority appealed, contending that the plaintiff was 'deemed to be the person having control' of the building because the plaintiff was the person who would receive the rack rent 'if the [building] were let at a rack-rent', notwithstanding that most of the flats were occupied under long leases and that if each flat was sublet at a rack rent the individual sublessors would be the persons entitled to it. The appeal to the House of Lords was dismissed. It was held that in the case of a house comprising a number of residential units let on long leases at ground rents the definition applied collectively to all the long leaseholders who between them either received the rack rent of units sublet at rack rents or would receive the rack rents if the units were so sublet.

46. I was referred to a number of passages from the speeches of Lord Bridge and Lord Goff. At pp 91 – 92 of his speech Lord Bridge pointed out that the formula in s 39(2) was of long statutory history dating back from at least 1847. He concluded his analysis of the statute in this way (at p 92D):

> In all these cases the rationale of the use of the formula to designate the person on whom the relevant obligation is cast is surely plain. The owner of that interest in premises which carries

> with it the right, actual or potential, to receive the rack rent, as the measure of the value of the premises to an occupier, is the person who ought in justice to be responsible for the discharge of the liabilities to which the premises by reason of their situation or condition give rise.

47. After analysing the arguments of the parties and referring in particular to the decision in *Truman, Hanbury,Buxton v Kerslake* [1894] 2 QB 774 Lord Bridge concluded his judgment (p 95 A – D) in this way:

> It seems to me, as it did to the Court of Appeal, that the principle clearly embodied in the reasoning in *Truman Hanbury Buxton & Co Ltd v Kerslake* and *London Corp v Cusack-Smith* is applicable not only where the freeholder has let the entire premises under a single lease at less than a rack rent, but equally where he has granted separate leases of all the separate units capable of occupation comprised within the building at rents which in the aggregate are less than the rack rent of the building and thus retains only a reversionary interest which confers no right of occupation which he can either enjoy for himself or let to anyone else. Moreover, this conclusion is, in my view, entirely in accordance with the philosophy which underlies the formula used in the definition.
>
> I appreciate that this conclusion may cause inconvenience for local authorities. But I imagine that normally the contractual rights of the owners of long leasehold interests in flats to enforce repairing obligations against their lessors will provide an adequate solution of the problem. This may be the explanation of the fact that, though the formula found in the definition has been in common use in statutes since at least 1847, it was not until 1982 that its application to buildings divided into units let on long leases had to be considered by the courts.

48. Mr Maddan drew my attention to the solution to the problem envisaged by Lord Bridge in that final paragraph. He pointed out that that solution could not assist ULL because ULL are not able to obtain a licence. To my mind, however, Lord Bridge's comment in that final paragraph did not form part of the essential reasoning of his decision.

49. Lord Goff was plainly attracted by the appellant's argument based on the literal wording of section 39(2). However, in the end, he did not accept it. His conclusion (at p 97F – H) is expressed thus:

> Nevertheless, in the end, I feel driven by the words of s 39(2) itself to reach the same conclusion as that reached by the Court of Appeal. This is because I feel that it must have been the intention of the Act that there shall always be a person having control of any relevant house, so that the statutory machinery must operate in relation to that house. And the inevitable consequence of the argument of counsel for the local authority is, as I see it, that, on his construction, the statutory machinery could never operate in a case where a house is in divided ownership, whether because of the existence of flying freeholds in different parts of the house, or because (as we are told may happen) the house is in divided ownership because it is constructed on land belonging to two separate freeholders. In such cases, there can be no single interest in the whole house; and, on counsel's construction, there can be no person having control of the house. This must, I consider, be inconsistent with the intention of the legislature.

50. Lord Goff continued (at 98 B – D):

> I am fortified in this conclusion by what appear to me to be two important considerations. First, although this solution can obviously create difficulties for local authorities in the serving of notices, those difficulties are not insuperable, especially having regard to the provisions of s 103 of the Housing Act 1964 (now s 617 of the Housing Act 1985). Second, the difficulties so created are, in my opinion, far outweighed by the fact that, on the construction put forward by counsel for the local authority, well-advised landlords could so arrange their affairs as to ensure that their property escaped from the provisions of the Act, by simply providing that one part of the relevant house (eg the roof or the common staircase) was vested in a separate freehold owner, for example a subsidiary company of the landlord. This would be a most undesirable state of affairs, which cannot, I think, have been intended by the legislature.

51. Ms Cooper submitted that the speeches in Pollway were supportive of the local authority's case and placed considerable emphasis on the second important consideration referred to by Lord Goff.

52. Mr Maddan referred me to the decision of the Court of Appeal in *White v Barnet LBC* [1990] 2 QB 328. In that case one of two flats into which a house was divided was let under a long lease with a low rent and the other was let under a statutory tenancy at the registered rent of £75 per month. In 1987 the council served on the freeholder and tenants, under section 190 of the Housing Act 1985, a notice requiring them to execute specified works of repair to the house. The statutory tenant appealed against the notice on the ground that a statutory tenant was not a "person having control" of the house within the definition of s 207 of the Act. S 207 was in substantially the same form as ss 263(1) and (2) of the 2004 Act. The appeal was upheld both in the County Court and the Court of Appeal.

53. The Court of Appeal discussed and distinguished the decision in Pollway in the judgments. Counsel for the local authority had submitted that the proper test is to identify the persons or corporate person who could grant a lease of the house, at a rack rent, which carried with it the right to occupation of the house. He went on to submit that person was the statutory tenant as she could grant an occupation lease of her flat.

54. After acknowledging the force of the submission (at p 334H) Fox LJ analysed Pollway in some detail. He referred in particular to the passage in the speech of Lord Bridge at p 92D (which I have set out above) which he described as the ratio of the decision. He asked himself (at 335G) "whether, in a case where a tenant in possession, Mrs. White, is actually paying a rack rent already, the statute requires one to ignore the reality and to proceed upon the artificial basis of a hypothetical new letting of her premises at a rack rent".

55. He concluded (at 336D) :

> In the circumstances, and having regard to the rationale stated by Lord Bridge, I conclude that the *Pollway* decision does not require us to decide that Mrs. White is one of the persons in control of the house for the purpose of the statute and I would decide that she is not.

56. Dillon LJ agreed. In the course of his judgment he said (at p 337 A – B):

> I cannot believe that Parliament would for a moment have contemplated that the costs of the local authority's carrying out the works could be recoverable from a statutory tenant. The works required to comply with such a repair notice are bound to be works of repair to the structure of the house, as in the notice in the present case, and with a statutory tenancy the repair of the structure is necessarily the responsibility of the landlord.

Discussion and Conclusion

57. Whilst it is true that there are no authorities on s 61(7) itself the authorities on the equivalent of ss 263(1) and (2) of the 2004 Act are of considerable assistance. They show to my mind a consistent theme of the Courts seeking to establish and give effect to the policy of the legislation and to avoid a situation where no-one is responsible for the relevant obligations. To my mind these themes emerge clearly from the passages I have set out above.

58. It is true that s 61(7) does not have the second limb contained in s 263(1) or the other statutes referred to in the authorities. However, to my mind that does not affect the general approach to construction identified in the authorities.

59. It is equally true that s 61(7) contains no definition of "rack rent" whereas all of the other provisions define it in the same way as "a rent not less than two thirds of the full net annual value of the premises". Both Counsel submitted to the FTT that rack rent in s 61(7) however meant market rent. It is not clear whether the FTT accepted that submission. I note that the authors of Woodfall (paragraph 7.013) describes its primary meaning as "the full annual value of the tenement or near it" though they acknowledge that the meaning may vary according to the context in which it is used. It is, to my mind, curious that for enforcement of the licensing provisions the rack rent received for the HMO needs to be the full annual value of the tenement whereas for other purposes it is sufficient if it is two-thirds of that value. However I need say no more about this in this appeal.

60. I have identified what seems to me to be the clear policy of Part 2 of the 2004 Act. Adapting the speech of Lord Bridge to the terms of s 61(7). It seems to me that the policy of s 61(7) is also plain:

> The owner of an interest in premises who receives the rack rent, as the measure of the value of the premises to an occupier, is a person who ought in justice to be responsible for the discharge of the licensing obligations of the HMO.

61. If Mr Maddan's submissions are correct no one would fall within the definition of a person in control with the result that no-one would be liable for the licensing obligations of these three HMOs. The lease from Mrs Hussain to CPR is at less than a rack rent and thus she is not within the definition. The 12 leases from CPR to ULL do not include the common parts merely rights of access over them. It follows (if Mr Maddan is correct) that they are not leases of the HMOs. Equally the 12 leases from ULL to the individual occupiers do not include the common parts and are thus (if Mr Maddan is correct) not leases of the HMOs. As Lord Goff pointed out this would be a very undesirable situation and not one which can have been intended by the legislature.

62. In those circumstances I have come to the conclusion that the views expressed by the FTT in paragraph 24 are correct. In my view there is no difference between the aggregate of the rack rent for the rooms with rights of access over the common parts and the rack rent for each HMO as a whole. I would interpret s 61(7) so as to include ULL on the agreed facts of this case.

63. Mr Maddan suggests that this interpretation gives rise to unfortunate consequences because ULL will not be granted a licence and/or will not be able to comply with the conditions specified by the local authority. I am not in a position to say whether Mr Maddan is correct or not in this assertion. If he is right the short answer is that ULL should not have entered into an arrangement whereby they could not comply with the licensing obligations in Part 2 of the 2004 Act.

64. It follows that this appeal is dismissed. However I cannot leave this case without expressing my gratitude to both Counsel for their assistance and the clear and helpful way in which this appeal has been presented and argued.

His Honour Judge Behrens

Dated: 5 March 2015