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**The “win-win” Property Guardianship proposition: Non-domestic rates liability and the property guardianship model**

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**Cases cited:**

***London Borough of Southwark v Ludgate House Limited* [2020] EWCA Civ 1637**

***Camelot Guardian Management Limited v Heiko Khoo* [2018] EWHC 2296 (QB)**

***John Laing & Son Ltd v Assessment Committee for Kingswood Assessment* Area [1949] 1 KB 344**

The judgment in *London Borough of Southwark v Ludgate House Limited[[1]](#footnote-1)* tackles a core component of the “win-win” proposition of so-called “property guardianship”. The property guardianship pitch is as follows. Owners of otherwise empty properties can contract with a property guardian company, who in turn arrange for “property guardians” to live in the property for as short or long a period as required. This can lead to significant financial savings. Owners of empty commercial properties can avoid the considerable expenses associated with securing the building, and the often even more considerable ongoing liability for non-domestic rates. In return, property guardians receive low-cost, flexible accommodation in “quirky and interesting” properties.

For the owners of Ludgate House in this case, the savings on offer were substantial. At the time of writing, VPS Ltd – the property guardianship company they contracted – boast about the arrangement as a “case study” of a “best-practice model” on their website.[[2]](#footnote-2) As an 11-story, 173,633 square foot office building in central London, the non-domestic rates it attracted were significant: the owners were seeking to mitigate an annual non-domestic rates bill of £2.25 million ahead of a major development project commencing in two years’ time. VPS secured the building with “security technologies”, “a concierge” and live-in guardians, including “an A&E nurse, a doctor, a West End actor, hairdressers, costume designers and photographers”.

The figures provided in this “case study” demonstrate the extent of savings this win-win proposition heralded for developers and the guardians themselves. The owners of Ludgate House paid £60,000 per annum in council tax – avoiding the £2.25 million in non-domestic rates altogether – while securing the property via continuous guardian occupation. The property guardians themselves paid £550 per month in licence fees, inclusive of bills, as compared to a market rent for a studio in the locality of £997 per month.

The decision in *Ludgate* interrogates the reality of this “best practice model”. At the first instance, the Valuation Tribunal had upheld Southwark’s efforts to charge non-domestic rates to the building owner. The UKUT allowed the building owner’s appeal, concluding that each property guardian room was its own hereditament and liable for domestic rates. On appeal to the EWCA, in concluding that the building owners remained liable for non-domestic rates, the court undermines a core component of the “win-win” property guardianship proposition. After outlining the legal issue at play and the judgment of the court, this note considers two further issues: the inherent irony in the Janus-face representation of guardianship occupation, and the insight the judgment provides into the reality of occupation in the property guardianship sector.

**The issue**

The legal question facing the court was whether the guardians were themselves occupying individual hereditaments for rating purposes (i.e. if they were all individually liable for council tax), or whether the nature of their occupation did not create such individual hereditaments and therefore the building owners remained liable for the significant non-domestic rates bill. This turns on two-interlinked elements: one cartographical (effectively, as the court puts it, whether one can “draw a continuous red line around it on a plan”[[3]](#footnote-3)), and another on the nature of the occupation. The UKUT had concluded that individual rooms occupied by guardians were capable of satisfying the test, and there was no appeal to this decision at the EWCA.[[4]](#footnote-4)

To answer the latter, the court reiterated as series of “ingredients” that have informed such assessments in previous cases. The core overarching principle, laid out in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344 and endorsed elsewhere, is that rateable occupation can turn on the terms of the contractual arrangement between the occupier and the building owner. This includes the following questions:

1. Is there actual occupation that is exclusive for the particular purposes of the possessor?
2. Is the possession of some value or benefit to the possessor?
3. Is the period of possession not for too transient a period?[[5]](#footnote-5)

Answering “yes” to all would indicate rateable occupation. The questions are in the spirit of what could be termed the “lodger principle”: where someone in possession of a property gives another non-exclusive possession of a part of their premises, they do not cease to become liable for rates. In the context of property guardianship, it was (i) and (ii) that occupied much the court’s attention in *Ludgate*. When assessing the extent of “actual occupation”, the court draws on *Westminster Council v Southern Railway* [1936] AC 511, to provide a summary of additional questions to consider, as follows:

i) "Occupation" must include "actual possession". It would appear to follow that if a putative occupier does not have possession, he will not be in rateable occupation.

ii) If there is more than one candidate, who is in rateable occupation depends on "the position and rights of the parties in respect of the premises in question." If those rights depend on a contract, that necessarily means that the relevant tribunal must examine the terms of the contract…

iii) One further question that the tribunal must consider is "the purpose of the occupation of those premises"….

iv) The ultimate question, where there is more than one candidate for rateable occupation, is who is "in paramount occupation" of the putative hereditament.[[6]](#footnote-6)

Therefore, when assessing the two “candidates” for rateable occupation – the property guardians or the building owner – the court must interrogate both the “purpose” for occupation of the premises and the contractual arrangement between them (here, the licence agreement between VPS Ltd, acting on behalf of the building owner, and the property guardians). I consider each in turn below.

**Purpose**

When considering the *purpose* of the occupation – namely, whether the property guardians were occupying on behalf of the property owner – the court effectively concluded that the clue is in the title: “property guardians” serve a function for the building owner by guarding the property, and this function is the very reason behind their engagement of a property guardian company. The court noted that “the presence of the guardians on site was an essential component” of what the building owner “had bargained for”,[[7]](#footnote-7) and considered that the purpose of the guardian’s occupation and of the building owner were “complementary and mutually reinforcing”.[[8]](#footnote-8) The fact that there was no direct contractual arrangement between the building owner and the guardians themselves, but rather through VPS Ltd, did not negate this symbiotic relationship.

Furthermore, the licence agreements themselves created contractual obligations on the property guardians to exercise this function on behalf of the property owners. The court emphasises in particular that the licence provided that “it was a serious breach if a guardian did not make the property their abode”[[9]](#footnote-9) – a guardian not in situ is a guardian not guarding. Likewise, the court underscored VPS Ltd’s compulsory property guardian training programme, which ensured that all occupants “understood their responsibilities” to the building owner.[[10]](#footnote-10)

**Exclusive occupation**

The guardians all had sole access to their own individual rooms in the building, which included the provision of a key. In the UKUT, the tribunal had considered that this was sufficient to illustrate exclusive possession. However, the court were unconvinced, noting that lodgers – or even hotel guests – are routinely provided with their own key.[[11]](#footnote-11) Instead, the court focused on the content of the license agreement between the guardian and VPS. This “proclaim[ed] several times that a guardian is not being granted exclusive occupation of any part of the building”.[[12]](#footnote-12) This declaration was accompanied by a series of other conditions, including:

1. The size and extent of the living space available to the guardians might be varied at any time (clause 3.4).
2. The guardians had no right to occupy any particular room at the Property. But the guardian was required to inform VPS of which room the guardian was sleeping in "to enable [VPS] to manage the Property in accordance with its obligations to the Owner". (clause 3.5 and clause 3.6).
3. VPS might require guardians to move to a different room within the living space. A request was expected to be made on a regular basis. (clause 4.3)[[13]](#footnote-13)

Importantly, the court considered that the reality of the day-to-day occupation of the property was not what mattered for the purposes of assessing “exclusive occupation” in this context. Instead, the focus should be on the effect any such exercise of rights within an agreement “would have had, if exercised.”[[14]](#footnote-14) Echoing the old cliché, the court underscores that “absence of evidence is not evidence of absence”.[[15]](#footnote-15) The rights accorded to the building owners in respect of the guardian’s occupation were to such an extent that the guardians could not be considered to be in exclusive occupation. The court draws a parallel at multiple points between property guardians and lodgers.[[16]](#footnote-16)

As a result of the lack of exclusive occupation and the fact that the guardians’ occupation of the property served a clear purpose for the building owner, the court allowed the appeal. Of the two “candidates” for rateable occupation, it was the building owner that was liable.

**Discussion**

This judgment is a significant blow to the current “win-win” proposition put forward by property guardianship companies. Particularly for large, commercial, city-centre buildings – among the most profitable candidates for guardianship companies – continuing liability of the building owners for non-domestic rates is a considerable shift in the “best-practice model” sold by property guardianship companies.[[17]](#footnote-17) It remains to be seen what this means in practice for the day-to-day operation in the sector and how business models, particularly the setting and management of license fee income, may vary in response.

The judgment does, however, illustrate two broader issues that have defined policymaker and academic interrogation of the sector to date. The first is the inherent Janus-face between how the occupation of property guardians is framed differently by property guardian companies, depending on the legal end. The arguments put in *Camelot Guardian Management Limited v Heiko Khoo[[18]](#footnote-18)*, analysed in an earlier edition of this journal,[[19]](#footnote-19) are an almost mirror image of those in the current case. The guardian, Mr Khoo, sought (unsuccessfully) to argue that he had exclusive possession of his room in an adapted office block and therefore was occupying the property via a tenancy, rather than by licence. The property guardianship company, *Camelot*,could not have constructed the licence agreement any more explicitly against this proposition, with it stating: “you will not get a right to exclusive occupation of any part of the living space” and “this is not a tenancy”.[[20]](#footnote-20) The judgment in *Ludgate* demonstrates that the sector cannot argue in support of exclusive occupation for the purposes of rates assessments, and against for the purposes of guardians’ occupation rights. The “win-win” proposition cannot have it both ways.

Second, the judgment is a further insight into the nature of property guardianship occupation laid bare. The court details at length the extent of conditions and limitations imposed on guardians via the VPS guardian licence agreement, including the requirement to not be away from the property for more than two nights in a week, a prohibition on guests staying overnight or guardians receiving more than two guests at any given time, a prohibition of children at the property, the possibility of without notice variation of the size and extent of the living space – to detail but some.[[21]](#footnote-21) As the court notes, counsel for the building owners conceded themselves that “it is difficult to think of a greater retention of general control over premises than the ability to require the occupier to vacate the premises without notice.”[[22]](#footnote-22)

The property guardianship business model adopted by many operators works through the amorphous construction of the “property guardian” – at once enjoying sufficiently exclusive occupation to attract rate liability, while attracting insufficient exclusive possession to occupy via a tenancy. The judgment of the court in *Ludgate* illustrates that the foundation of the “win-win” proposition sold to building owners can be problematic in practice. By focusing on the extent of the conditions and lack of security offered in their licence agreements, the judgment also underscores the extent of precarity faced by guardians living in the sector.

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3. *Ludgate* (n 1) [28]. [↑](#footnote-ref-3)
4. Ibid [29]. [↑](#footnote-ref-4)
5. Questions adapted from ibid [32]. [↑](#footnote-ref-5)
6. Ibid [40]. [↑](#footnote-ref-6)
7. Ibid [70]. [↑](#footnote-ref-7)
8. Ibid [71]. [↑](#footnote-ref-8)
9. Ibid [70]. [↑](#footnote-ref-9)
10. Ibid [71]. [↑](#footnote-ref-10)
11. Ibid [72]. [↑](#footnote-ref-11)
12. Ibid [73]. [↑](#footnote-ref-12)
13. Ibid [18]. [↑](#footnote-ref-13)
14. Ibid [77]. [↑](#footnote-ref-14)
15. Ibid [78]. [↑](#footnote-ref-15)
16. Ibid [41], [67]. [↑](#footnote-ref-16)
17. *VPS Guardians* (n 2). [↑](#footnote-ref-17)
18. [2018] EWHC 2296 (QB). [↑](#footnote-ref-18)
19. Jed Meers, ‘Khoo do you think you are? Licensees vs Tenants in the Property Guardianship Sector’ (2019) J.H.L, 22(2), 24-27. [↑](#footnote-ref-19)
20. *Camelot* (n 18) [9], [12]. [↑](#footnote-ref-20)
21. *Ludgate* (n 1) [18]. [↑](#footnote-ref-21)
22. Ibid [81]. [↑](#footnote-ref-22)