PGPA
PROPERTY GUARDIAN PROVIDERS ASSOCIATION

The law on property guardianship

A white paper setting out the health, safety and legal status of security through occupation

Giles Peaker, Partner, Anthony Gold Solicitors;

Andrew Arden, QC, Andrew Dymond, Barrister, Arden Chambers

Published by seven UK property guardian providers

Ad-Hoc	**www.adhocproperty.co.uk**
DEX	**www.dexpropertymanagement.co.uk**
Dot Dot Dot	**www.dotdotdotproperty.com**
Guardians of London	**www.guardiansoflondon.com**
Live-in Guardians	**www.liveinguardians.com**
Lowe Guardians	**www.loweguardians.com**
VPS Guardians	**www.vps-guardians.co.uk**

November 2017

Scope of this document

This document sets out the general legal position on Property Guardians and Property Guardian Companies in respect of:

1. Legal status of occupation
2. Summary of rights of assured shorthold tenants
3. Termination of licences
4. Guardian Company obligations in relation to health and safety and property conditions
5. HMO licensing and regulation
6. Criminal record checks and Right to Rent obligations

The document does not address such issues as council tax/business rates, insurance obligations, planning, contractual issues or other company or other commercial law that may apply to Guardian Companies. Its focus is wholly on the obligations raised by occupation of a property by Guardians. The general legal position is stated as of November 2017.

1. Legal Status of Property Guardians and Guardian Companies

1.1 Introduction

The term 'Property Guardian' is not a legal term of art: it has no statutory definition. The name derives from a particular business model, under which a Guardian Company provides on-site security to a property owner (whether a freeholder or leaseholder) for a property which is temporarily vacant by granting rights to people ('Guardians') to live in it.

The property is usually commercial, but Guardian Companies also provide this service in relation to residential accommodation. The property may be vacant for any number of reasons. Common examples are where an owner intends to redevelop the property and is awaiting the grant of planning permission and/or commencement of building works, and

where a commercial property is being marketed for a new tenant or a new tenancy has been granted but the tenant has yet to move in. Accordingly, although the time during which the property may be occupied by Guardians will often be uncertain, their occupation is on an interim basis pending a more permanent use of the property. The presence of the Guardians is intended to deter squatters and vandals and to maintain the condition of the property by ensuring that the owner is notified immediately of any deterioration, *e.g.* leaks or storm damage.

The nature of the relationship between the property owner and the Guardian Company is governed by the terms of the contract between them. It would be possible for the parties to enter into an agency agreement under which the Guardian Company provides the service on behalf of the property owner although this is not done in practice. By far the most common form of agreement is a commercial licence granted by the owner to the Guardian Company, although some Guardian Companies are granted leases (usually for a short term).

The Guardian Company in turn grants rights to the Guardians to reside in the property. Although some Guardian Companies grant tenancies to Guardians, it is much more usual for Guardians to be granted licences to occupy the property. Whether an agreement grants a licence or a tenancy is not determined by the labels that the parties attach to it: *Street v Mountford* [1985] AC 809. The courts look to the substance of the agreement and will not uphold an agreement to be a licence if it is a sham or a pretence: *Street v Mountford*; *Antoniades v Villiers*; *A-G Securities v Vaughan* [1990] AC 417, HL. The distinction between a tenancy and a licence is significant: Guardians who are tenants are assured shorthold tenants under the Housing Act 1988 and have more security of tenure than licensees.

The distinction is not, however, clear-cut or easy to define or describe; ultimately, each case will turn on its own facts, bearing in mind that it is the facts which will be determinative, not what an agreement may claim or state are the facts. This is particularly important as the courts are astute to identify arrangements which are really tenancies, but which have been described as licences, in order to avoid the greater security, bearing especially in mind the difficulty occupiers have finding accommodation and the extent to which they lack bargaining power and are therefore vulnerable.

1.2 Status of Guardian Occupation – Licence or tenancy

In *Street v Mountford*, three hallmarks of a tenancy were identified: exclusive possession, payment and a term (*i.e.* an agreement that the right of occupation will last for a specified term or is to be referable to an ongoing period, *e.g.* weekly or monthly). It was, however, recognised that there may be other, surrounding circumstances which suggest that the relationship is other than tenancy, *e.g.* occupation under a contract for sale, occupation by an employee or occupation by the holder of an office.

In these cases, there will always be a rent, and there will be some kind of period, whether a fixed period agreed at the beginning or a weekly or monthly arrangement. The relevant issues are therefore whether the occupier has exclusive possession and, even if he or she does so, whether the surrounding circumstances suggest that the relationship is not one of tenancy. There is an element to which these criteria interact, *i.e.* although an occupier appears to enjoy exclusive possession, the surrounding circumstances may mean that he or she is not a tenant, which would mean that, however much the occupier enjoys it in practice, he or she does not have it as a matter of law.

1.2.1 Surrounding Circumstances

It is useful to take this first, as if it is clear that surrounding circumstances mean that there will be no tenancy, it will be unnecessary to consider exclusive possession. That does not mean that this is itself an easy discussion, in particular because the business model does involve the Guardian making a payment. Were the Guardian's occupation to be free of charge, it would be highly likely to be considered a licence, even if not an employee or any kind of well-established "office". At the other extreme, if the Guardian is paying a significant sum (even if less than the market rent), and is occupying the whole or most of the property in question, there is no obvious reason why this should not be considered a tenancy, even if the occupation is expected to be relatively temporary (as many tenancies are). If the Guardian is - or the Guardians between them are - occupying a small part of the property in question, at what is a relatively low rent even for that part, then, while the possibility of a finding of tenancy of that part cannot be ruled out, the surrounding circumstances may be such as to suggest that the relationship is primarily referable to the need to protect the premises and the tasks involved in doing so, so that it is not a tenancy.

1.2.2 Exclusive possession and unrestricted access

In practice, the key issue remains whether the occupier has 'exclusive possession'. An occupier has exclusive possession if the agreement conveys the right to use the property to the exclusion of all others including the landlord (or anyone else the landlord claims to try to let in). Exclusive possession is not lost where the landlord retains some right to visit the property, *e.g.* to inspect for disrepair, or whether the tenant is treating the property properly, or even for the purpose of showing it to new tenants. Indeed, the inclusion of an express reservation of a right to enter for limited purposes or at particular times tends to confirm that exclusive possession has been granted (as it would be unnecessary if the occupier did not have exclusive possession): *Street v Mountford*. Where, however, the person who grants the right of occupation retains unrestricted access to the property, exclusive possession will not have been given to the occupier and the agreement will be a licence rather than a tenancy.

Much of the case law on the distinction between a tenant and a licensee has focussed on the situation where the licensor provides services to the occupiers which requires the licensor to have unrestricted access to the property. While the provision of services is not necessarily inconsistent with the grant of a tenancy, where the provision of those services means that the owner (or his employees) need to go into and out of the occupier's rooms at the owner's convenience and without the occupier being there to let the owner in, the owner will have unrestricted access to the property and the agreement will be a licence: *Crancour Ltd v Da Silvaesa* (1986) 18 HLR 265, CA. A relatively low level of attendance or service has been held sufficient to negate a grant of exclusive possession: see *Huwlyer v Ruddy* (1995) 28 HLR 550, in which the Court of Appeal held that an agreement was a licence where the services consisted of room cleaning and a change of bed linen on a weekly basis, which took about 20 minutes each week. Access for the provision of services is unlikely to be significant in the context of Property Guardians, as it would be most unusual for a Guardian Company to provide such services.

1.2.3 Sharing agreements – non-exclusive occupation

In addition, where there is a number of occupiers, they may be licensees because they occupy under "non-exclusive occupation agreements". Under such an arrangment, the owner enters into a serious of separate contracts with each occupier, granting to each the right to use the property in common with others, but not to use a particular part of the

property. If genuine, such agreements avoid the possibility of any occupier asserting that he or she has a tenancy of part of premises and also prevents the occupiers as a group from asserting that they have a joint tenancy of the whole property: *Antoniades v Villiers*; *A-G Securities v Vaughan* [1990] AC 417, HL.

The courts scrutinise such agreements with care to determine whether they are genuine. All the circumstances are relevant, including the relationship between the occupiers before they approached the landlord, the negotiations that led to the agreement and, in so far as the agreements may not reflect the true nature of the arrangement, the way in which the property is occupied once the occupiers have moved in. If the reality is that the occupiers are to use the property as a home together, paying a rent for it, then the arrangement will be construed as a (joint) tenancy, irrespective of the label given to the agreement.

In the context of Property Guardians, there may well be occasions where non-exclusive occupation agreements will be held to be genuine. Accordingly, if a number of Guardians who do not know each other are granted individual agreements giving each a right to occupy the property as a whole, without allocating a particular room to each of them, and requiring them to share the property with other Guardians, it is highly likely that the Guardians would be licensees.

1.2.4 Right to move occupier from room to room

An agreement which entitles the owner to require the occupier of a room in a property to move to another room in it at any time is inconsistent with a grant of exclusive possession: *Westminster CC v Clarke* [1992] 2 AC 288, HL. It is important to note, however, that the right must be a genuine right, in the sense that it serves some purpose and may on occasion actually be implemented.

In *Clarke*, a local authority provided a homeless person with accommodation in a room in a hostel but his agreement made it clear that he could be moved to another room at any time. It was held that a grant of exclusive possession would have been inconsistent with the purposes for which the authority provided the accommodation, given the importance to the Council of being able to move residents from one room to another. Although the House of Lords acknowledged that the case was highly unusual, a genuine

right to move a Guardian from one part of a property to another would mean that a licence rather than a tenancy had been granted. For example, the owner may wish to redevelop the property by working around the Guardian, moving him or her from room to room as and when parts of redevelopment, refurbishment or redecoration are completed.

1.2.5 Different types of property

In the majority of cases, it will be clear that the Guardian does not have exclusive possession because the property owner retains an unrestricted right of access to a property occupied by Guardians, as he, and his employees and professional advisers, will need to be able to enter the property at their convenience, without the permission or assistance of the Guardians.

Although there is an unlimited range of types of property which may be occupied by Guardians, consideration of the following broad categories of property may assist in illustrating how the courts may approach the issue of whether a tenancy or a licence has been granted.

- Commercial property (whether constructed or converted into commercial property or used as such in accordance with planning permission)
- Large residential accommodation designed for occupation by numerous occupiers, *e.g.* a mansion block of self-contained flats or a former hostel, where the number of Guardians is well below what might be described as the normal number
- A single unit of accommodation or house comprising a very small number of flats.

In the case of commercial property, it is highly likely that an agreement with a Guardian will be considered to be a licence. The primary use of the property remains commercial and the rights of the Guardians to occupy it to provide on-site security are ancillary to that primary use. Where the property is to be redeveloped, the owner needs unrestricted access for a wide range of professionals pending the works, *e.g.* surveyors, structural engineers, planning consultants or building contractors tendering for the construction contract. Access may also be required for building contractors to carry out works to parts of the property while the Guardians remain in occupation. Where the property is on the

market for a new commercial tenant, the owner's estate agent will need unrestricted access to show round prospective tenants, who will also wish to have access for their own professionals, *e.g.* to survey the property's condition. Likewise, even if not fully redeveloping, the owner may need to carry out works to parts of property to deal with dilapidations caused by the former tenant. If the property is vacant because a new commercial tenant has yet to move in, it will wish to have access to decide how rooms are to be allocated to employees or to carry out works, *e.g.* installing partitioning in office accommodation or cabling.

In the case of large residential accommodation, the position is somewhat harder to address. Where redevelopment of the property is intended, considerations similar to those arising in relation to commercial accommodation will apply: the owner will again require unrestricted access for professionals and builders. In contrast, where there are no imminent plans for the building and no other genuine need for the owner to have unrestricted access, a court may be expected to scrutinise the arrangement carefully to see whether it is one under which a rent for occupation (by the Guardian) is being secured pending a longer-term, even higher paying, arrangement. It is here that the number of occupiers may well be critical: if only part of the building is being occupied by Guardians, the surrounding circumstances may suggest that no tenancy was intended, even of that part. It is possible to put the point, either as one of surrounding circumstances, or as one of access: if only a part of the building is in use by the Guardians, it is that much easier to see that unrestricted access to the property has truly been reserved. Nonetheless, the possibility of tenancy of part, *e.g.* a single flat, cannot be ruled out: see below, the ***Camelot*** decision.

In the case of a single unit of residential accommodation, or a small residential property with only a few residential units, a court is likely to be more reluctant to find that the Guardian is a licensee. Much depends on the particular circumstances. Again, if redevelopment is imminent, there may be very good reasons for the owner to have unrestricted access to the property but otherwise there is a real risk that the court will consider that the Guardian is paying a rent, for exclusive possession, and that there is no reason why he or she or she should not be considered a tenant. Without notice access by the owner or Guardian Company, or provision of services to the occupier (cleaning, providing and laundering bedding) would be indicators that the occupant was not a

tenant, but not decisive. Provision of services would be the stronger indicator that the occupation was not under a tenancy.

1.2.6 Service accommodation

In some cases, Guardians may be let into accommodation normally used to house an employee whose employment contract requires him or her to live in it, but which is temporarily vacant pending the appointment of a new employee. In some cases, the property which the employee services will itself be empty, in which case it is highly likely to be treated the same as the commercial or large residential categories in the last heading; if the property is still in use, however, it is very difficult to see how it is necessary for there to be a Guardian or why it should be let out at a rent although there may be surrounding circumstances which justify a finding of licence.

1.2.7 Status of Guardian Company

The fact that the Guardian Company may not itself have a tenancy but instead only has a licence does not prevent it from granting tenancies to occupiers: *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, HL.

1.2.8 *Camelot Property Management Ltd and Camelot Guardian Management Ltd v Greg Roynon*

The higher courts have yet to consider the status of Guardians. There is, however, a county court decision involving a Guardian: (*1) Camelot Property Management Ltd, (2) Camelot Guardian Management Ltd v Greg Roynon*, County Court at Bristol, 24 February 2017. As the decision is a county court decision, it is not an authority which is binding on any other court. Indeed, it could not be as whether any agreement is a tenancy or a licence is necessarily dependent on the facts of each case. Nevertheless, as the occupier was found to have a tenancy, the case illustrates the current uncertainty of this area of the law. The key findings of the the court in that case were as follows.

- Mr Roynon had been offered and accepted specific rooms by Camelot in accommodation which had formerly been used by the local authority as a residential care home for the elderly.

- Mr Roynon had keys to those rooms and could lock them.
- Camelot controlled assignment of rooms, not the Guardian occupiers.
- The agreement did not contain a power for Camelot to move Mr Roynon.
- The absence of an express reserved right to enter for inspection or repair was not fatal to the agreement being a tenancy. It did not follow from the absence of an express reservation that a licence has been created.
- Although Camelot had entered to inspect on a monthly basis, this was not incompatible with exclusive possession. Inspection had been a viewing from the doorway.
- The agreement contained restrictions on the use of the room – no more than 2 guests at any one time – but it was not uncommon for tenancy agreements to contain restrictions on use.

No appeal was pursued. There is an argument that the decision was wrong, as there was no finding that terms of the agreement which were incompatible with exclusive possession were a pretence, or a sham. Nor is it clear what the surrounding facts were. In particular, it is not known what the owner's intentions for the property were, *e.g.* whether redevelopment of the property was planned, and whether there were any genuine reasons why the owner needed unrestricted access to the property.

2. Rights of assured shorthold tenants

As the majority of Guardians are most likely to be licensees, this document does not consider the rights of tenants at any length but instead focuses on the obligations of Guardian Companies to Guardians who are licensees. A full treatment of the law of residential landlord and tenant is plainly not practicable in the context of this document. Nonetheless, the sections of this document dealing with Health and Safety, HMO licensing and regulation, Criminal Record checks and Right to Rent are relevant to both tenants and licensees.

Where a Guardian Company grants a tenancy, it will be an assured shorthold tenancy under the Housing Act 1988. The following a summary of the key rights accorded to such tenants which are not accorded to licensees.

2.1 Repairs

Although a tenancy agreement will usually set out the landlord's repairing obligations, section 11 Landlord and Tenant Act 1985 imposes certain repairing obligations on the landlord. In general terms, section 11 requires the landlord

- to keep in repair the structure and exterior of the dwelling (including drains, gutters and external pipes),

- to keep in repair and proper working order the installations in the dwelling for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and applicants for making use of the supply of water, gas or electricity, and

- to keep in repair and proper working order the installations in the dwelling for space heating and heating water.

The dwelling may be part only of a property; in some circumstances, duties may extend to the building of which a dwelling is part.

Although *prima facie* where a landlord covenants to keep property in repair, there is a breach of the obligation immediately a defect occurs so that the landlord will be liable for any damage caused by it (*British Telecommunications PLC v Sun Life Assurance Society PLC* [1996] Ch 69, CA, *Passley v Wandsworth LBC* (1996) 30 HLR 165, CA), where the disrepair arises within the demised premises, the landlord's obligation to repair only arises once he or she has had notice of it: *O'Brien v Robinson* [1973] AC 912, HL; *McGreal v Wake* (1984) 13 HLR 107, CA. If the repair needed is to the building rather than the dwelling, notice may not be needed.

Where the landlord is in breach of his repairing obligation, the tenant will be entitled to seek an injunction requiring the landlord to carry out the repairs and may be entitled to special damages, *e.g.* for damages to the tenant's possessions, and general damages for the discomfort and inconvenience caused by the disrepair.

In addition, the landlord is under a duty to take such care as is reasonable in all the circumstances to all persons who are likely to be affected by defects in the premises to ensure that they are reasonably safe from personal injury or from damage to property caused by a failure to comply with his repairing obligations: section 4(1) Defective Premises Act 1972. In contrast with the position under section 11 Landlord and Tenant Act 1985, under section 4 of the 1972 Act it is not necessary for the landlord to have notice of the defect: it is sufficient if he or she ought to have known of it.

2.2 Deposits

If an assured shorthold tenant pays a deposit, the landlord must protect it under an approved tenancy deposit scheme in accordance with sections 212 to 215C Housing Act 2004. Failure to do so prevents the landlord from serving a notice requiring possession under section 21 Housing Act 1988 (see termination of occupation, below). Further, the tenant can apply to court for an order requiring the landlord to pay him or her a sum of money which is not less than the amount of the deposit together with a sum which is not more than three times the amount of the deposit.

2.3 Quiet enjoyment

Under common law, the tenant has a right to 'quiet enjoyment' of his property. This means that the tenant has a right to remain in possession undisturbed. Acts of threatened eviction or harassment by a landlord may breach this right as may any conduct by a landlord which interferes with the tenant's freedom of action in exercising rights as a tenant.

2.4 Termination of assured shorthold tenancy

A landlord may bring an assured shorthold tenancy to an end by serving a notice requiring possession under section 21 Housing Act 1988. At least two months' notice must be given. If the tenancy was granted on or after 1 October 2015, a prescribed form must be used (Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015). In addition, the notice must not be given within four months of the commencement of the tenancy.

In a number of circumstances, the landlord cannot give notice under section 21.

- Where the tenancy is of an HMO or other dwelling which has not been licensed in accordance with the Housing Act 2004 (see below).

- Where the tenant has paid the landlord a deposit and he or she has failed to deal with it in accordance with a tenancy deposit scheme (see tenancy deposits, above).

- Where the landlord is in breach of a 'prescribed requirement'. The prescribed requirements currently only apply to tenancies granted on or after 1 October 2015, and are that the landlord must provide the tenant free of charge with an energy performance certificate for the dwelling (under Energy Performance of Buildings (England and Wales) Regulations 2012) and a gas safety certificate (see Gas Safety, below). The obligation to provide this information currently only relates to tenancies granted on or after 1 October 2015, but, from 1 October 2018, will apply to all assured shorthold tenancies in England whenever they were granted.

- Where the landlord has failed to give the tenant prescribed information about the rights and responsibilities of a landlord and a tenant under an assured shorthold tenancy, contained in *How to rent; the checklist for renting in England*, published by the DCLG. The obligation to provide this information currently only relates to tenancies granted on or after 1 October 2015, but from 1 October 2018, it will apply to all assured shorthold tenancies in England whenever they were granted.

- Where the provisions in the Deregulation Act 2015 relating to 'retaliatory eviction' apply. In general terms, this prevents a landlord from serving a notice requiring possession where the local housing authority has served him or her with an improvement notice or a notice of remedial action under the Housing Act 2004 (see Housing Health and Safety Rating System, below).

If the landlord is prevented by any of these provisions from serving a notice requiring possession, he or she may still obtain a possession order under one of the grounds for

possession contained in Schedule 2 to the Housing Act 1988. Consideration of these grounds is outside the scope of this document, but it is to be noted that they include rent arrears, breach of a term of the tenancy agreement and anti-social behaviour by the tenant.

3. Termination of licence

In contrast, the only statutory protection of the licensee's rights is the Protection from Eviction Act 1977. This requires notice ending the right to occupy of at least 28 days, in writing and with certain required formalities. If the licensee does not leave, he or she cannot be evicted without a possession order being made by the court and a warrant and bailiff's appointment obtained.

If notice is served correctly and with the statutory requirements, a Guardian who is a licensee has no defence to a possession claim.

The formalities of the notice to quit are given in The Notices to Quit etc. (Prescribed Information) Regulations 1988. The notice must contain the following text:

> 1. *If the tenant or licensee does not leave the dwelling, the landlord or licensor must get an order for possession from the court before the tenant or licensee can lawfully be evicted. The landlord or licensor cannot apply for such an order before the notice to quit or notice to determine has run out.*
>
> 2. *A tenant or licensee who does not know if he or she has any right to remain in possession after a notice to quit or a notice to determine runs out can obtain advice from a solicitor. Help with all or part of the cost of legal advice and assistance may be available under the Legal Aid Scheme. They should also be able to obtain information from a Citizens' Advice Bureau, a Housing Aid Centre or a rent officer.*

The remainder of the licensee's rights are those contained within the licence agreement as a contract or any that are necessarily implied by the circumstances, *e.g.* use of

essential facilities if not within the Guardian's part of the property, access, to keep the building itself structurally safe and sound.

4. **Health and Safety**

There are several different overlapping regulatory regimes and statutory requirements which apply minimum health and safety standards to property guardianship. Slightly different regulatory requirements will apply depending on the occupancy status of the Guardians, the type of building they occupy and the identity of the landlord. However, the vast majority of health and safety requirements apply to licences in precisely the same way that they apply to tenancies.

Some regulations require a specific action to be performed by the person who owns or manages a property. Other regulations focus on the outcomes which property managers need to achieve.

This section of the document addresses key aspects of the obligations placed on Guardian Companies, and how civil remedies can arise out of poor health and safety practices, additional to those considered above.

4.1 Section 5 Occupiers Liability Act 1957.

An occupier of premises owes a duty to take such care as is reasonable in all the circumstances of the case to see that a visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there: section 2 Occupiers' Liability Act 1957. For a person to be an 'occupier' of premises, he or she must have a sufficient degree of control over the premises to put them under a duty of care to visitors: *Wheat v Lacon & Co. Ltd* [1966] AC 552, HL. Where an owner has let the premises to a tenant, the tenant is the occupier but where the owner has granted a licence to someone, the owner remains the occupier for the purposes of the 1957 Act. Accordingly, a Guardian Company owes the duty of care to a Guardian who is a licensee; it also owes the duty of care to a Guardian who is a tenant, in respect of that part of the building that has not been let.

A Guardian Company would be liable for any injury caused by a danger that was known or ought to have been known to be present in the premises.

4.2 Housing Health and Safety Rating System

Since 6 April 2006 the Housing Health and Safety Rating System ("HHSRS") has been the primary legal framework for the enforcement of housing standards. The HHSRS is a framework for risk based analysis and enforcement in all residential property – it applies to buildings or parts of a building which are occupied or intended to be occupied as dwellings (whether under a tenancy or a licence).

The provisions of the HHSRS are enforced by local authorities, acting through their environmental health departments.

There are 29 different hazards recognised by the HHSRS. These are classified under four separate groups.

A Physiological Requirements
Hydrothermal Conditions
1 Damp and mould growth
2 Excess cold
3 Excess heat

Pollutants (non-microbial)
4 Asbestos (and MMF)
5 Biocides
6 Carbon Monoxide and fuel combustion products
7 Lead
8 Radiation
9 Uncombusted fuel gas
10 Volatile Organic Compounds

B Psychological requirements
Space, Security, Light and Noise
11 Crowding and space
12 Entry by intruders
13 Lighting
14 Noise

C Protection against Infection

Hygiene, Sanitation and Water Supply

15 Domestic hygiene, Pests and Refuse

16 Food safety

17 Personal hygiene, Sanitation and Drainage

18 Water supply

D Protection against Accidents

Falls

19 Falls associated with baths etc

20 Falling on level surfaces etc

21 Falling on stairs etc

22 Falling between levels

Electric Shocks, Fires, Burns and Scalds

23 Electrical hazards

24 Fire

25 Flames, hot surfaces etc

Collisions, Cuts and Strains

26 Collision and entrapment

27 Explosions

28 Position and operability of amenities etc

29 Structural collapse and falling elements

4.2.1 Application of the HHSRS

The nature of the property guardian business creates specific challenges for complying with the HHSRS. For example, a Guardian Company will need to consider how to avoid excessive cold and how to provide suitable hygiene facilities. As considered below, in assessing whether there is a hazard, it is not relevant under the HHSRS that a property was designed as a commercial property, or that the occupiers are not paying very much for their accommodation, or that it is only a temporary arrangement for them. These

factors are, however, relevant to the enforcement action which an authority may decide to take.

4.2.2 Assessments under HHSRS

Environmental Health Officers (EHOs) make assessments under the HHSRS. In carrying out the assessment, they are required to consider the risk to health which may be caused to a hypothetical occupier. The attributes of the hypothetical occupier vary depending on the hazard concerned but, in general terms, the EHO must consider occupiers who are believed to be at greatest risk from the hazard (*e.g.* because of old age).

EHOs are required to consider what hazards are present in a property, and then to go on to assess both what is the likelihood of an "occurrence" resulting from that hazard and then the severity of harm that might result from that occurrence. These assessments are numeric and are multiplied to generate a 'hazard score'.

A hazard score is calculated for each potential hazard. A high hazard score could signify a low but real risk of a catastrophic injury occurring, or a higher likelihood of a moderate injury occurring.

Where the 'hazard score' is above a specific level, there is a 'category 1 hazard'. Where there is a hazard present, but the score does not reach the specified level, this is a 'category 2 hazard'.

4.2.3 Enforcement under the HHSRS

If local authorities become aware of a category 1 hazard, they are obliged to take enforcement action; there is a discretion about whether to take any further action in regard to category 2 hazards.

The possible enforcement action that can be taken include hazard awareness notices, improvement notices, prohibition order and emergency remedial action.

A hazard awareness notice does not require the owner of the property to do anything and is merely a warning of the existence of a hazard.

An improvement notice sets out a schedule of works that must be carried out to the property within a set time period. Failure to comply with an improvement notice without a reasonable excuse is a criminal offence.

An authority may suspend the effect of an improvement notice or a prohibition order for a period of time or until the happening of a specified event.

Prohibition orders are a more severe sanction as they prohibit the use of the property or a part of it for specified purposes. Where it is necessary to take urgent action in respect of a category 1 hazard, a local authority may also use an emergency prohibition order. Failure without reasonable excuse to comply with a prohibition order is a criminal offence.

Emergency remedial action allows local authorities to take urgent action themselves in serious cases where there is a risk to the health of the occupiers.

An authority may suspend the effect of an improvement notice or a prohibition order for a period of time or until the happening of a specified event.

As noted above, in assessing the hazard an EHO must consider the position of a hypothetical occupier, who will usually be much more vulnerable to the effect of a hazard than a Property Guardian. In deciding what action to take, the EHO considers the position of the actual occupier, *i.e.* the Property Guardian's age and health and own views about the property and the length of his proposed occupation of it. Accordingly, even if the hazard is category 1, the authority may consider that immediate action is not required. For example, a steep staircase may mean that there is a significant risk of an elderly occupier suffering a serious fall but the authority may consider that a young and fit person is unlikely to find the staircase problematic so that only a hazard awareness notice is required. Similarly, where an improvement notice is the appropriate course of action to address a hazard, if it is clear that the Guardian is only going to be in occupation for a short period of time before the property is completely redeveloped, the authority might consider suspending the notice.

That said, there is clearly a basic standard of accommodation which is required even if the Guardian's occupation is for a very short time. If an authority consider that it is wholly unsuitable for a person to be sleeping in a building, *e.g.* a warehouse or open-plan office, or if there are no facilities for cooking or personal hygiene, an authority will almost certainly take enforcement action.

A person against whom any enforcement action is taken has a right of appeal against it to the First-tier Tribunal (Property Chamber).

4.3 Gas Safety

4.3.1 HHSRS

Exposure to carbon monoxide and fuel combustion products is a hazard under the HHSRS and any such hazard caused by a gas appliance or installation can be dealt with by the local authority using their enforcement powers under Housing Act 2004.

4.3.2 Gas Safety Regulations

The Gas Safety (Installation and Use) Regulations 1998 uses landlord and tenant terminology but places the same duties on landlords and licensors.

The regulations require the landlord to ensure that gas appliances, pipework and installations are checked annually to ensure that they are safe. The testing can only be carried out by a Gas Safe registered installer and it is the responsibility of the property Guardian Company to check this.

When a fault is found in any gas appliance, the installer must inform both landlord and tenant. Remedial action should be taken. If the appliance is dangerous the engineer should disconnect the appliance and put a sticker on it showing it has been condemned. Guardians should be informed that, if a fault with the appliance is reported by a contractor directly to the occupiers, or the occupier believes there is a leak or fault with an appliance, it is the occupier's responsibility to inform the Guardian Company immediately.

Guardian Companies should maintain a record of when each gas appliance was checked, the defects found and the remedial action taken. The records for the last 2 years should be available for inspection upon request, usually by the trading standards officer or the environmental health department.

A copy of the safety certificate must be given to the occupiers within 28 days of the start of the tenancy/licence. If no safety certificate is provided or does not exist, then the landlord commits a criminal offence. If the occupier is an assured shorthold tenant, it will also not be possible to serve a valid section 21 notice if no gas safety certificate has been given (see Termination of Assured Shorhold Tenancies, above).

4.3.3 HMO Regulations

If the property is an HMO, the Management of House in Multiple Occupation (England) Regulations 2006 require the person managing the HMO to supply the latest gas appliance test certificate it has received in relation to the testing of any gas appliance to the local authority within 7 days of receiving a request to do so. Failure to do so without a reasonable excuse is a criminal offence. It is therefore essential to keep good records in addition to carrying out the tests.

4.4 Electrical Safety

4.4.1 HHSRS

Electrical Hazards are covered by the HHSRS and any electrical hazard can be dealt with by the local authority using their enforcement powers under Housing Act 2004.

4.4.2 HMOs

If the property is an HMO, the Management of Houses in Multiple Occupation (England) Regulations 2006 impose a duty to obtain an electrical installation inspection report and certificate every five years.

4.4.3 Electrical Safety Regulations

Once sections 122 and 123 Housing and Planning Act 2016 are in force, the Secretary of State will have power to make regulations imposing duties on landlords and licensors of residential accommodation to ensure that electrical safety standards are met. Local authorities will primarily be responsible for enforcing these duties, but the regulations may also provide for terms to be implied into a tenancy or licence agreements to enable enforcement by the tenant or licensee.

4.5 Fire Safety

4.5.1 HHSRS

Exposure to uncontrolled fire is a hazard under the HHSRS. Any fire hazard can be dealt with by the local authority using their enforcement powers under Housing Act 2004.

4.5.2 HMO Management Regulations

If a property is an HMO, The Management of Houses in Multiple Occupation (England) Regulations 2006 require the manager of the HMO to ensure that all means of escape from fire in the HMO are kept free from obstruction and maintained in good order and repair. The manager must also take all such measures as are reasonably required to protect the occupiers of the HMO from injury, having regard to the design of the HMO, the structural conditions in the HMO and the number of occupiers.

The Regulations also impose duties on the manager of the HMO to ensure that any fire-fighting equipment and fire alarms are maintained in good working order.

Managers of HMOs must ensure that all notices indicating the location of means of escape from fire are displayed in a position that enable them to be clearly visible to the occupiers.

4.5.3 Smoke and Carbon Monoxide alarms

The Smoke and Carbon Monoxide Alarm (England) Regulations 2015 impose a duty on landlords and licensors to ensure that smoke and carbon monoxide alarms are fitted in

properties let by them. The duty applies where a person grants a tenancy or licence to a person to occupy the property as his only of main residence. Even if Guardians are, *e.g.*, students or otherwise relatively transient, they are more likely than not to be considered to be occupying as an only or main residence.

The duty does not apply to an HMO licenced under the Housing Act 2004 (see below). This is because the mandatory conditions attached to such a licence require the licence-holder to ensure that smoke and carbon alarms are installed in licensed properties. The landlord/licensor must ensure that there is a smoke alarm on each storey of the property on which there is a room used wholly or partly as living accommodation. Living accommodation includes a bathroom or lavatory. The landlord must also ensure that there is a carbon monoxide alarm in any room used as living accommodation which contains a solid fuel burning combustion appliance. The Regulations are enforced by local authorities.

4.5.4 Fire Safety Order

The Regulatory Reform (Fire Safety) Order 2005 is primarily concerned with fire safety in the workplace but extends to a wide range of other premises. Although the Order does not apply to 'domestic premises', these are defined so as only to include premises occupied as a private dwelling, including any garden, yard, garage, outhouse, or other appurtenance of such premises which is *not* used in common by the occupants of more than one such dwelling. Accordingly, the Fire Safety Order applies to the common parts of a block of flats or the shared parts of any HMO which *are* so used. In some cases, therefore, the Fire Safety Order will apply.

In others cases, it may be less clear, *e.g.* where there is only one dwelling in the building, which is occupied by a number of Guardians, so that there is no apparent use by the occupiers of other dwellings, the Guardian Company (or its principal) will nonetheless be in possession of other dwellings (if any), and as such may be considered to be in occupation of them so that, in turn, they are using the common parts in common with the Guardians, *e.g.* when showing round potential new occupiers.

Caution therefore suggests compliance in all cases, not least because it is not impossible (bearing the nature of the relationship in mind) that a Guardian Company could be considered to owe a common law duty of care to very similar effect in all the circumstances.

The duties under the Order are imposed on the 'responsible person' defined in such a way that, where the Order applies, the duties are imposed on the Guardian Company.

Key issues are summarised below, but all Guardian Companies should have regard to the Home Office document: "Fire safety risk assessment: sleeping accommodation" which gives detailed guidance on the Fire Safety Order.

4.5.4.1 General duty

Under the Fire Safety Order, the responsible person owes a duty to any 'relevant person' to take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe. Relevant person is defined as anyone who may be lawfully on the premises.

4.5.4.2 Risk assessment and other duties

The Fire Safety Order also requires the responsible person to undertake an assessment of the risks to which relevant persons are exposed in order to identify the general fire precautions he or she needs to take to comply with the requirements of the Order.

There is a duty on the responsible person to ensure that, where necessary, the property is, to the extent that is appropriate, equipped with fire-fighting equipment, fire detectors and alarms, and that any equipment provided is easily accessible, simple to use and indicated by signs. There must be a suitable system of maintenance for maintaining any fire-fighting equipment.

The responsible person must also ensure that routes to emergency exits from the property and the exits themselves are kept clear at all times.

The Order also imposes a duty on the responsible person to implement appropriate safety procedures to be followed in the event of imminent danger. While the Order does not specify the extent of suitable training for building types, buildings occupied by Guardians are often may be complex in layout. It is probably appropriate to ensure that every Guardian has a basic training course on what to do in the event of fire and how to use fire-fighting equipment to comply with the expectations of the Order. On their arrival at the property, Guardians should actually be shown the exit routes and be given a briefing on the fire plan and who is responsible in the event of fire.

4.5.3 Physical Protection

Physical protection from fire is largely achieved through proper building standards and the installation of effective fire doors. If any significant works are carried out, these works will need to comply with Part B of the Building Regulations 2010. Where a building is not at this standard, this is something which will affect the fire risk assessment and additional precautions may be needed.

4.5.4 Furniture

If any upholstered furniture is provided it must comply with the Furniture and Furnishings (Fire) (Safety) Regulations 1988. All furniture in the property must have a permanent label clearly stating that it passes the ignitability test (which means are resistant to ignitability if a lighted match or cigarette is placed on them). Beds and mattresses do not require these labels but are fire resistant if they comply with the Standard BS 7177 which will usually be shown on the mattress label.

Failing to comply with these Regulations is a criminal offence punishable by up to 6 months' imprisonment and an unlimited fine. A Guardian may also be able to make a personal injury claim for damages if a fire is caused by a breach of these regulations.

4.6 Other Environmental Health considerations

4.6.1 Legionella

Legionella can develop in stagnant hot or cold water systems. If water droplets containing with legionella bacteria are inhaled, this can cause legionnaires' disease.

Property Guardian Companies have duties in relation to managing the risks of legionella arise from the application of the Health and Safety at Work etc Act 1974 and the Control of Substances Hazardous to Health Regulations 2002. Landlords and licensors are required to assess the risk of exposure to legionella in their properties but that does not always mean that a detailed assessment is necessary.

The HSE have issued guidance - *Legionella and landlords' responsibilities* – which states that 'legionella test certificates' are not mandatory and there is no specified frequency of risk assessments that is required. However, it would be good practice to record the findings of any risk assessment and to review the assessment periodically.

If a Guardian Company is confident that there are no risk factors present and there is no significant risk posed by legionella, no further risk assessment will be required. Some risk factors which would indicate that a more detailed assessment is needed to include the presence of stored water tanks and or 'dead legs' in the pipe system.

4.6.2 Asbestos

Asbestos might be present in properties occupied by Guardians. Removal of such asbestos is likely to result in an increase in airborne fibre levels, and so existing asbestos can be managed. Asbestos itself is not forbidden but it must be in a safe condition.

If asbestos is present but it is in good condition and not damaged and it is not likely to be worked on or disturbed, then there is probably not a significant risk to Guardians.

Effective management of asbestos materials involves identifying the location and condition of asbestos ensuring it is effectively sealed, made inaccessible, labelled, and its location recorded.

Asbestos can be a hazard under the HHSRS and if Guardians subsequently suffer any injuries they might have a civil claim under the Occupiers Liability Act 1957.

4.6.3 Physical safety

4.6.3.1 HHSRS

A local authority may take action in relation to a tripping or falling hazard under the HHSRS.

4.6.3.2 HMO Management Regulations

If the property is an HMO, the HMO Management Regulations impose a duty on the person managing the HMO to maintain all common parts of the HMO in safe and working condition and to keep then them reasonably clear from obstruction. Beyond this, the common parts of the HMO must be kept in good and clean decorative repair.

"Common parts" has an extensive definition and includes entrance doors, stairways corridors used by occupants to access their own personal units of living accommodation. A potential issue for Guardian Companies is that common parts includes "any other part of an HMO the use of which is shared by two or more households living in the HMO, with the knowledge of the landlord". This could encompass parts of a building which the company did not intend the Guardians to make use of but which it knows they do. The regulations specify that handrails and bannisters should be provided where necessary, and all stair coverings, banisters and handrails, windows and other means of ventilation in the commons parts are kept in good repair.

Breach of the Management Regulations without reasonable excuse is a criminal offence. In order to avoid committing this offence, regular inspections of the common areas will be essential. Records must be kept to prove that this was done and that no problems were detected. If Guardians are causing obstructions (such as leaving bicycles in a hallway) action must be taken and records kept, or the Guardian Company will not have a 'reasonable excuse defence'.

5. HMO licensing, selective licensing and HMO Management Regulations

5.1 Introduction

Houses in multiple occupation (HMOs) and licensing of other residential property are regulated by the Housing Act 2004.

HMO definitions and licensing requirements apply to all residential occupiers and therefore it is irrelevant whether the Guardian occupies a property under a licence or a tenancy. HMO definitions and licensing requirements also apply to all properties that are residentially occupied, regardless of their previous use, so would include commercial properties when residentially occupied by Guardians.

When considering the possibility of HMO requirements applying, it is essential to:

- identify whether the property or part of a property is a HMO;
- determine whether the HMO requires a licence.

It is important to be aware that HMO has a different definition in the context of planning and council tax. The information set out below relates to licensing.

To assist the reader, terms in italics are defined in further detail in this document.

5.2 HMOs

5.2.1 HMOs - Overview

The Housing Act 2004 sets out five tests for determining whether a building or part of a building is a HMO.
These are:

1. The *standard test* under s254 Housing Act 2004
2. The *self-contained flat test* under s254 Housing Act 2004
3. The *converted building test* under s254 Housing Act 2004
4. Buildings subject to an *HMO declaration* under s255 Housing Act 2004
5. The *converted block of flats test* under s257 Housing Act 2004

If the building or part of a building does not fall within any of the above tests it will not be a HMO.

If the building or part of a building does fall within one of the above tests, it is then necessary to check whether it falls within any of the HMO exclusions contained in Schedule 14 of the Housing Act 2004. If it does so, then it will not be an HMO.

It is important to be aware that both a part of a building such as a flat may be an HMO and the entire building may also be a HMO under a different definition. Therefore, when assessing whether a property is a HMO it is important to identify any self-contained flats first. The HMO tests above should be applied to the individual self-contained flats and then to the building as a whole.

Not all HMOs need to be licensed. Once it is established that the property is a HMO, the next step is to check to whether it falls within any of the licensing schemes. HMO licensing falls within two categories:

1. *Mandatory licensing* for all larger HMOs, which are considered to present the greatest risks to health and safety; and
2. *Additional licensing* for other HMOs which is governed covered by local licensing schemes.

Some local authorities also require non-HMO accommodation to be licensed under *selective licensing* schemes.

Landlords or managers of all HMOs, regardless of whether or not they require a licence, need to comply with the HMO Management Regulations.

5.2.2 HMO Tests

5.2.2.1 Standard Test

The *standard test* under s254 Housing Act 2004 is the key test for determining whether a property is a HMO. The other tests are variants of this test, so it is important to understand its detail. The test states:

A building or part of a building meets the standard test if:

a) It consists of one or more units of living accommodation not consisting of a *self-contained flat* or flats;

b) The living accommodation is occupied by persons who do not form a single *household*;

c) The living accommodation is occupied by those persons as their *only or main residence* or they are treated as so occupying it;

d) Their occupation of the living accommodation constitutes the *only use* of that accommodation;

e) Rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

f) Two or more of the *households* who occupy the living accommodation share one or more *basic amenities* or the living accommodation is lacking in one or more basic amenities.

Most guardian HMO properties will be HMOs under the *standard test.*

5.2.2.2 The Self-Contained Flat Test

The *self-contained flat test* applies if the property is a self-contained flat and paragraphs (b)-(f) of the above test apply with references to living accommodation being read as references to the flat.

5.2.2.3 Converted-Building Test

The *converted-building test* is designed to catch converted buildings that contain a mixture of self-contained flats and living accommodation with shared facilities which is not self-contained. The converted-building test is very similar to the standard test incorporating paragraphs (b)-(e) above. However, there is no requirement that households share one or more basic amenity (paragraph (f)).

5.2.2.4 Important Definitions

In order to apply the above tests, it is crucial to have an understanding of other important definitions in the Act. A summary of the most important terms is set out below.

- *Basic amenities*: means a toilet, personal washing facilities or cooking facilities.
- *Household*: The definition centres around families and co-habiting couples.

Therefore, a single household would include a couple and those related as parents, siblings, children, uncles, aunts, nephews, nieces, grandparents, grandchildren or cousins. Half, step and foster relationships count as full relationships.

- *Only or main residence*: The Act treats certain people as always occupying as their only or main residence. In most cases, Guardians will be occupying the property as their only or main residence. (Certain occupiers are deemed to be occupying property as their only or main residence. They are: students occupying for the purpose of undertaking a full-time course of further or higher education and those occupying accommodation as a refuge. While the latter is unlikely to be relevant, the former may well be).
- *Only use*: also known as the 'sole use' condition. There is a presumption that the sole use condition is met unless the contrary is shown.
- *Self-contained flat*: means a separate set of premises, whether or not on the same floor, which forms part of a building; either the whole or a material part of which lies above or below some other part of the building; and in which all three *basic amenities* are available for exclusive use of its occupants.

5.2.2.5 HMO Declarations

The Housing Act 2004 also allows a local authority to declare that a property or part of it is an HMO even where the 'sole use' condition is not satisfied. A local authority may do this by making an *HMO declaration*. The subject property still needs to satisfy the other conditions of either the '*standard,' 'self-contained flat,'* or *'converted-building*' test and the local authority must be satisfied that HMO use is a 'significant use' of the property. HMO declarations are unlikely to be relevant to Property Guardianship as the Guardians will usually all be occupying the property as their only or main residence. The purpose of HMO declarations is to address properties where the fluctuating nature of the occupants may mean that the property moves in and out of one of the three tests, *e.g*. a hotel which from time to time provides interim accommodation to homeless persons.

5.2.2.6 Converted Block of Flats Test - 'S257' HMOs

There is a further completely distinct test for HMOs contained at s257 Housing Act 2004. These HMOs are commonly referred to as 's257 HMOs' and the test is known as the '*converted block of flats'* test. S257 HMOs are covered by separate rules relating to licensing and management.

A building or part of a building will be a s257 HMO if:

a) It has been converted into and consists of *self-contained flats*;

b) The building work undertaken in connection with the conversion did not comply with the *appropriate building standards* and still does not comply with them; and

c) Less than two-thirds of the self-contained flats are *owner-occupied.*

The *appropriate building standards* refer to the Building Regulations imposed at the time of the conversion by s1 of the Building Act 1984 or the Building Regulations 1991 for building work completed before 1 June 1992.

Owner-occupied means occupied by a leaseholder with a term of more than 21 years, a freeholder or a member of a leaseholder or freeholder's family.

A flat within a converted block could be an HMO under the '*self-contained flat test*' and the whole building could be a 257 HMO under the '*converted block of flats'* test.

S257 HMOs are much harder to recognise on the surface as it is not always clear whether building work has been undertaken in accordance with the relevant building regulations. Advice should be obtained from a surveyor or other suitably qualified professional to confirm that work has been completed to the relevant standard.

5.2.2.7 HMO Exemptions

Schedule 14 of the Housing Act 2004 contains exemptions setting out when a building will not be an HMO for licensing purposes. These are unlikely to be relevant to Property Guardianship. They include:

- Buildings controlled by local authorities
- Buildings occupied by students and controlled by the educational establishment
- Buildings occupied by religious communities
- Owners living in their properties with no more than two lodgers

In addition, buildings occupied by two persons who form two households are exempt. This could therefore apply where there are only two Guardians, or two Guardian households, in a building, no matter how large.

5.3 HMO Licensing

Once it has been established that the property or part of a property is an HMO, the next step is to determine whether a licence is required.

Not all HMOs need to be licensed. The government has ordered that some large HMOs are required to be licensed in all cases. This is known as *mandatory licensing*. All other HMOs only require a licence if the local authority has implemented further licensing schemes. This is known as *additional licensing*.

5.3.1 Mandatory Licensing

Whether an HMO requires a licence under the mandatory licensing scheme is determined by the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006. An HMO requires a licence if all the following conditions are met:

- It has three or more storeys;
- It has five or more occupiers;
- The occupiers live in two or more single households.

Special rules apply for counting storeys including how to treat basements, attics and accommodation situated below and above business premises.

When counting the number of storeys, it is the number in the individual HMO that counts, not the number of storeys in the building in which the HMO is situated. A single storey, self-contained flat in a five-storey block of flats is a single storey HMO not a five-storey HMO. Where, however, the HMO is a part of a building situated above or below business premises, the storeys comprised in the business premises are included in the calculation of the number of storeys even though the business premises do not form part of the HMO.

Properties which are HMOs under s.257 Housing Act 2004 are not subject to mandatory licensing.

It is important to be aware that the government has recently consulted on extending mandatory licensing to cover all HMOs with five or more occupiers irrespective of the number of storeys: *Houses in Multiple Occupation and Residential Property Licensing Reforms: A Consultation Paper*, October 2016. This would substantially broaden the scope of mandatory licensing and would bring a large number of HMOs, which currently do not require a licence, within the remit of mandatory licensing.

5.3.2 Additional Licensing

Additional licensing provides local authorities with power to impose further licensing schemes to cover smaller HMOs that fall outside the scope of mandatory licensing. Local authorities need to consider a number of factors and take reasonable steps to consult with those who might be affected before making an additional licensing designation.

Some local authorities, including the London Borough of Newham, Liverpool City Council and Oxford City Council have brought in additional licensing schemes that cover all HMOs.

Some local authorities have imposed designations to require all s257 HMOs to be licensed. Local authorities have discretion over the scope of additional licensing schemes and therefore are able to choose which HMOs require a licence. For example, the London Borough of Camden's additional licensing designation includes s257 HMOs but only those in which 50% or more of the HMO is tenanted.

5.4 Selective Licensing

Local authorities have power under Pt 3 Housing Act 2004 to implement a further type of licensing scheme known as selective licensing. This applies to non-HMO accommodation and therefore includes properties let to a single family or single individual. Local authorities are required to satisfy certain criteria and consult before they introduce such schemes and larger schemes still require central government approval. The London Borough of Newham has a selective licensing scheme that applies borough-wide, *i.e.* subject to its exceptions, all residential lettings in Newham require to be licensed. Selective licensing schemes are increasingly popular in London with the London Borough of Hammersmith and Fulham recently introducing a scheme (on 5 June 2017).

5.5 Penalties for Failure to License

The Housing Act 2004 introduces a number of penalties for failing to obtain a licence (whether under mandatory or additional HMO licensing schemes or under a selective licensing scheme). These can be summarised as follows.

- Criminal Prosecution: It is an offence to be in control of or manage an HMO which is required to be licensed but is not, unless there is a reasonable excuse for doing so. The local authority can bring a prosecution in the magistrates' court and the amount of any fine is unlimited.
- Civil Penalties: Section 249A Housing Act 2004, introduced by Housing and Planning Act 2016 with effect from 6 April 2017, allow local authorities to imposed fixed penalties of up to £30,000 as an alternative to prosecution.
- Restrictions on Gaining Possession (Tenancies): A landlord is not able to serve a valid section 21 notice seeking possession where the HMO is unlicensed or there is no application for a licence or there is no application for an exemption from licensing.
- Rent Repayment Orders: the tenant or local authority can make an application to the First-Tier Tribunal (Property Chamber) for an order that the landlord re-pay housing benefit or rent for a period of up to 12 months.

- Banning Orders and Database of Rogue Landlords: Once the provisions of Pt 2 Housing and Planning Act 2016 are brought into force it is likely that failure to obtain a licence will be a 'banning order offence', which will mean that the local authority will be able to apply to the First-tier Tribunal for an order banning the person guilty of the offence from being involved in letting residential accommodation. A person subject to a banning order will be entered in the new database of rogue landlords.

5.6 Temporary Exemption Notice

A person having control of or managing an HMO which needs to be licensed (under either the mandatory or additional schemes) or of a property which needs a licence under a selective licensing scheme can notify the authority of his intention to take steps to ensure that the property no longer requires a licence. If so, the authority may serve a 'temporary exemption notice', the consequence of which is that the property does not have to be licensed while the notice is in force. Such a notice remains valid for three months but it can be extended for a further three months. There is a right of appeal to the First-tier Tribunal against a decision not to serve a temporary exemption notice.

This procedure may be useful for Guardian Companies where it is clear that the Guardians' occupation of the property will be short-term.

5.7 HMO Management Regulations

It should be noted that the HMO Management Regulations apply to all HMOs regardless of whether they need to be licensed. All HMOs are subject to the Management of Houses in Multiple Occupation (England) Regulations 2006 save for section 257 HMOs which are subject to the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007.

The regulations require the landlord or HMO manager to:

- Provide the manager's details to the occupiers
- Take safety measures
- Maintain water supply and drainage

- Supply and maintain gas and electricity
- Maintain common parts, fixtures, fittings and appliances
- Maintain living accommodation
- Provide waste disposal facilities

The regulations require landlords or managers of HMOs to be proactive in their management. They cannot rely on occupiers reporting problems and instead must ensure that they devise and implement a regular inspection regime. Proper records must also be kept setting out details of the inspections and action taken to address any issues found.

It is a criminal offence to fail, without reasonable excuse, to comply with the HMO Management Regulations. The local authority can bring a prosecution in the magistrates' court or, alternatively, impose a fixed penalty.

6 Criminal Record Checks and Right to Rent Obligations

6.1 Criminal Records Checks

6.1.1 Circumstances in which Guardian Company can obtain a criminal record check

The main types of checks available are:

- Basic Disclosure
- Disclosure and Barring Service (DBS) Checks, formerly known as Criminal Records Bureau (CRB) checks

6.1.2 Basic Disclosure

Basic disclosure checks are available from Disclosure Scotland. Disclosure Scotland is not limited to providing checks in Scotland. It also delivers basic disclosure checks to employers in England and Wales.

Basic disclosure only provides information on 'unspent' cautions or convictions. Under the Rehabilitation of Offenders Act 1974 certain convictions become spent after a period of time, at which point the offender is treated as rehabilitated with no criminal record. For example, where an offender is sentenced to a fine, the conviction becomes spent after one year. These spent convictions will not appear on a basic disclosure check.

A Guardian Company could only obtain a basic disclosure check with the occupier's consent. Given the limited information provided on a basic disclosure certificate, its value is limited. The certificate would not show any previous convictions that have become spent.

6.1.3 Disclosure and Barring Service (DBS) check

These are checks requested by employers or certain licensing bodies to check a person's criminal record. They are usually required for jobs working with vulnerable people or children or jobs in law or finance where the role places the person in a position of trust. There are two types of DBS checks: Standard DBS checks and Enhanced DBS checks. These checks reveal all convictions and cautions as the roles are 'exempt' from the Rehabilitation of Offenders Act 1974. An Enhanced DBS check provides the highest level of disclosure but is only available for certain roles such as jobs which involve working closely with children.

A Guardian Company would only be eligible to apply for a DBS check in very limited circumstances, *e.g.*, where Guardians will be living in sheltered accommodation alongside vulnerable people or educational accommodation alongside children.

6.2 Right to Rent

The Immigration Act 2016 amended the Immigration Act 2014 to include provisions designed to prevent landlords letting property to illegal immigrants. A person who does not have leave to enter or remain in the United Kingdom is disqualified from having the 'right to rent' under a 'residential tenancy agreement'. A residential tenancy agreement is a tenancy or licence that grants a right of occupation in a property for residential use. Leave to enter or remain in the country may also be made conditional on the person not having the right to rent. An exception is made for nationals of the EEA and Switzerland

so that, *e.g.*, a national of an EEA state does not lose the right to rent on losing his or her job. The provisions apply to both tenancies and licences.

Right to Rent checks are required for all Guardians. A Guardian Company should obtain and check an adult's original acceptable documents (not merely a copy) before allowing them to live in the property. The Guardian Company should make a dated paper or electronic copy of the document and retain it securely for the duration of the tenancy and for twelve months after the licence/tenancy ends. The copies should then be securely disposed of.

Reasonable enquiries to find out who will live in the property as their only or main home should be made, and a record kept of the questions asked. All adults who will live in the property, whether or not they are named on the tenancy agreement, should be checked. A Guardian Company which does not make reasonable enquiries may be liable for a civil or criminal penalty for any other adult occupiers, irrespective of whether or not they are named on the agreement and even if money is only collected from the named tenant/licensee.

Full details of the Right to Rent procedures, suitable documents and the civil and criminal penalties for failing to conduct the checks are beyond the scope of this document. Detailed guidance is to be found in the Home Office's *Code of Practice on Illegal Immigrants and private rented accommodation*, updated on 25 May 2016.

About the Property Guardian Providers' Association:

Seven of the UK's leading property guardian providers have been meeting during 2017 to discuss the issues within the sector and to explore setting up a property guardian providers' association. The providers aimed to benchmark the current legal status of a guardian, and what the obligations are for the owners or management companies for those premises being used to house guardians. This document, we hope, will help inform all stakeholders – including building owners and local authorities - and support the providers' joint aim of promoting best practice across the sector, advocating that all legal and safety standards and regulations are adhered to, or exceeded, by all providers.

For more information contact Graham Sievers, Secretariat graham.sievers@perfectlypicked.com

Published by seven UK property guardians' providers

Ad-Hoc	**www.adhocproperty.co.uk**
DEX	**www.dexpropertymanagement.co.uk**
Dot Dot Dot	**www.dotdotdotproperty.com**
Guardians of London	**www.guardiansoflondon.com**
Live-in Guardians	**www.liveinguardians.com**
Lowe Guardians	**www.loweguardians.com**
VPS Guardians	**www.vps-guardians.co.uk**

About the authors:

Giles Peaker is a partner at Anthony Gold Solicitors. A specialist in housing, leasehold and property disputes as well as judicial review. He helps people who are facing serious problems in their housing, or where the relationship of landlord and tenant has become difficult. He works for those facing homelessness or eviction, and aids leaseholders and freeholders in lease disputes, including service charges, breach of lease and forfeiture cases. Described in Legal 500 2015 as 'among the best housing lawyers around', and in Chambers and Partners 2016 as "walking encyclopaedia when it comes to landlord and tenant law", he is a former Chair of the Housing Law Practitioners Association.

Andrew Arden, QC, is recognised as being at the forefront of the development of housing law and has been described by Chambers and Partners UK as the "pre-eminent expert on housing and local government law" and "head and shoulders above anyone else in housing litigation". He founded Arden Chambers in 1993 to provide a centre for specialist practice primarily in the area of housing law.

Andrew is a leading author on both housing and local government matters, whose titles include the principal practitioner works in each area (Housing Law Reports, Housing Encyclopaedia, Journal of Housing Law, Arden & Partington's Housing Law, Homelessness and Allocations, Manual of Housing Law, Local Government Constitutional and Administrative Law and Local Government Finance Law).

Andrew Dymond, barrister, is a founder member of Arden Chambers who advises and represents both public and private sector clients, including local authorities, private registered providers, registered social landlords, private landlords, leaseholders, tenants and the homeless. He is recommended in both Chambers and Partners and the Legal 500 as a leading junior in social housing law. He is Deputy General Editor of the Housing Law Reports, an editor of Arden & Partington's Housing Law and a member of the editorial board of the Journal of Housing Law.

Cover photo by Tom Hull - tomhull.co.uk