IN THE ROYAL COURT OF JERSEY

29th June, 1989.

102.
89/30

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat J.J.M. Orchard
Jurat G.H. Hamon

Attorney General

-v-

Jean Hogan (née Quinquis)

Crown Advocate C.E. Whelan, for Attorney General
Advocate D.E. Le Cornu, for defendant

The defendant is charged with five infractions of the Housing (Jersey) Law, 1949 (the Housing Law). Counts 1, 2 and 3 all relate to 14 Museum Street, St. Helier, and allege infractions of Article 7(1) of the Housing Law, i.e. entering into a lease without the consent of the Housing Committee, previously obtained, the first to Mr. Denis Edward Cullinane (Mr. Cullinane) of a bed-sitter and kitchen on the ground floor, the second to Miss Andrea Biggs (Miss Biggs) and Mr. Matthew Jack (Mr. Jack) of a bed-sitter on the first floor, and the third to Miss Lorraine Eyre (Miss Eyre) and Mr. John Mallarky (Mr. Mallarky) of another bed-sitter on the first floor. Count 4 alleges an infraction of Article 14(1)(b) of the Law, by making, in an "exemption form" a statement that Anthony Gallichan (Mr. Gallichan) had entered into a lease of a house at 14 Museum Street, that was false or misleading, inasmuch as he had only entered into a lease of the top flat. Count 5 relates to another property i.e. 36 Aquila Road, St. Helier, and alleges a further infraction of Article 7(1) of the Law i.e. entering into a lease to Robert Buchanan and Janice Buchanan née Beattie (Mr. and Mrs. Buchanan) of a chalet at the rear of 36 Aquila Road without the consent of the Housing Committee previously obtained.

Article 7(1) of the Law provides that:-

"No person shall,....as lessor...,and whether as principal or agent....enter into any transaction to which this Part of this Law applies without the consent of the Committee previously obtained."

Article 6 of the Law provides that:-

"....this Part of this Law shall apply to....(b) a lease of any land, whether parol or in writing...."

Article 1 of the Law provides that "land" includes any building or other erection on land.

Article 14(1)(b) of the Law provides that:

"Any person who....(b) with intent to deceive makes any false or misleading statement or any material omission in any application to the Committee, or in any communication (whether in writing or otherwise) to the Committee or any person, for the purposes of this Part of this Law....shall be liable to a fine...."

This judgment is concerned primarily with Counts 1, 2, 3 and 5, the defence being that the occupants of the bed-sitters and chalet occupied as lodgers and not as tenants under a lease; but, obviously, deals with Count 4 also.

14 Museum Street - background

The defendant purchased 14 Museum Street in or about February, 1985. Application was made to the Housing Committee for consent to the transaction on or about the 27th January, 1985. The property comprised, on the ground floor, a living-room (or a bed-sittingroom) and kitchen separated only by an arched access and a separate utility room, on the first floor two double and one single bedrooms and a bathroom, and on the second floor two bedrooms or one bedroom and a living-room, with their own kitchenette, bathroom and w.c. The second floor accommodation was effectively divided off by a sliding door and was, in effect, a self-contained flat, but was not declared as such.

The application for consent to the sale and purchase was required to provide "full postal address and description". (The underlining is ours). The reply provided by the then vendor and the defendant as prospective purchaser in reply to that requirement was "14, Museum Street, St. Helier. Private House". The purpose for which the property was then being used was answered with the words "Private house". The purpose for which the property was intended to be used was equally answered by the words "Private house". The full name(s) of the proposed occupier(s) was given as "Paul Smith" who is a son of the defendant by her first marriage.

There was no disclosure by that application of the fact that there was a self-contained flat on the second floor of the premises and, thus, effectively, that there were two units of private dwelling accommodation on the premises. The form should have been returned to the parties as incomplete because a full description of the property had not been provided as required. We understand that at the present day the failure to disclose would be overcome, because officers of the Housing Department would visit the property and report on what they found.

Consent issued, in revised form, on the 6th February, 1985 (the reason for a revised consent was not explained to us and is irrelevant). The consent was subject to three conditions:-

1. The property was not to be used for professional, commercial or business purposes; these include use for the provision of lodging or guest-house accommodation, such as would require registration under the Lodging Houses (Registration) (Jersey) Law, 1962, or the Tourism (Jersey) Law, 1948. The effect of this condition is that use for the provision of lodging or guest-house accommodation for up to five persons, although undoubtedly a business purpose, is not to be regarded as such for the purposes of this condition.

2. The property was to be occupied by the purchaser as her sole or principal place of residence (which was never her intention as she clearly told the Committee in her application for consent) or it was to be let unfurnished to or otherwise occupied by persons approved by the Committee as being of a category specified in Regulation 1(1)(a) to (h) inclusive of the Housing (General Provisions) (Jersey) Regulations, 1970, as amended.

3. In the event of the creation of any further units of private dwelling accommodation on the property such further accommodation was not, without the consent of the Committee, to be occupied other than by persons specifically approved by the Committee as being of a category specified in Regulation 1(1)(a) to (h) inclusive of the Housing (General Provisions) (Jersey) Regulations, 1970, as amended, and who would occupy the accommodation as their sole or principal place of residence.

In practice the Committee does not enforce its conditions strictly; "approved by the Committee" in Condition 2 does not require approval by the Committee in advance of occupation; Regulation 5(1), as amended from time to time, provides those classes of transaction that are exempt from requiring consent, subject to the following proviso:-

"Provided that such a transaction shall be deemed to be exempted as aforesaid only if, not later than fourteen days after the transaction has been entered into, both parties thereto submit such particulars of the transaction, and in such form, as the Committee may from time to time require."

Thus, the filing of a "particulars of exempted transaction" form is regarded as sufficient compliance with Condition 2 of the consent which, of course, it is not, since the Committee does not give its approval of the person(s) in occupation as being of the specified category other than tacitly by taking no action.

We note that condition 2 refers to "persons approved by the Committee" whereas condition 3 refers to "persons specifically approved by the Committee". Condition 3 also requires that occupation be "as their sole or principal place of residence". We were not addressed as to whether the requirement for "specific approval" under condition 3 precludes the use of the "particulars of exempted transaction" form whereas the form is accepted for the purposes of condition 2 which requires merely "approval" and, therefore, we do not decide the point.

On the 4th March, 1985, the Housing Department received a "particulars of exempted transaction" form in respect of 14, Museum Street. That form showed that Paul Smith - who, as we have said, is the son of the defendant by a previous marriage and was then eighteen years of age - was the lessee of a "one bedroom furnished flat" from the defendant as lessor. The lease had commenced on the 22nd February, 1985. In effect, the "one bedroom furnished flat" was the self-contained second floor flat to which we have referred already.

Apparently, the Housing Department was not put on enquiry as to 1) why Paul Smith was the lessee of only a one bedroom furnished flat when the application for consent had shown that he was the proposed occupier of the whole of the "private house" and 2) who was in occupation of the remainder of the "private house" since no other "exemption form" or any application for consent to a lease was received. Although no doubt due to an insufficiency of staff, the failure of the Department to investigate at that time has contributed to the difficulties faced by the Court in the present case.

The factual position claimed by the defendant appears to be this: the defendant and her husband obtained legal advice as to what they were entitled to do with the private house; it was treated throughout as a single dwelling and the existence of the self-contained flat was ignored; it was intended that the entire property should be let to Paul Smith; he would take in five lodgers; he would control the property and the lodgers; the total rent that he would pay to his mother represented a) the monies that he could reasonably charge to his

lodgers and b) a reasonable contribution by him, bearing in mind what he could afford having regard to his age and his employment, for the rooms occupied by him, i.e. the self-contained flat on the second floor; his mother would help him with the work that had to be carried out for his lodgers, i.e. cleaning of the rooms and of the areas in common use; provision of electric light bulbs, toilet rolls and the like; checking of the rooms, windows, appliances, ventilation, cleanliness and the like; emptying of meters and collection of rents; all of this she would do as the servant or agent of her son, the lessee and lodging-house keeper; and, additionally, his mother and step-father would assist with general supervision and his step-father would see to any items of maintenance; the first lodgers were all men and a genuine lodging situation existed, Paul Smith had keys to every room, services were provided, regular access was exercised: and a police register was maintained.

The prosecution does not accept the contentions of the defence: the prosecution submits that the "particulars of exempted transaction" form showing Paul Smith to be the tenant of a one bedroom furnished flat, i.e. the self-contained second floor flat, was a true and correct declaration: that there was no lease of the whole house to Paul Smith at any time; that the defendant disposed of the remainder of the house as tenements to a number of tenants; and that the alleged control of the whole house and of the occupants therein by Paul Smith was a facade to enable the defendant to circumvent the Law.

Because none of the charges brought against the defendant relate to the initial occupants, it is unnecessary for us to decide the true relationship between the defendant and Paul Smith as her tenant and between Paul Smith and the other occupants of the house in the early stages of his occupation and we do not do so.

Paul Smith moved out of 14, Museum Street on or about the 27th February 1987, in order to take up occupation of 36, Aquila Road. He took with him three of the occupants of 14, Museum Street. These were Mr. George Wall, and Mr. Gary Gaughran and Mr. Paul O'Rourke, who had occupied respectively a single and a double room on the first floor. All three became lodgers of Paul Smith at 36, Aquila Road. As a result of their departure, a double bed-sitting room on the first floor of 14 Museum Street became vacant.

as well as a single bedroom. The single bedroom subsequently became a storeroom. There were on the premises at that time Miss Biggs and Mr. Jack, in occupation of the remaining double bedsitting room on the first floor, who moved in on the very same day, and Mr. Cullinane in occupation of a bedsitting room and kitchen on the ground floor. In the view of the prosecution they were, and remained, the tenants of the defendant. In the view of the defence they were, and remained, the lodgers of either Paul Smith or the defendant. It is clear that the defendant believed them to have been the lodgers of her son Paul Smith and that she had to find another tenant of the whole house, who would occupy the self-contained flat on the second floor and would "take-on' the lodgers in the house as his.

It was in those circumstances that Mr. Anthony Gallichan, (Mr. Gallichan) a nineteen year old Jerseyman, and thus a minor, with "housing qualifications", became a tenant at 14, Museum Street. On or about the 4th March, 1987, the Housing Department received a "particulars of exempted transaction" form in relation to Mr. Gallichan's tenancy. The accommodation is described by the single word "house", the nature of the transaction as "weekly tenancy" and the date of the commencement of the lease as the 7th March, 1987. The signatures of both the defendant and Mr. Gallichan are dated the 3rd March, 1987, and the declaration of Advocate Henry John Cridland that Mr. Gallichan was known to him and that the facts stated regarding his residential qualifications were true is dated 4th March, 1987.

There is a direct and serious conflict of evidence on the question of Mr. Gallichan's tenancy and status in the house; which results in Count 4 which charges the defendant with having, in the "exemption form", with intent to deceive, made a statement, namely that Anthony Gallichan had entered into a lease of a house at 14, Museum Street, that was false or misleading, inasmuch as he had only entered into a lease of the top flat of the premises, which charge the defendant denies.

To decide the question with which the Court is primarily concerned i.e. whether the occupants named in Counts 1, 2, 3 and 5, were tenants or lodgers, it is necessary only to summarise that conflict.

Mr. Gallichan says that he heard from a friend that accommodation might be available, he contacted the defendant, he made an appointment to meet at the flat, he kept the appointment, he was shown the top (second floor) flat only, he was told that he would have to pay a deposit of £200, £60 per week in rent for the flat, and a surcharge of £2 per week for hot water. Mr. Gallichan says that whilst he was aware that there were other rooms with occupants, he was not shown over the house and he was not leasing the whole house or any rooms other than his flat. He makes a serious allegation that he was told that if the Police should call about, for example, a complaint about noise in the rooms below, he was to say that he was the tenant (of the whole house). He says that he was told he would be receiving a set of keys but he never received them. He was not instructed to clean or service other rooms and did not do so; he was aware that there was a Police Register but he did not put his name on the front cover; he had residing with him a young male friend who did not have "housing qualifications"; he believed there were six other persons in the house but he had no control over them and did not even know their names.

As to the "exemption form", he did not write the word "house" on the form, he assumed that the defendant or her husband did so, the word was there when he signed the form, but he had never filled-in a form of that kind before, and did not really know what it meant; he assumed that it was in order to show that he was Jersey born and did not really understand.

The defendant said that, her son having moved to 36 Aquila Road, she knew that she would need a tenant for 14, Museum Street; one evening she received a telephone call from Mr. Gallichan who had been given her telephone number by a friend; he had heard that she had accommodation available and he was "pretty desperate"; she explained that what she had to offer was not just a room or a lodging but that she was looking for an actual tenant to move into the property she owned; she told him it was a house and it did have some lodgers in it; she explained in detail how her son had been running the property; Mr. Gallichan said he would like to have a look at the property; she went on to ask if he realized that it was not just a room or a flat, that it was a whole house, but he would occupy the top floor; they made an arrangement to meet; she told him the rent would be £215 per week, that the deposit would be £200,

odgers and instal lodgers of his own; but he said that he was happy with them because they were no trouble. The defendant said that the rent was geared to the lodgers, that Mr. Gallichan said that £215 was a lot, but that she had explained that her son had made up his rent through the lodgers. told him what her son was charging and that it would be up to him what he charged. The defendant said that there was no confusion, that Mr. Gallichan had understood everything and that he was now lying on oath. The defendant also claimed that Mr. Gallichan was party to the completion of the "exemption form" and knew and understood what the form was and what it meant. The defendant also told us that Mr. Gallichan went to the property on at least three occasions before he moved in; that every room was shown to him; that only Mr. Cullinane was in at the time and that she intoduced Mr. Gallichan to Mr. Cullinane as his new landlord. The defendant went on to say that Mr. Gallichan moved in with a friend, but that he said that his friend had "housing qualifications" and also had to get out of his previous occommodation; she made Mr. Gallichan understand that if his friend moved in. he was not to take any rent from him because that would mean there would be six lodgers in the house; the friend was to be a guest.

The defendant went on to claim that the day before Mr. Gallichan moved in she and her husband completely redecorated the flat and put in new carpets and a new settee and washed the curtains; they worked there until midnight. However. only one week later Mr. Gallichan asked them into the flat and it was in a terrible condition; she asked him to clean up because everything was new. She thought that he had paid the first week's rent but later retracted this - he had never paid the full rent; he could not afford the full deposit as well, she had asked him to put his name on the Police Register which he had said he would do but after a week he had not done so and said he would not. She noticed that things were not getting done, neither the bathroom nor the stairs had been cleaned and he had not put out the refuse bins. She told him he was not doing his duty; he decided that he would prefer her to collect the rents because he really did not want to do it and he had not collected any rent. The defendant decided, therefore, to collect the rents herself and told Mr. Gallichan that he was to pay her the difference each week; this continued until she evicted him some ten weeks later. Her nephew then moved in as tenant of the whole house.

Mr. Peter Hogan (Mr. Hogan), the husband of the defendant, substantially corroborated her evidence. Mr. Cullinane corroborated the evidence of the defendant and Mr. Hogan to the extent that Mr. Gallichan was intoduced to him as the new tenant of the house, replacing Paul Smith - he was told "this is your new landlord" - but he, Mr. Cullinane was "a little bit aware" of the Housing Law and believed that the reason for the intoduction was that if there was nobody in the house with "qualifications" he would have to move out himself; he was not told to pay his rent to Mr. Gallichan. He believed that what Paul Smith and Mr. Gallichan had in common was their housing qualifications.

We must now go on to consider the facts relating to each of the occupants in Museum Street.

Mr. Denis Edward Cullinane - Count 1

Mr. Cullinane moved in to 14, Museum Street in September 1985. At first he occupied the single room on the first floor - he signed the Police Register on the 6th September, 1985, - and then moved into the larger room on the same floor.

In May, 1986, the ground floor flat, bed-sitter and kitchen, became vacant and he moved into it. He had arrived in Jersey in 1983 and had no "housing qualifications". He regarded the defendant as his landlord. He paid £35 per week as rent. He paid his rent by leaving it in cash on a coffee table every Friday, he did not really know who collected it every week but he did not see anybody other than the defendant pick it up. He was aware that there were other people on the first floor and that Paul Smith lived on the second floor. He did not ask Paul Smith's permission to move to the ground floor but dealt exclusively with the defendant. He received no services from Paul Smith who had nothing to do with him or the flat. He would not necessarily go to Paul Smith if there were any difficulties. The defendant had cleaned for him both the rooms that he had occupied on the first floor but she did not do so on the ground floor. His girlfriend did so. He received no services whatsoever on the ground floor except that the defendant cleaned the bathroom on the first floor each Saturday; he was entitled to use the bathroom. There was a lock on

his door and he had a key to it. The only conditions were that he was to leave the rent each week and that he could not have "sleepers" in the house; but his girlfriend stayed overnight on occasions; he did not ask Paul Smith for permission; it was the defendant who said she could do so provided she left with him in the morning; when he first moved in the defendant told him that visitors had to leave before midnight. He knew that Paul Smith was the defendant's son and he was told that if he had any difficulties he could go to him, but he never did; the defendant came to the house two or three times each week. There was clean linen available on the first floor. The defendant had a key to his flat; he did not know if she visited his flat when he was not there. He had a meter for electricity. He never paid Parish rates. Light bulbs were provided by the defendant; they were available in the basement. Detergents were supplied by the defendant for the communal bathroom but not for the flat. He had decorated the flat and the defendant had supplied the paint. He could not recall the curtains in the flat being washed by the defendant but she might have done so before he moved in. When Mr. Gallichan moved in he, Mr. Cullinane, had expected him to do the defendant's work, but he had done nothing. Whilst the defendant had washed the linen when he lived on the first floor, this stopped when he moved to the ground floor because he bought his own linen and his girlfriend looked after it. He wanted privacy and the defendant agreed.

The defendant claimed that all arrangements made by her with Mr. Cullinane were made on her son's behalf. She further claimed that the arrangement whereby Mr. Cullinane's girlfriend would do the cleaning and would use his own linen was made with her son direct; she was still prepared to do both; she still cleaned the stairs and the bathroom regularly each week; she and her son both had a complete set of keys; the light bulbs were kept upstairs in her son's living area and anyone needing one had to go to her son to ask for it; however, on a few occasions there were some in the basement as Mr. Cullinane had said; the defendant paid for the light bulbs; she also purchased toilet rolls and detergents in gross lots and stored them in the bathroom. When Mr. Cullinane moved to the ground floor she had taken down the curtains, washed them and replaced them the same day. She believed that she had washed them on one occasion since. Net curtains throughout the house were washed by her on a regular basis. The defendant paid for the electricity for the common

areas; the account went to 14, Museum Street in her name. She paid both the foncier and the occupier's rates. Mr. Cullinane had called her the landlord because she was the owner; lodgers were sometimes confused but Mr. Cullinane knew that her son was in charge; he was paying rent to her son, although sometimes she collected it; when Mr. Cullinane wanted to move down he had seen the defendant, her husband, and her son together. The defendant did not accept that all Mr. Cullinane's dealings had been with her. When he wanted permission for his girlfriend to stay he asked both herself and her son. When she collected Mr. Cullinane's rent, if her son was not in she took the rent home, but told her son that she had it; on other occasions she saw it on the table and left it there. Mr. Cullinane did not have exclusive possession because she and her son had keys and they made more than a token visit; they checked the room, the state of repair and the crockery. Mr. Cullinane was her son's lodger in her son's house; she acted for her son to tell his lodgers what they could or could not do in her house. When she washed the curtains she did it on her son's behalf but she owned them and so was washing her own; she washed the net curtains for the whole house because her son had no washing machine.

Again, Mr. Hogan substantially corroborated the evidence of the defendant; as did Mr. Paul Smith. He said that he continued to have access to Mr. Cullinane's flat after the arrangement about his girlfriend had been arrived at, but had always found it "pretty tidy". When he left Museum Street he did not pay any money to his mother for deposits received but he might have repaid Mr. Cullinane's deposit.

Andrea Biggs and Matthew Jack - Count 2

Miss Biggs and Mr. Jack occupied a bed-sitter on the first floor of 14, Museum Street, from the 27th February, 1987. This was the date of Paul Smith's departure in order to take up occupation of 36, Aquila Road, and

before the arrival of Mr. Gallichan. When Mr. William Hague Sugden, Housing Law Enforcement Officer, visited the premises on the 30th April, 1987, he saw them in possession. Unfortunately, neither was available to be a witness and what they said to Mr. Sugden is hearsay and inadmissible. However, the Housing Department had no record of them and they did not have "housing qualifications". When the defendant and her husband were interviewed on the 1st July, 1987, they admitted that Miss Biggs and Mr. Jack were two of the occupants whom they claimed were five "lodgers" and that Miss Biggs and Mr. Jack paid £60 per week to them for the room.

Miss Eyre and Mr. Mallarky later occupied the other bedsitter on the first floor. They believed they did so on the same terms as Miss Biggs and Mr. Jack. Certainly Miss Biggs and Mr. Jack were in occupation and both couples shared a kitchen on the ground floor.

The defendant admitted that she was involved in the arrangements whereby Miss Biggs and Mr. Jack entered into occupation; she was present at the time; they were offered the same services as everybody else; Miss Biggs did not want the linen because she had her own and she also wanted to do her own cleaning because she wanted her privacy; the defendant agreed. The defendant still entered the room from time to time, a few times each week, to see that everything was alright; she went into the room on some occasions to collect the rent and to empty the meters. She did not treat Miss Biggs and Mr. Jack any different from other occupants; she cleaned the carpets and all the common areas except when her son did it; she went in to check for any breakages, and that the room was clean and tidy; she sometimes replaced broken crockery in the shared kitchen.

Mr. Hogan claimed to have been present when Miss Biggs and Mr. Jack viewed the premises and to have been a party to the arrangement; he thought Paul Smith was present; he told them the usual conditions; as lodgers, they the landlords would have to provide a service and certain conditions would have to be met; he told them they would have no tenant's rights but would merely be lodgers; and that Paul Smith would be there to deal with any problems that might arise. Miss Biggs said that she preferred to do her own cleaning; this came as no surprise and he was happy to agree; but the service was there available if needed. Linen was always supplied: it was kept in a large wardrobe on the first floor landing; he checked the wardrobe from time to time to ensure there was plenty of linen there; the occupants could hang their working clothes and place their boots in the same wardrobe.

Mr. Hogan claimed that he was involved in collecting rents, albeit infrequently, and that the rent money was always left out on a Friday evening; he entered the flats to empty meters. not regularly, but from time to time, at the same time as collecting rents, and would go in regardless of whether the tenant was in or out.

However, Mr. Hogan could not say when Paul Smith would have met Miss Biggs and Mr. Jack.

Paul Smith confirmed that Miss Biggs and Mr. Jack moved in on the day he moved out.

Lorraine Eyre and John Mallarky - Count 3

Miss Eyre and her boyfriend, Mr. Mallarky, moved into 14, Museum Street, on the 28th March, 1987. They had no "housing qualifications". They

heard of a room being available through friends. They occupied the second bed-sitter on the first floor. They knew the defendant as the owner; according to Miss Eyre they were never introduced to Mr. Gallichan or told that he was their new landlord. They paid £62 per week in rent, inclusive of £2 for water. They paid a deposit of £60, being equivalent of one week's rent. They paid their rent to the defendant, at first by cheque but later in cash; they could not remember why they changed from cheques to cash. Miss Eyre knew that there were other people in the property, i.e. two people in the second floor flat upstairs, two in the room next door to them, and one on the ground floor downstairs; whilst she knew that somebody lived upstairs she could not remember if she had known his name; she knew that he had "housing qualifications for the rest of the house"; she could not remember if it was the defendant who had told her so; she had never been introduced to him; she understood the law to be that if somebody with "qualifications" lived there, all were covered; she had lived in Jersey for nine years and had learned this "along the way". Miss Eyre had not asked Mr. Gallichan's permission to take the room; she had had nothing to do with him; he did not provide any services; the defendant did not clean the room; she and Mr. Mallarky had their own bed-linen and crockery, but there was bed-linen and crockery on the premises which they could have used; the defendant never offered to wash the bed-linen; toilet rolls were available; at first Mr. Gallichan put out the dustbin but then stopped; Miss Eyre was told he was to do it, but he did not, so Mr. Mallarky did.

The defendant never walked into the bed-sitting room uninvited; she was the owner to whom the rent was paid; there was a lock and key; there were no restrictions on the use of the room or on visitors; the defendant called once each week and Miss Eyre never saw her at any other time; she called to collect the rent, normally at the weekend.

Under cross-examination, Miss Eyre said that she could not remember the defendant having offered to clean the room but would not argue with her if she said so. There was a hoover and an ironing-board on the first floor landing, available to everybody. Miss Eyre stored the crockery that she found in the kitchen, because she preferred to use her own. She changed light-bulbs in the flat from the available stock; those in the communal parts were changed. Toilet rolls and detergents for the toilet and bathroom were provided. The defendant had a key and Miss Eyre would not have objected if the defendant had gone into the flat to check that everything was tidy. If she had wanted an overnight visitor, Miss Eyre would have asked the defendant for permission but it was not practical to have anyone to stay as the room was not big enough. Miss Eyre paid no contribution towards the electricity used in the parts of the house that were in common and never paid parish rates.

Mr. Mallarky substantially corroborated the evidence of Miss Eyre. He went out to work and would not have known if the defendant visited the flat; she had a key and he took it for granted that she could go in; nothing was said about it when they took the flat but he assumed a right of access because the defendant was the owner; he would not have challenged her because he supposed she was in control. He did not remember an offer to clean the flat. He had personally put the refuse bins out on a couple of occasions. He had usually lodged with a living-in landlady, in private houses whereas at 14, Museum Street they had their own room and were less restricted.

The defendant told us that Miss Eyre came to the property on the introduction of Miss Biggs; that she was offered exactly the same services; that she was already well aware of the situation and that she asked to be on exactly the same terms. Miss Eyre and Mr. Mallarky came into the property

whilst Mr. Gallichan was the tenant of it, and knew that he was the landlord. Miss Eyre did pay her rent to her, the defendant, at first; the first payment was the deposit; then she paid her rent to Mr. Hogan. Under cross-examination the defendant conceded that when Miss Eyre and Mr. Mallarky entered into occupation Mr. Gallichan had already refused to have anything to do with the house and occupants and that she, the defendant, had "taken over". Thus, she conceded that they could not be Mr. Gallichan's lodgers but maintained that they were lodgers in the house and thus, did not need "housing qualifications"; she then said that they must have been her lodgers although she did not look upon them as her lodgers. She did have access to the flat in order to check that everything was in order and tidy.

Mr. Hogan claimed that services were provided to Miss Eyre and Mr. Mallarky but that he and the defendant went to the property in the daytime when they were not there. He said that none of the occupants had the remotest idea of the housing law and went on to make the strange assertion that none of them had any idea what services were; they wanted to look after themselves. The return completed by Mr. Sugden when he visited was not specific; when asked about services they would think of only cleaning and washing and reply in the negative, but, if asked properly, they would have said that services were provided; putting out the refuse, cleaning of windows, washing of curtains and cleaning of the bathroom were all services. Mr. Hogan conceded that Miss Eyre never paid the rent to other than the defendant or himself; this was because Mr. Gallichan had indicated that he would not manage the house and had asked that they collect the rent; Mr. Hogan knew that in any event the rent was coming to the defendant and himself, so it was easier if the cheques were made payable to him; during the period that Mr. Gallichan was there he, Mr. Hogan, personally collected the rents; Mr. Gallichan specifically asked that the rents be collected "for him". Despite the fact that relations with Mr. Gallichan had soured it was still the intention that Miss Eyre and Mr. Mallarky should be his lodgers and so far as Mr. Hogan was concerned

they were; Mr. Hogan was acting as Mr. Gallichan's agent; the rents were Mr. Gallichan's rents and Mr. Hogan was merely saving him the trouble of having to pay the rent over; he thought he was doing Mr. Gallichan a favour by collecting the rents for seven to ten weeks until he moved out, but it became a question of self-preservation.

36 Aquila Road - background

Early in 1987, the defendant's second son, Jason Smith, was coming up to his eighteenth birthday. The defendant had it in mind to carry out a similar operation for him as she had done at 14, Museum Street, for her son Paul. The defendant and her husband saw the property, 36, Aquila Road, which was being offered for sale. The Vendors were Messrs. John Charles Marett Pallot and Advocate Steven Charles Kilvington Pallot. They had been "taking-in" lodgers already. The property comprised, on the ground floor, a lounge, kitchen and bathroom, occupied by the Vendors and one single bed-sitting room; upstairs, there were two bedrooms reserved for occupation by the Vendors, two bed-sitting rooms, a shower room and a toilet. Also on the ground floor, but with access only from the back yard, access to which in its turn was through the main house, was a chalet, comprising a bed-sitting room with kitchen and toilet. Messrs. Pallot had already turned some of the rooms into bed-sitting rooms and the property was thus very suitable for what the defendant had in mind. It was possible that Paul Smith would move from 14, Museum Street to 36, Aquila Road, because the owner's accommodation there was slightly better and Jason Smith was away from the Island at the time.

Application was made to the Housing Committee for consent to the proposed sale and purchase on or about the 26th January, 1987. Under the requirement for the full postal address and description (the underlining is ours) the parties, or their agents, merely wrote "No. 36 Aquila Road, St. Helier"; under "purpose for which the property is at present being used" the application

stated merely "Dwelling Accommodation"; and again the purpose for which the property was intended to be used stated "Dwelling Accommodation"; under "full name(s) of proposed occupier(s)" the parties or their agents entered "not known at present". The price was £80,000 for the realty and £3,000 for the contents.

The Housing Committee's consent to the transaction issued on the 9th February, 1987. It was subject to three conditions, identical in their terms to those imposed on the earlier consent to the sale and purchase of 14, Museum Street.

Prior to the issue of that consent, officers of the Housing Committee had visited the property. Their findings are to be found in a marginal note on the application form which reads as follows:- "Town house which has been converted into a no. of lodging units. 6 beds, none of them are s/c unit unfortunately but most unsatisfactory set-up. Price OK 1 unit".

It is clear, therefore, that in the view of the Housing Committee's officers, and thus of the Committee which did not visit the property but issued the consent referred to above, the chalet did not form a separate unit of accommodation.

On the 16th February, 1987, the Housing Department received a "particulars of exempted transaction form" purporting to show the lease, on a weekly tenancy, of the chalet, described only as a furnished chalet, to one Ken Romeril, described as "born in Jersey". Both "K. Romeril" and the defendant had signed the form on the 5th February, 1987, and the lease was declared to commence on the 6th February, 1987. Mr. Romeril never moved into the premises because he found other accommodation.

However, on or about the 23rd February, 1987, the Housing Department received a further "particulars of exempted transaction" form. This form related to the lease of 36, Aquila Road, an unfurnished house, by the defendant to Paul Smith of 14, Museum Street, on a monthly tenancy from the 20th February, 1987. Both parties signed the form on the 17th February, 1987. The contract for the purchase of 36, Aquila Road was passed on the 27th February, 1987, and Paul Smith moved in on that day. He took with him three "lodgers" from 14, Museum Street.

The defendant told us that originally she thought that persons who would occupy the chalet would need housing qualifications. She thought it was a separate unit. Her son believed that he could take five lodgers within the house and tenants in the chalet. She contacted an agency at her son's request in order to find tenants.

However, the defendant's view as to the status of the chalet changed. Her solicitor discovered that the owners who were predecessors in title to Messrs. Pallot had built the chalet without permission. But there was a meeting with an officer of the Island Development Committee who said that it was built so many years ago that he would do nothing about it, but that it must not be used by "qualified" people; he meant that it was to be used as part of the house and that the number of lodgers could not lawfully be five in the house and two in the chalet.

As a result, the Court caused Mr. Paul Tucker, an officer of the Island Development Committee, to be called. He recalled a meeting with the defendant's solicitor and Mr. Pallot at the premises and that a lady and gentleman were there (probably the defendant and her husband). He inspected the chalet but the work had been done a number of years earlier and it was unlikely that the Island Development Committee would wish to take any action.

He remembered it clearly; he advised that it could not be occupied as a separate unit; it should be included with the ground floor unit, all as part of the main house; this was because the chalet did not have the required open space at the rear; it was in breach of the building bye-laws and could not be a dwelling unit in its own right; it could not be let separately as far as the building bye-laws were concerned. Mr. Tucker went on to say that a great number of self-contained flats did not comply with the bye-laws; it was blocks of flats that the Committee was "fussy" about. Under cross-examination, Mr. Tucker said that he had not been offering free advice about the Housing Law, which he never did; because there was a breach of the bye-laws, strictly no-one should be living in the chalet; in simple terms the chalet had to be used as part of the house and not as an individual unit. Nothing had been said at the meeting about any distinction between lodgers and tenants.

Robert Buchanan and Janice Buchanan (née Beattie) - Count 5

Mr. Buchanan came to Jersey in 1981 and did not possess "housing qualifications". In February, 1987, he advertised in the local press for accommodation. The defendant telephoned him and they arranged to meet outside 36, Aquila Road, the same evening. He and his wife kept the appointment, were met at the door, and were first shown an upstairs room in the main house which was offered to them at £60 per week. They were then shown the remainder of the house and also the outside chalet. They were told "housing qualifications" were necessary for the chalet. They arranged to take the upstairs room at £60 per week.

They later met the defendant in Broad Street when she said that occupation of the chalet did not require qualifications after all. This was within two weeks of their first meeting; they had not moved in upstairs; the defendant had not yet passed contract. The chalet rent was to be £70 per week and a deposit of £100 was required over and above the deposit of £100

already paid for the upstairs room. In addition they would have to pay £2 per week for the use of the shower inside the house. They moved in and paid £72 per week to Mr. Hogan and his wife, the defendant. Mr. and Mrs. Hogan did not live on the premises, no meals, or cleaning, or clean linen each week were provided; there were no services at all. Mr. and Mrs. Buchanan were aware that Paul Smith was on the premises but he provided no services. Mr. Buchanan carried out certain works to the chalet; he put up curtain rails and fitted a washing machine. He asked Mr. Hogan for permission which was granted on condition that he did not deface the chalet; with that permission he carried out all the plumbing work. There was a lock on the door, with a key and no-one else had right of access to the chalet. No restrictions on visitors or otherwise were imposed. The defendant called every Sunday to collect the rent and empty the electricity meter. Mr. Buchanan signed the Police register on the 28th February, 1987.

Under cross-examination Mr. Buchanan agreed that the chalet was fully furnished - he did not put in much furniture himself. He knew that Paul Smith was the defendant's son; he was introduced as such and was told that if he had any problems he should go and see him. He could have had "sleepers" without consent and would have done so had he wished. There was no linen on the bed or in the wardrobe, which was empty. He and his wife brought their own; he was certain that he had not been shown a wardrobe in the main house that was used as a linen store. He and his wife cleaned the shower whenever they used it. There was trouble over the shower because others left it dirty and he went to Paul Smith to complain. He had a key to the main front door of the property. He had no separate door bell and callers would have to ask for him. The back door of the house was always open. There was nothing on the door of the chalet to indicate that it was a separate dwelling. There was a notice on the door of the shower warning all "lodgers" that if it was not kept clean they would have to leave. Mr. Buchanan agreed that the notice included him because he regarded himself as a lodger because he paid rent to live in the

premises. He did not know what a tenant was: if he paid rent he was a lodger. He eventually left the premises on very bad terms with the defendant; he said that the trouble with being a lodger was that one had no rights; there was trouble over the cleaning of a carpet and the deposit; his wife said they were tenants but he had said "No, we are lodgers". When he and his wife left, he refused to sign the Police register or to give details of where he was going. The defendant and her husband had a key to the chalet and would go in when they, Mr. and Mrs. Buchanan, were not there, on the pretence that they, the defendant and her husband, were showing someone over. He did not think that Paul Smith had a key; but the defendant could go in to check if everything was tidy. He did not contribute to the cost of electricity for the main house. He and his wife provided their own crockery. Toilet rolls and cleaning materials for the bathroom were supplied. On one occasion a light bulb was inoperative for three weeks; he told the defendant about it and it was replaced. She told him to contact Paul Smith if there were any further problems. He was not always there when the defendant called to collect the rent and empty the meter; if he was not, he left the rent on the table. He and his wife put their refuse out themselves and Paul Smith never did it.

Under re-examination, Mr. Buchanan said that he and his wife supplied their own toilet rolls and light bulbs. He did not regard the defendant and her husband as the owners and Paul Smith as Manager. It was merely that Paul Smith happened to be living in the house. He dealt exclusively with Mr. Hogan about the washing machine and plumbing and did not even speak to Paul Smith about it.

Mrs. Buchanan arrived in Jersey in 1984 and did not have "housing qualifications". Substantially, she corroborated her husband's evidence. She regarded the defendant and her husband as landlords and the rent was paid to them. The defendant had not offered to do any cleaning. Mrs. Buchanan was not shown any linen and did not know what was in the upstairs wardrobe. She

knew that she could see Paul Smith if she had any problems. She thought that Paul Smith had a key to the chalet as well as the defendant and her husband. She would have been surprised if she had seen Paul Smith in the chalet and had never seen him there. But both her husband and herself went out to work. The defendant and Mr. Hogan could come in and out when they were away; they did call at unusual times and would just arrive. They could check the chalet to satisfy themselves that everything was in order.

After being told that if the shower got into a mess again, all "lodgers" would have to go, Mr. and Mrs. Buchanan did not wait, but found other accommodation elsewhere. Mrs. Buchanan believed that if given one week's notice, they would have gone.

Crockery was supplied but they used their own. The odd packet of detergent was supplied for the upstairs bathroom. She was told that the refuse bins would be put out on a Tuesday; she had seen Paul Smith put them out on some occasions although she had not been told who would be responsible and when he did not do it she and her husband did it themselves.

Finally, Mrs. Buchanan said that she was aware that there were people in the main house but she was unable to compare the terms of her occupancy with theirs. As to access by the defendant and her husband she said that it was their property and they were entitled to check the state of repair and whether there was any damage.

The defendant admitted that she dealt direct with Mr. and Mrs. Buchanan but the terms were to be the same as those upon which the lodgers in the main house occupied their rooms; Paul Smith was to be their landlord and they would be his lodgers. The services would be the cleaning of the chalet, provision of bed linen, and the washing of it if required. Mr. and Mrs. Buchanan had a separate toilet but would use the shower of the main house.

They were to pay £1 per week each for constant hot water. The meter was for electricity for the chalet and they made no contribution to the cost of electricity for the communal part of the premises. They made no contribution towards the rates for the property. The defendant had met Mrs. Buchanan alone when she said she had household effects in store and asked to be permitted to bring in her own linen, do her own cleaning, and take the crockery and cutlery out of the kitchen, replacing it with her own. The defendant had given permission. Mr. and Mrs. Buchanan were not treated differently from the lodgers in the main house. The defendant had keys to Paul Smith's front door and kitchen door. He kept a set of keys for all the lodgers' rooms in his kitchen and she used them. She went to the chalet quite frequently as she did to the rooms of other lodgers. On a number of occasions Mr. and Mrs. Buchanan had asked Mr. Hogan to call because there was a problem with condensation. They also complained about the state of the shower after other lodgers had used it; they complained to Paul Smith, as a result of which the defendant attended; she told her son to put a notice on the door and to tell his lodgers to keep it clean.

Under cross-examination the defendant said that she paid £83,000 for 36, Aquila Road and sold it in 1988 for £110,000, a profit of £27,000. She supposed it was a good way to make money but most of the rent went into the running of the properties. She had wanted to make enough to cover the cost of the mortgages and maintenance. Paul Smith had five lodgers, including Mr. and Mrs. Buchanan. The occupation of Mr. and Mrs. Buchanan was different from that which Mr. Romeril would have enjoyed because Mr. Romeril would have received no services and would have had more rights. The defendant accepted that it was not normal for lodgers to "plumb-in" their own washing machine. She cleaned the outside of the chalet windows. Paul Smith paid her £215 per week in rent. This was made up as to chalet £70, two singles, O'Rourke and Gaughran £70, Wall £45, Paul Smith £30, total £215. Mr. Alan Wallwork who shared Paul Smith's accommodation never paid rent to the defendant or to

Paul Smith as this would have made six lodgers which was unlawful. but he contributed towards the food. 36, Aquila Road was purchased fully furnished; Paul Smith moved in; the defendant did not regard the furniture as hers, it became her son's; when she sold the property the contents were included and she received £3,000 for them; she had not accounted to her son for the £3,000, but intended to give him some money.

Mr. Hogan told us that upon the purchase of 36, Aquila Road. Paul Smith rented the whole of the property. Mr. Hogan continued to assist but his step-son took over the whole property. He was the tenant and the other occupants were his lodgers; they were not the defendant's lodgers and they were not Mr. Hogan's lodgers. Mr. Hogan attended at Aquila Road to help Paul Smith as often as he had done at 14, Museum Street; he did some cleaning and went into the lodgers' rooms. Paul Smith had asked him to be involved in making arrangements with Mr. and Mrs. Buchanan. Mr. Hogan substantially corroborated the defendant's evidence. However, contrary to that which the defendant had said, Mr. Hogan claimed that he was a party to the arrangement about cleaning and services. He said there was the same discussion with Mr. and Mrs. Buchanan as with every other lodger. They were told the terms and that they were lodgers; they were told the conditions they had to obey; however Mrs. Buchanan was opposed to the cleaning and washing arrangements and the defendant and Mr. Hogan agreed that she could do these things herself, but making it plain that the services were there, available to her. Mr. Buchanan had left on very bad terms, swearing, and threatening to "get his own back". Mr. Hogan believed that Mr. Buchanan had made a false statement to achieve this. He went to the chalet certainly once a fortnight at least, to make sure that everything was in order; he had attended to a leak underneath the sink and various other matters. All the lodgers shared the shower-room in the main house but Mr. Buchanan had become very angry about its dirty condition; which continued after Mrs. Buchanan had complained and a notice had been put up; Paul Smith cleaned the shower-room once a week but he had one lodger, who he could not identify, who constantly left it dirty.

Under cross-examination Mr. Hogan said that he and the defendant had selected Mr. and Mrs. Buchanan on Paul Smith's behalf; they had reported back to him, with a recommendation and he took the decision. Mr. Hogan collected the rent from Mr. and Mrs. Buchanan on occasions and took it home; if Paul Smith was there, Mr. Hogan told him and he gave the rent to the defendant for him; the lodgers' rent would go to make up the total rent. When he emptied the meters he paid the monies collected to the defendant and not to Paul Smith.

Paul Smith told us that when he moved in to 36, Aquila Road with three of his lodgers from 14, Museum Street, he was working on a shift work basis; therefore the defendant saw Mr. and Mrs. Buchanan initially on his behalf. He was quite sure that at first he had only three lodgers in the house and after two or three days Mr. and Mrs. Buchanan moved into the chalet, making a total of five lodgers. Mr. Alan Wallwork also lived in the house but he was a personal friend who had a single bed in Paul Smith's bedroom; Mr. Wallwork never paid any rent. The premises had one entrance, one knocker, no bell, and no names or numbers on any of the doors; the access to the chalet was through the main door; any caller would have to knock because there was no indication where the chalet was. Paul Smith insisted that he had interviewed Mr. and Mrs. Buchanan in the presence of the defendant and Mr. Hogan. He claimed that he had told Mr. and Mrs. Buchanan that the rent would be £70 and that they would have all cooking facilities, crockery and cutlery; that he offered linen that was stored on the first floor; and that he told them that he would be coming in generally to clear up and ensure tidiness. He got on very well with the lodgers in the main house and at first with Mr. and Mrs. Buchanan, but that relationship deteriorated. There were problems with the shower; it was dirty but not as dirty as Mr. and Mrs. Buchanan made out. Paul Smith claimed that he collected the rents each Sunday morning but that sometimes Mr. and Mrs. Buchanan had forgotten to leave or put the rent out and he then had to wait until he saw them. He also claimed that he emptied the meters every week.

He also claimed that he put the refuse out for collection every week. Whenever he found a bin liner or carrier bag within the chalet that was full he would put it out in the yard or empty it; there were several dustbins in the back yard but Mr. and Mrs. Buchanan used carrier bags which were sometimes left in the yard and sometimes fell over; on those occasions he would remove the refuse.

Under cross-examination, Paul Smith insisted that he had seen Mrs. Buchanan in the chalet when she was calling to make arrangements before she moved in. He insisted that he had collected the rent from Mr. and Mrs. Buchanan not only when the defendant had been away on holiday, but regularly, although he accepted that the defendant sometimes collected it. He said that the defendant would give him the rent but he said that was pointless and paid only the difference. When he interviewed Mr. and Mrs. Buchanan, the defendant and Mr. Hogan were there to help him. He asked for their advice about charges. Mr. and Mrs. Buchanan's deposit was repaid less ten pounds. He had visited the chalet quite often, he would knock on the door, sometimes Mr. and Mrs. Buchanan were present and on other occasions they were out at work. He also insisted that he had informed Mr. and Mrs. Buchanan that he required a deposit of £200 and that he had received it personally; however he gave the money to the defendant because he preferred it to be kept in her bank account for him; he did have a bank account but he did not like to keep it in his account; when he had to repay he asked the defendant to get it out of the bank or take it out of the rent; he kept no record of deposits received.

The Law

In respect of charges 1, 2, 3 and 5, the usual rules as to proof in criminal or quasi-criminal prosecutions do not apply. The control of leases is to be found in Part III of the Housing (Jersey) Law, 1949, Articles 5 - 16.

Article 14(2) provides as follows:-

"(2). In any proceedings for an offence against this Part of this Law, the burden of proving that the consent of the Committee has been granted to any transaction, or that this Part of this Law did not apply to any transaction, shall be on the person charged with the offence".

Thus, the defendant must prove, on the balance of probabilities, that no consent was required to the transactions with the several occupants.

Offences against the Housing (Jersey) Law, 1949, are offences of absolute liability. Thus, no guilty mind, or "mens rea", on the part of the defendant is required. If the Court is satisfied that the transactions took place and that consent was needed, that is enough to establish the charges brought. (See Attorney General -v- Hales (1978) 40 P.C. 519, and A.G. -v- St. Roche Limited and Davey (9th March, 1989, as yet unreported) with which, although under appeal, the Court respectfully concurs.)

In the case of Count 4, the burden is upon the prosecution to prove the offence beyond resonable doubt because Article 14(1)(b) of the Law requires an intent to deceive.

Thus Counts 1, 2, 3 and 5 require the defendant to satisfy the Court that Mr. Cullinane, Miss Biggs and Mr. Jack, and Miss Eyre and Mr. Mallarkey, all at 14, Museum Street, and Mr. and Mrs. Buchanan at 36, Aquila Road, were somebody's lodgers rather than tenants of the defendant and the distinction is highly material.

The first case cited to us by the Crown Advocate, Mr. Whelan, was Attorney General -v- Larbalestier (1980) J.J. 223, an action brought against the defendant alleging that he had let part of his flat to someone who became a

tenant without the consent of the Housing Committee. The issues were much as in the present case. The Court found that the burden of proof had been discharged by the defendant and dismissed the case against him. Commencing at p.225 the Court said this:-

"It is impossible to exhaust all the circumstances in which one can find a lodger or a tenant as was rightly said by Romer L.J. in Kent v. Fittal [1906] K.B. 60, when citing Jessel M. R. in Bradley v. Baylis [1881] 8 Q.B.D. 195, "I have been quite unable, so far as I am concerned, to frame an exhaustive definition", and he went on to say: "I respectfully agree with that statement, and I will proceed to apply it to the case before us, and to consider what are the circumstances of this case", and it was in the light of that judgment and citation that we have examined the present circumstances.

"The Attorney General suggested that there is now established, according to the case of Honig v. Redfern [1949] 2 All E.R. 15, a rule referred to by Lord Goddard C. J. "That if the owner of a house who allows other people to live in it lives on the premises and manages the premises himself, or if the owner has a servant resident on the premises to manage them on his behalf, the other people living in the house are lodgers, whereas if he does not live in the house but lets the whole house out to various people it is a letting out of the house in tenements and the persons occupying the tenements are not lodgers but tenants". That may indeed well be so, but on the other hand there was an earlier case of Bradley v. Baylis, [1881]8 Q.B.D. 195, which again the Attorney cited to us, where indeed the contrary is said on page 241, in the judgement of Cotton L. J.: "In my opinion it is not necessary that the person with whom he lodges, that is his immediate landlord, should live in the house to make him a lodger." Be that as it may that is not really the main test which we have been applying in considering the circumstances of the particular prosecution today.

"The Attorney General has said that there were four tests to which he drew our attention in deciding whether Mr. Pope was a lodger or a tenant, or,

to put it another way, whether he occupied under a licence or under an agreement for a tenancy. First, the control of the landlord of the premises; secondly, the question of exclusive occupation; thirdly, the residence on the premises by the landlord, and fourthly, the intention of the parties, and really there is no issue between him and Mr. Bailhache that those were the matters which we have had to consider.

"Turning to the question of exclusive possession, Mr. Bailhache drew our attention to the same work, Dawson and Pearce, page 7: "Exclusive possession by legal right, or the exclusive right to possession is an essential characteristic of a tenancy. It is necessary for the creation of a lease that the tenant should have the right to exclude all other persons from the premises. This right to maintain or recover possession of a thing as against all others may be said to be the essential part of ownership", and of course the right to exclude would have to include the right to exclude the owner or landlord of the premises. Now in that connection he has pointed out that Mr. Larbalestier entered the bedroom - and here I stop for a moment to say this, that the Attorney General has rightly drawn our attention to the summons, which means that we would not have to find that the whole of the flat had been let or occupied by Mr. Pope, but it would be sufficient if we directed our attention to the bedroom, and if we were satisfied that he had exclusive possession in the way it has been suggested that would be sufficient coupled with the shared bathroom and kitchen - well, we accept that as a submission. However, Mr. Bailhache pointed out, and the evidence has satisfied us, that as regards the bedroom itself, on which really this case hangs, Mr. Larbalestier went there to do three things. Firstly, to open the big windows, because he didn't like the 'after aroma', as Mr. Pope said, and I understand what he means, secondly, he did a little cleaning, and thirdly, he emptied the ashtrays. It is relevant to note that the bedroom was not locked, indeed we understand from Mr. Pope it didn't even have a lock there to use. That being so we have to look at the four tests, and the Attorney General has pointed out that as regards the question of keys,

residing on the premises and the provision of services, the English cases are inconclusive.

"We really have to ask ourselves this question: Was it his flat or his home in which Mr. Larbalestier installed somebody allowing him to live there? And if it was his home in which he just allowed Mr. Pope to live as a lodger as opposed to installing him in part of his house as a tenant, then Mr. Larbalestier is entitled to be acquitted. One of the tests which was suggested by Lord Denning in the case which we have referred to of Facchini v. Bryson to distinguish whether an occupier was a tenant or a licensee is that "there should be some family arrangement, an act of friendship or generosity, such like, to negative any intention to create a tenancy". Well, we think that there was in fact that connection here. It was an act of generosity on Mr. Larbalestier's part to allow this couple to move from the noisy premises in town to somewhere a little more congenial in or near the country. And examining the tests which we have had set out before us we are satisfied that Mr. Pope did not have the necessary exclusive possession, and we are satisfied that the landlord exercised general control. In this connection we should point out that he did tell us that he made certain rules, but particularly there was one occasion he remembered when he found that his occupiers had moved some of his belongings, I think it was in the kitchen, and he remonstrated with them and told them that they had to leave his things alone; there were tears on the part of Miss Weight, but these things were patched up. It was quite clear that he was determined to impose his own control on the house. He visited the house quite frequently, he and his wife, although we agree with the Attorney General that that is not a complete test in itself. But looking at it in a broad sense and considering all the matters together we are satisfied that in fact looking at the four tests which the Attorney has propounded to us that in accordance with the Housing Law the burden of proof, such as it is, has been discharged in this case by the defendant, and, therefore, the case against him is dismissed with costs."

Attorney General v de Carteret, (27th March, 1984 - unreported), was relied upon by the prosecution. The judgment reads as follows:

"The defendant in this action has been charged by Her Majesty's Attorney General with eight infractions of the Housing (Jersey) Law, 1949. The prosecution says that he let eight parts of the premises, 76 Rouge Bouillon, to a number of people without the consent of the Housing Committee. The circumstances which gave rise to this prosecution are briefly these - Mr. de Carteret bought these premises and at the time he bought them, the Housing Committee imposed a number of conditions when granting consent. The three important ones were these: that the main house shall be occupied by the purchaser or shall be let unfurnished or otherwise occupied by persons approved by the Committee as being persons in the category specified in Regulation 1 (1)(a), (b), (c), (d), (e), (f), (g) or (h) of the Housing (General Provisions) (Jersey) Regulations, 1970 (as amended). The next one is the equivalent and covers a remaining existing unit of private dwelling accommodation; and the next one required the same persons to occupy any new unit which might be created in the premises.

"At the time the property was bought, it had been occupied by a family for a number of years and we were told that there had been no transaction relating to it for some one hundred years. The Housing Committee, through its officers, inspected the premises and decided that the premises should contain at least two units of private dwelling accommodation; accordingly, the consent was issued with those three conditions I have mentioned and the additional one that there should be two units of private dwelling accommodation. In addition, of course, there was the restriction on using it for or in connection with any profession, commerce or business, including use for the provision of lodging or guest house accommodation such as would require registration under the Lodging Houses (Registration) (Jersey) Law, 1962, or the Tourism (Jersey) Law, 1948.

"The defendant recognised that there were restrictions on the premises that he had bought but he believed that as long as the two parts were under the control of a qualified person, that each of those qualified persons would be able to take advantage of a concession granted by the Housing Committee which, so we were informed and accepted, I think, by the Attorney, allows each householder to take up to five lodgers with him in his premises. I use the word 'with' because it has some significance when we come to give our decision in a moment or two.

"The defendant, having altered a number of the rooms in the premises by adding a kitchen or a bathroom or both, as the case may be, through an agent installed two persons in the premises in addition to himself. He was living for a time in the first floor flat; perhaps it is more properly described as the ground floor, but at any rate underneath it is a basement, above it are three further floors. First of all, when he was there, he installed a Mr. Le Merrer on the 21st December, 1981, in part of the basement, not the whole, but in giving the information which was required by the Housing Law to the Housing Committee, he declared that Mr. Le Merrer was going to occupy the basement of 76 Rouge Bouillon, St. Helier; that, as I have already said, he did not do.

"In the course of his private affairs, which do not concern us, Mr. de Carteret left the premises in 1982, towards August or September, and in place of himself, he installed a Mr. Ronald MacFarlane. I should say here that both Mr. Le Merrer and Mr. Ronald MacFarlane are persons who fall within the categories required by the Housing Committee to occupy the premises. In the case of Mr. Ronald MacFarlane, the exemption form is in unequivocal terms; in describing the accommodation, it is described quite clearly as 'unfurnished house' and the address is 76 Rouge Bouillon. Now, we were given to understand that, by that, Mr. de Carteret meant only that part of the house which Mr. MacFarlane was going to occupy in place of himself and he would have control over the other persons occupying it.

"The test that we have to decide in coming to our conclusions is whether the persons who were occupying parts of the main house and parts of the basement over the period of time as alleged in the action were tenants or lodgers. In this connection, I inferred before we retired that I would direct the Jurats along certain lines and I did so. We have considered, therefore, the case of the Attorney General -v- Larbalestier and approached the question in the light of the requirements of the law. Now, Article 14(2) provides that in any proceedings for an offence against this part of this law, the burden of proving that the consent of the Committee has been granted to any transaction or that this part of this law did not apply to any transaction, shall be on the person charged with the offence, and that burden is discharged on the balance of probabilities; that is accepted between all the parties and in arriving at our decision , we have had regard, as it was our duty to do, to all the circumstances of this case; as has been rightly said on many occasions, it is not possible to have a definitive explanation of exactly what is a lodger and what is a tenant. Each case has to be taken according to its circumstances. But, of course, there are a number of common factors to which the Court has to have regard and these were mentioned in the Larbalestier case as being four. First, the control of the landlord of the premises; second, the question of exclusive occupation; third, the residence on the premises of the landlord, although, according to English authorities, that is no longer perhaps quite so important; and fourth, the intention of the parties; to which we would add a fifth, all those can be looked at but what the Court has to arrive at in the end is to discover the true relationship of the parties.

"The Attorney General drew our attention to a number of matters which, he said, were clear; they were not challenged and we think we may recite them as being facts which we are satisfied have been proved. Firstly, no-one had a rent book; secondly, most of the occupiers signed the police register; thirdly, all had keys and the defendant had keys as well to the rooms; the occupiers had keys to their rooms and keys to the front door or the basement door, as the

case may be; fourthly, there were meters for electricity in each room and Mr. de Carteret used to enter the rooms when necessary to empty the gas meters which were cash meters. As regards the electricity he would charge a certain amount for each of the occupiers and recover the amounts from them. He, therefore, paid the bill for the whole electricity direct and recovered some of it from the occupiers. Fifthly, all except the top flat or attic flat occupied by Mr. and Mrs. McIntosh shared a kitchen and/or a lavatory. Sixthly, some of the premises were furnished, some partially furnished, some unfurnished. Seventhly, no bed linen was supplied except that offered to Mr. McIntosh on one occasion which was not, I think, accepted. Eighthly, no services were provided in the rooms themselves; and ninthly, no control was exercised over what the occupiers did in the rooms whilst they were there. Obviously, if they misbehaved to an outrageous extent, the ordinary remedies of the law would be available to the owner of the premises.

"To that list, of course, we add an important matter which occurred in the course of the evidence when Mr. de Carteret was in the witness box. He agreed, in fact, that there was no difference in the details of the occupation of the rooms between the qualified persons who were the tenants of certain parts of the premises - Mr. MacFarlane and then Mr. Wilson after him, and Mr. Le Merrer - and the other persons.

"Looking at the true relationship, we had to ask ourselves whether any of these persons could be said to be lodging with Mr. de Carteret or lodging with, even if his explanation was acceptable, lodging with Mr. MacFarlane, Mr. Wilson or Mr. Le Merrer. We cannot find that this was so. We had to ask ourselves, also, did, in fact, Mr. de Carteret exercise dominion over the flats; in our opinion, we do not think he did; he had occasion only to go there twice like any other person who might want to go there; he went to collect the cash from the gas meters and that was all, except for applying to the parties for the rent. It is true that he did enter on those several occasions to collect the

cash, but that by itself would not, in our opinion, alter the basic position which we think was the true relationship between him and these people, that is to say, of tenants. And we therefore find that because they were tenants and he did not obtain the consent of the Housing Committee, the infractions have been proved."

Mr. Whelan next referred us to Attorney General v F.R. Roberts & Son (Holdings) Limited and others, (3rd March, 1988, as yet unreported) upon which the prosecution relied strongly and it is necessary to cite a long extract:-

"The facts were not in dispute. The Respondent Company is the tenant on a long lease of garage premises which include a flat. The consent granted by the Housing Committee to take these premises included a condition in the following terms:

> 'that the existing unit of private dwelling accommodation at the property shall be offered for sale to or be otherwise occupied by, persons approved by the Committee as being persons of a category specified in Regulation 1(1)(a), (b), (c), (d), (e), (f), (g) or (h) of the Housing (General Provisions) (Jersey) Regulations, 1970 as amended.'

"The private dwelling accommodation referred to in the condition was the flat, which consisted of a living room, a kitchen, two bedrooms and a bathroom. Miss Donna Le Claire, who gave evidence, moved into the flat in March, 1986. She was a qualified 1(1)(a) resident, and a form, giving particulars of an exempted transaction, signed by herself and on behalf of the Company, was sent to the Housing Department. In this form the accommodation was described as a two-bedroom furnished flat. Miss Le Claire was not however given the occupation of the whole of the flat. It was also occupied by the manageress of part of the Company's business, Miss Julie Norris, who occupied one of the bedroms, and shared with Miss Le Claire the use of the living room,

kitchen and bathroom. As the period of time stated in the charge does not include Miss Norris' occupation, we will not go into the arrangements between herself, Miss Le Claire and the Respondent Company.

"Before Miss Norris left the flat, in September 1986, Miss Le Claire asked her whether the Company would agree to her brother taking Miss Norris' place. Miss Norris said that she would ask Mr. Francis Roberts, the owner of the Company, and later said that he would not so agree and her place would be taken by another employee, Mrs. Carol Ashworth, with her husband and infant child. The flat was redecorated at the expense of the Company, and recarpeted at the expense of the Ashworths, who then moved in. The arrangements between the parties were that Miss Le Claire occupied her bedroom; the Ashworths occupied theirs; and the remainder of the flat could be jointly used, though Miss Le Claire usually preferred to stay in her room rather than use the living room with the family. Both Miss Le Claire and the Ashworths paid rent to the Company, £25 and £35 per week respectively; Miss Le Claire paid hers to Mrs. Ashworth, who paid the total rent of £60 to the Company. Miss Le Claire paid £30 a quarter for electricity to Mrs. Ashworth. The telephone was in the name of Ashworth.

"In November, 1986, Miss Le Claire moved out. Mrs. Ashworth on behalf of the Company placed an advertisement in the Evening Post, seeking "one person with housing qualifications to share a furnished two-bedroom flat". As a result, Mr. Roger Marie, also a witness, was approved by Mr. Roberts and the Ashworths, signed the form "Particulars of Exempted Transaction" and moved in. In the form the accommodation was again described as a two-bedroom flat. The rental to be paid is not included in the information sought by the form. The rental and other arrangements, were the same as with Miss Le Claire. Mr. Marie told us that he regarded himself as the tenant of a room rather than of a flat. He was not found to be a satisfactory tenant, in that he fell behind with his rent, and moved out in February, 1987.

"The charge against the Respondents is that, between the 1st September, 1986, and the 31st March, 1987, they acted in contravention of Article 14(1)(d) of the Housing (Jersey) Law, 1949, by being parties to a device, plan or scheme for an arrangement whereby Mr. and Mrs. Ashworth would occupy part of the flat in question, which was inconsistent with the consent granted by the Housing Committee, the second condition of which provided that the flat should be occupied by persons approved by the Committee as qualified residents, inasmuch as neither Mr. nor Mrs. Ashworth fell into any of the approved categories of qualified residents.

"It was contended in the first place, by and on behalf of the Respondents, that during the period charged, the flat was occupied first by Miss Le Claire and then by Mr. Marie, that is by qualified residents approved by the Committee, that the Ashworths were their lodgers, and that the requirements of the second condition had therefore been fulfilled. The Crown Advocate accepted that the right of occupation by a qualified resident carries with it the right to take in immediate members of the family and also lodgers up to the maximum of five, the number above which the premises are required to be registered under the Lodging Houses (Registration) (Jersey) Law 1962. If therefore the Committee had intended to exclude non-qualified lodgers, the conditions would have had to be expressly drafted to that effect.

"But were the Ashworths lodgers? It is not easy to give an all-purpose definition of a lodger, and we do not propose to try to do so. But, in the view of the Court it is obvious that they were not. They received neither board nor service from Miss Le Claire, to take her example (the arrangements were the same with Mr. Marie) though one can be a lodger without receiving either. Apart from the fact that they were not qualified and had signed no form, they were in exactly the same position as Miss Le Claire. Both parties were selected by the landlord; both paid him rent; both had exclusive enjoyment of a bedroom and joint enjoyment of the rest of the flat; the occupation of the

Ashworths was not by the wish nor under the direction of Miss Le Claire. In our view, both Miss Le Claire and Mr. and Mrs. Ashworth were tenants of the Respondent Company. The only difference between the tenants was that one was authorised and the other was not. There was no contractual relationship between Miss Le Claire and Mr. and Mrs. Ashworth. Both parties. on the other hand, had a legal relationship with the Company. Mr. and Mrs. Ashworth were not the lodgers, nor the sub-tenants, nor anything else of Miss Le Claire. They merely shared the same flat and the same landlord.

Their occupation of the flat was therefore contrary to the terms of the condition, because they were neither qualified nor the lodgers of someone who was."

Since the English authorities relied on in Attorney General v Larbalestier (supra) the House of Lords has simplified and clarified the relevant law in Street v Mountford (1985) 2 All ER 289 HL. We start with the headnote at p. 289:-

The landlord granted the appellant the right to occupy a furnished room under a written agreement which stated that the appellant had the right to occupy the room 'at a licence fee of £37 per week', that 'this personal licence is not assignable', that the 'licence may be terminated by 14 days written notice' and that the appellant understood and accepted that 'a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts'. The appellant had exclusive possessions of the room. Some months after signing the agreement the appellant applied to have a fair rent registered in respect of the room. The landlord then applied to the county court for a declaration that the appellant occupied the room under a licence and not a tenancy. The county court judge held that the appellant was a tenant entitled to the protection of the Rent Acts. but on the landlord's appeal the Court of Appeal held that the occupier was a mere licensee since,

notwithstanding the fact of exclusive possession, the agreement bore all the hallmarks of a licence and the parties had in fact only intended to create a licence. The appellant appealed to the House of Lords.

Held - The test whether an occupancy of residential accommodation was a tenancy or a licence was whether, on the true construction of the agreement, the occupier had been granted exclusive possession of the accommodation for a fixed or periodic term at a stated rent, and unless special circumstances existed which negatived the presumption of a tenancy (e.g. where from the outset there was no intention to create legal relations or where the possession was granted pursuant to a contract of employment) a tenancy arose whenever there was a grant of exclusive possession for a fixed or periodic term at a stated rent. The intention of the parties, as manifested in the agreement, that they only intended to create a licence (and expressed the agreement to be a licence) and that they agreed not to be bound by the Rent Acts was irrelevant. Accordingly, since the effect of the agreement between the appellant and the landlord was to grant the appellant exclusive possession for a fixed term at a stated rent, and no circumstances existed to negative the presumption of a tenancy, it was clear that the appellant was a tenant. Her appeal would therefore be allowed."

The agreement reached in that case is recited by Lord Templeman at p.291 and is directly relevant to the present case:-

"In the course of argument, nearly every clause of the agreement dated 7th March 1983 was relied on by Mrs. Mountford as indicating a lease and by Mr. Street as indicating a licence. The agreement, in full, was in these terms:

'I Mrs Wendy Mountford agree to take from the owner Roger Street the single furnished room number 5 & 6 at 5 St. Clements Gardens, Boscombe, Bournemouth, commencing 7th March 1983 at a licence fee of

£37 per week. I understand that the right to occupy the above room is conditional on the strict observance of the following rules:

1. No paraffin stoves, or other than the supplied form of heating, is allowed in the room.

2. No one but the above-named person may occupy or sleep in the room without prior permission, and this personal licence is not assignable.

3. The owner (or his agent) has the right at all times to enter the room to inspect its condition, read and collect money from meters, carry out maintenance works, install or replace furniture or for any other reasonable purpose.

4. All rooms must be kept in a clean and tidy condition.

5. All damage and breakages must be paid for or replaced at once. An initial deposit equivalent to 2 weeks licence fee will be refunded on termination of the licence subject to deduction for all damage or other breakages or arrears of licence fee, or retention towards the cost of any necessary possession proceedings.

6. No nuisance or annoyance to be caused to the other occupiers. In particular, all music played after midnight to be kept low so as not to disturb occupiers of other rooms.

7. No children or pets allowed under any circumstances whatsoever.

8. Prompt payment of the licence fee must be made every Monday in advance without fail.

9. If the licence fee or any part of it shall be seven days in arrear or if the occupier shall be in breach of any of the other terms of this agreement or if (except by arrangement) the room is left vacant or unoccupied, the owner may re-enter the room and this licence shall then immediately be terminated (without prejudice to all other rights and remedies of the owner).

10. This licence may be terminated by 14 days written notice given to

the occupier at any time by the owner or his agent, or by the same notice by the occupier to the owner or his agent.

Occupier's signature.

Owner/agent's signature

Date 7th March 1983

I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts.'"

At p.292 Lord Templeman said this:-

"My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted".

And at p.293:-

"In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own. In Allan v. Liverpool Overseers (1874) LR 9 QB 180 at 191 - 192 Blackburn J said:

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

after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'

"If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is conceded that Mrs. Mountford is entitled to exclusive possession and is not a lodger. Mr. Street provided neither attendance nor services and only reserved the limited rights of inspection and maintenance and the like set forth in cl 3 of the agreement. On the traditional view of the matter, Mrs. Mountford not being a lodger must be a tenant."

And at page 294:-

"In the present case the agreement dated 7th March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy wihout interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the

parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

"It was also submitted that, in deciding whether the agreement created a tenancy or a licence, the court should ignore the Rent Acts. If Mr. Street has succeeded, where owners have failed these past 70 years, in driving a coach and horses through the Rent Acts, he must be left to enjoy the benefit of his ingenuity unless and until Parliament intervenes. I accept that the Rent Acts are irrelevant to the problem of determining the legal effect of the rights granted by the agreement. Like the professed intention of the parties, the Rent Acts cannot alter the effect of the agreement."

And at page 296:-

"In Facchini v. Bryson [1952] 1 TLR 1386 an employer and his assistant entered into an agreement which, inter alia, allowed the assistant to occupy a house for a weekly payment on terms which conferred exclusive possession. The assistant did not occupy the house for the better performance of his duty and was not therefore a service occupier. The agreement stipulated that 'nothing in this agreement shall be construed to create a tenancy between the employer and the assistant'. Somervell LJ said (at 1389):

> 'If, looking at the operative clauses in the agreement, one comes to the conclusion that the rights of the occupier, to use a neutral word, are those of a lessee, the parties cannot turn it into a licence by saying at the end "this is deemed to be a licence"; nor can they, if the operative paragraphs show that it is merely a licence, say that it should be deemed to be a lease.'

"Denning LJ referred to several cases including Errington v. Errington and Cobb v. Lane and said (at 1389 - 1390):

'In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy...In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it'.

"The decision, which was thereafter binding on the Court of Appeal and on all lower courts, referred to the special circumstances which are capable of negativing an intention to create a tenancy and reaffirmed the principle that the professed intentions of the parties are irrelevant. The decision also indicated that in a simple case a grant of exclusive possession of residential accommodation for a weekly sum creates a tenancy."

And commencing at page 298:-

"In Shell-Mex & BP Ltd v Manchester Garages Ltd [1971] 1 All ER 841, [1971] 1 WLR 612 the Court of Appeal, after carefully examining an agreement whereby the defendant was allowed to use a petrol company's filling station for the purposes of selling petrol, came to the conclusion that the agreement did not grant exclusive possession to the defendant, who was therefore a licensee. Lord Denning MR in considering whether the transaction was a licence or a tenancy said ([1971] 1 All ER 841 at 843, [1971] 1 WLR 612 at 615):

'Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a licence, or whether it grants an

> interest in land, in which case it is a tenancy. At one time it used to be thought that exclusive possession was a decisive factor. But that is not so. It depends on broader considerations altogether. Primarily on whether it is personal in its nature or not: see Errington v Errington and Woods'.

"In my opinion the agreement was only 'personal in its nature' and created 'a personal privilege' if the agreement did not confer the right to exclusive possession of the filling station. No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable.

"Heslop v Burns [1974] 3 All ER 406, [1974] 1 WLR 1241 was another case in which the owner of a cottage allowed a family to live in the cottage rent free and it was held that no tenancy at will had been created on the grounds that the parties did not intend any legal relationship. Scarman LJ cited with approval the statement by Denning LJ in Facchini v Bryson [1952] 1 TLR 1386 at 1389:

> 'In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy.'

(See [1974] 3 All ER 406 at 415, [1976] 1 WLR 1241 at 1252).

"In Marchant v Charters [1977] 3 All ER 918, [1977] 1 WLR 1181 a bed-sitting room was occupied on terms that the landlord cleaned the rooms daily and provided clean linen each week. It was held by the Court of Appeal that the occupier was a licensee and not a tenant. The decision in the case is sustainable on the grounds that the occupier was a lodger and did not enjoy exclusive possession. But Lord Denning MR said ([1977] 3 All ER 918 at 922, [1977] 1 WLR 1181 at 1185):

> 'What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not in which case he is a licensee?'

"But in my opinion, in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether on its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable.

"In Somma v Hazlehurst [1978] 2 All ER 1011, [1978] 1 WLR 1014 a young unmarried couple, H and S. occupied a double bed-sitting room for which they paid a weekly rent. The landlord did not provide services or attendance and the couple were not lodgers but tenants enjoying exclusive possession. But the Court of Appeal did not ask itself whether H and S were lodgers or tenants and did not draw the correct conclusion from the fact that H and S enjoyed exclusive possession. The Court of Appeal was diverted from the correct inquiries by the fact that the landlord obliged H and S to enter into separate agreements and reserved power to determine each agreement separately. The landlord also insisted that the room should not in form be let to either H or S

or to both H and S but that each should sign an agreement to share the room in common with such other persons as the landlord might from time to time nominate. The sham nature of this obligation would have been only slightly more obvious if H and S had been married or if the room had been furnished with a double bed instead of two single beds. If the landlord had served notice on H to leave and had required S to share the room with a strange man, the notice would only have been a disguised notice to quit on both H and S. The room was let and taken as residential accommodation with exclusive possession in order that H and S might live together in undisturbed quasi-connubial bliss making weekly payments. The agreements signed by H and S constituted the grant to H and S jointly of exclusive possession at a rent for a term for the purposes for which the room was taken and the agreement therefore created a tenancy. Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts. I would disapprove of the decision in this case that H and S were only licensees and for the same reason would disapprove of the decision in Aldrington Garages Ltd v Fielder (1978) 37 P & CR 461 and Sturolson & Co v Weniz (1984) 272 EG 326.

"In the present case the Court of Appeal held that the agreement dated 7 March 1983 only created a licence. Slade LJ accepted that the agreement and in particular cl 3 of the agreement -

> 'shows that the right to occupy the premises conferred on [Mrs. Mountford] was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to [Mr. Street] to enter...'

" Before your Lordships it was conceded that the agreement conferred the right of exclusive possession on Mrs. Mountford. Even without cl 3 the resu

would have been the same. By the agreement Mrs. Mountford was granted the right to occupy residential accommodation. Mr. Street did not provide any services or attendance. It was plain that Mrs. Mountford was not a lodger. Slade LJ proceeded to analyse all the provisions of the agreement, not for the purpose of deciding whether his finding of exclusive possession was correct, but for the purpose of assigning some of the provisions of the agreement to the category of terms which he thought are usually to be found in a tenancy agreement and of assigning other provisions to the category of terms which he thought are usually to be found in a licence. Slade LJ may or may not have been right that in a letting of a furnished room it was 'most unusual to find a provision in a tenancy agreement obliging the tenant to keep his rooms in a "tidy condition"'. If he was right about this and other provisions there is still no logical method of evaluating the results of his survey. Slade LJ reached the conclusion that 'the agreement bears all the hallmarks of a licence, rather than a tenancy, save for the one important feature of exclusive occupation'. But in addition to the hallmark of exclusive occupation of residential accommodation there were the hallmarks of weekly payments for a periodical term. Unless these three hallmarks are decisive, it really becomes impossible to distinguish a contractual tenancy from a contractual licence save by reference to the professed intention of the parties or by the judge awarding marks for drafting. Slade LJ was finally impressed by the statement at the foot of the agreement by Mrs. Mountford 'I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts.' Slade LJ said:

> '....it seems to me that if [Mrs. Mountford] is to displace the express statement of intention embodied in the declaration, she must show that the declaration was either a deliberate sham or at least an inaccurate statement of what was the true substance of the real transaction agreed between the parties...'

"My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupany referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy.

"The position was well summarised by Windeyer J sitting in the High Court of Australia in Radaich v Smith (1959) 101 CLR 209 at 222, where he said:

> 'What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a

lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long-established law: see Cole on Ejectment ((1857) pp 72 - 73, 287, 458).'

"My Lords, I gratefully adopt the logic and the language of Windeyer J. Henceforth the courts which deal with these problems will, save in exceptional circumstances, only be concerned to inquire whether as a result of an agreement relating to residential accommodation the occupier is a lodger or a tenant. In the present case I am satisfied that Mrs. Mountford is a tenant, that the appeal should be allowed..."

On the question of access by the defendant and others to the various flats or bed-sitting rooms and chalet Jenkins L.J. in Addiscombe Garden Estates Limited v Crabbe (1958) 1 QB 513 at pp 524 and 525 said this:-

"The next provision of importance is the agreement to permit "the grantors and their agents at all reasonable times to enter the said premises to inspect the condition thereof and for all other reasonable purposes". The importance of that is that it shows that the right to occupy the premises conferred on the grantees was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantors to enter. The exclusive character of the occupation granted by a document such as this has always been regarded, if not as a decisive indication, at all events as a very important indication to the effect that a tenancy, as distinct from a licence, is the real subject-matter of a document such as this."

The learned authors of Dawson & Pearce: "Licences relating to the occupation or use of land", at p.8, say this:-

"Where the rights of the occupier are qualified the distinction which has to be drawn is between an exclusive, though restricted, right to possession, and a right to possession which is not exclusive, for in the absence of exclusive possession by legal right there can be no tenancy.

"Although a lease may be subject to reservations or restrictions (for instance leases often contain a clause permitting a landlord to enter to view the state of repairs) it is inconsistent with a tenancy for the landowner to retain control of the premises. In Smith v St. Michael, Cambridge, Overseers the agreement by which a landowner permitted the Commisssioners of Inland Revenue to use five rooms in a house stipulated that the landowner was to provide gas, wood and coals, and also a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same. The Court held that the agreement did not create a tenancy.

'We think that we must look not so much at the words as the substance of the agreement; and taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance.'"

On the question of services or 'attendance', the Crown Advocate referred us to Marchant v Charters (1977) 3 All ER 918 where at p. 923, Lord Denning MR said this:-

"The word 'attendance' was much considered by the House of Lords in Palser v Grinling. Viscount Simon LC said that attendance means 'service personal to the tenant...provided by the landlord...for the benefit or convenience of the individual tenant in his use or enjoyment' of the room. It

does not include services in regard to the common parts, such as cleaning the common staircase, or the porter at the bottom. Applying that test, it is quite plain that the attendance here included these services: Each day the room was cleaned, each day the rubbish was removed and each week the dirty linen was removed and clean linen was supplied in its place. The fact that Mr. Charters may have refused it on some occasions does not affect the matter."

In addition to commenting on the authorities cited by the Crown Advocate, Mr. Le Cornu sought to rely on Carrel v Carrel and anr. (1981) J.J.53, a case concerning the question whether partners in a family grocery business occupied premises as tenants or licensees. There, at page 55, the Court referred to Marchant v Charters (supra) and having read from the judgment of the Master of the Rolls the passage already cited in the present judgment (page 48), the learned Deputy Bailiff continued:

"I stop there and say that as regards the words of the learned Master of the Rolls when he uses these words "a stake in the room" that clearly must mean an interest in property and not just an extended personal interest."

Mr. Le Cornu said that he accepted the authority of Street v Mountford (supra); nevertheless the Court should refer to the earlier English authorities, the first being Bradley v Baylis, Morfee v Novis, and Kirby v Biffen (1881) QBD Vol. VIII, 195, borough franchise cases heard together. The issue referred to rateability because the householder or tenant had to occupy a rateable tenement and the lodger need not, and indeed, could not be rated. Commencing at p. 218, Jessel, M.R., dealt with the matter thus:-

"That being so, it remains to consider when a man who occupies a rateable tenement is an occupying tenant, and when he occupies or uses it as a lodger only.

"There is, probably, no question on which there has been a greater variety of judicial opinion than this. The question has arisen, first of all, under the rating Acts; secondly, it has arisen, in Ireland, under one of the Parliamentary Franchise Acts; and thirdly, it has arisen in this country under the Lodgers Protection Act, 1871 (34 & 35 Vict. c. 79), and all I can say is that, having considered the cases upon it, I am of opinion it is quite impossible to reconcile them. You must prefer some to the others, for it is impossible to say that all are right; and this shews that the question is a very difficult one. Again, I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case. But that, of course, will give very little aid to revising barristers; and I think, therefore, I ought to go further and state what cases, in my opinion, are cases of occupying tenants, and what cases are cases of lodgers, and to say that the descriptions are not exhaustive, and that there may and must be cases between them, as to which it is wholly impossible to give an opinion until their details are known.

"First of all, take the case of a lodger. It seems to me, as to unfurnished lodgings (and I will only deal with unfurnished lodgings, as it is the only class of cases with reference to which questions are likely to arise) where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase and outer door, but gives to the "inmates" (I use that term for my present purpose) merely a right of ingress and egress, and retains to himself the general control, with the right of interfering - I do not mean an actual interference, but a right to interfere, a right to turn out trespassers, and so on; there I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a lodger. That is one extreme case.

"Now I take another case, where the landlord lets out the whole of the house into separate apartments, and lets out each floor separately, so as to demise the passages, reserving simply to each inmate of the upper floors the right of ingress and egress over the lower passages, but parts entirely with the whole legal ownership, for the term demised, and retains no control over the house: there, in my opinion, the inmates are occupying tenants, and are capable of being rated as such. That is an extreme case on the other side.

"There will be an immense number of intermediate cases, which, as I said before, can only be dealt with as they arise. Take such a case as the first of those before us. Does it make any difference that the inmates have latch-keys to the outer door and also keys to the inner door? I think not. I think they are still lodgers notwithstanding. Does it make any difference that the landlord does not reside there personally, but has resident servants, who occupy, on his behalf, part of the house. I think not. I think that the inmates are still lodgers. Does it make any difference that the landlord does or does not repair? I think not; they are still lodgers.

"On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over, and does not reside in the house, - I think the inmates are occupying tenants. Here, again, does the fact of the landlord repairing or paying rates and taxes make any difference. I think not. Of course he has a right to enter to make such repairs, but still, in my opinion, that does not prevent the occupier being in rateable occupation.

"I have given these illustrations, for the purpose of aiding those who have to consider these matters, and I think further aid will be obtained from the consideration of the actual cases themselves which we have to decide.

"Now, they are three in number. The first is the case of Bradley v. Baylis, and the term of the Special Case, as amended, are these. [His Lordship here read them from the Special Case.]

"It follows, from what I have already said, that, in my opinion, the claimaint in this case is a lodger. The landlord resides in the house and has a general control over it; in other words, I think the claimant lives with him as a lodger, and is properly so described. Therefore, I am of opinion that the appeal ought to be allowed, the claimant not being a householder, and not capable of being rated, but being a mere lodger.

"The next case is the case of Morfee v. Novis. [His Lordship here read the facts of that case.] The landlord occupied all the rest of the house except the two rooms let to the claimant, and the claimant had only a right of access. The mere fact of his having the key of the outer door, in my opinion, does not make him other than a lodger; he is not the landlord of the house; and, in my opinion, in this case also the appeal ought to be allowed.

"The third case is the case of Kirby v. Biffen [His Lordship read the facts of that case.]

"It follows, from what I have said, that this claimant is an occupying tenant. The landlord has no control over the house, and he does not interfere with it in any way whatever. He neither lives there himself, nor do his servants, and he does not render any service to the tenants. He lets out the whole house, in the way in which it is usually let, that is, he lets out all the rooms, with the right of ingress and egress, and the keys are in the possession of the tenants. It seems to me, that if there can be a case at all in which part of a house can be "separately occupied as a dwelling", this is that case. It is true that it was admitted in the argument and it must be treated that the passages and staircases were not demised, and that only a right of ingress and

egress over them was given to the tenants, but such a demise of the passages and staircases is practically unknown; at all events, it is not the usual way of letting, and one cannot suppose that the legislature intended only to include such an extreme and peculiar case as that."

At page 241, Cotton, L.J. said this:-

"Now, what is a lodger? I do not intend to try to give that which will be an exhaustive definition of a lodger. I have had to consider it several times in this Court, and, in my opinion, there is involved in the term "lodger", that the man must lodge in the house of another man and lodge with him. With respect to lodging in the house of another man, there is no difficulty about that. What constitutes his lodging with the landlord is the difficulty. In my opinion, it is not necessary that the person with whom he lodges, that is his immediate landlord should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control over the house must be exercised by the person in whose house a man lives to make him a lodger. There may be an infinite variety of cases which may occur, and to attempt to exhaust them, in my opinion, would be futile. What we have to do here is to see whether, having regard to the facts which are stated, it can be said that in these cases the claimants are or are not lodgers."

In Marchant v. Charters (supra), Mr. Le Cornu referred us to the judgment of Lord Denning MR at page 922, where His Lordship cited two other cases:-

"The nearest case to the present case is Luganda v. Service Hotels Ltd. A student was reading for the Bar. He took a furnished room in a building called the Queensborough Court Hotel. There were 88 rooms. They were said to be 'let' out to tenants. Every student had a Yale key for his room. It was

a bed-sittingroom with a double gas ring. He got his own meals and provided his own towels and soap. The chamber-maids came in every day and made the bed and cleaned the room. Every week they changed the linen. It was held that he was a contractual licensee and not a tenant. But as he had applied to the rent tribunal he was protected for a limited period from being evicted".

And:-

"The last case is R. v. South Middlesex Rent Tribunal, ex parte Beswick. A young lady lived in a single room at a YWCA hostel. It was a furnished room. It was her sole home. She was permanent, not temporary. In common with other residents, she had the use of a kitchen, diningroom, livingroom, laundry room, bathroom and toilet. It was held that she was not a tenant but a licensee. So the fair rent was to be fixed, not by the rent officer, but by the rent tribunal."

Decision:

The Court regards Street v. Mountford (supra) as of the highest persuasive authority. In that case the occupation was expressed, and believed, to be a licence in order to avoid the creation of a tenancy protected under the Rent Acts. In the same way, in the present case, the Court has to consider whether the several occupancies were expressed, and believed, to be licences in order to avoid the requirements of the Housing Law.

The House of Lords held that the test whether an occupancy of residential accommodation was a tenancy or a licence was whether, on the true construction of the agreement, the occupier had been granted exclusive possession of the accommodation for a fixed or periodic term at a stated rent, and unless special circumstances existed which negatived the presumption of a tenancy (e.g. where from the outset there was no intention to create legal

relations) a tenancy arose whenever there was a grant of exclusive possession for a fixed or periodic term at a stated rent. The intention of the parties, as manifested in the agreement, that they only intended to create a licence and that they agreed not to be bound by the Rent Acts was irrelevant. Accordingly, since the effect of the agreement between the occupant and the landlord was to grant exclusive possession for a fixed term at a stated rent, and no circumstances existed to negative the presumption of a tenancy, it was clear that the occupant was a tenant.

A tenancy includes a term from week to week in possession at a rent and liable to determination by notice or re-entry.

A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.

The question which the Court has to answer is one not of words but of substance. The Court has to consider the purpose of the grant, the terms of the grant and the surrounding circumstances.

Street v. Mountford, at page 293 (supra) provides that the occupier is a lodger if the landlord provides attendances or services which require the landlord or his servants to exercise unrestricted access to and use of the premises.

On the facts of the instant case we are quite unable to find that the defendant (or Paul Smith or Mr. Gallichan) provided attendances or services which required the defendant (or Paul Smith or Mr. Gallichan) to exercise unrestricted access to and use of the premises. What was retained, as in Street v. Mountford was a right at all times to enter the rooms to inspect their

condition, read and collect money from meters, carry out maintenance works, install or replace furniture or for any other reasonable purpose.

Unlike in Street v. Mountford the agreements made with the several occupiers were verbal agreements. Nevertheless, the defendant, whether on her own behalf or on behalf of others, enjoyed freedom to offer each of the several occupants the right to occupy the rooms comprised in the agreement on such lawful terms as the defendant pleased. Each of the occupants enjoyed freedom to negotiate with the defendant to obtain different terms. In each case both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties could not alter the effect of the agreement by insisting that they only created a licence. As Lord Templeman so aptly put it, the manufacturer of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

In Street v. Mountford, Lord Templeman also said that if Mr. Street had succeeded in driving a coach and horses through the Rent Acts, he must be left to enjoy the benefit of his ingenuity unless and until Parliament intervened. His Lordship accepted that the Rent Acts were irrelevant to the problem of determining the legal effect of rights granted by the agreement. Like the professed intention of the parties, the Rent Acts could not alter the effect of the agreement. The Court respectfully concurs. If the defendant has succeeded in driving a coach and horses through the controls imposed by the Housing Law, she must be left to enjoy the benefits of her ingenuity unless and until the States intervene. The Court accepts that the Housing Law is irrelevant to the problem of determining the legal effect of rights granted by the agreements between the defendant (or Paul Smith or Mr. Gallichan) and the

several occupants, excepting always that the burden remains on the defendant of proving that Part III of the Housing Law does not apply to the transactions thus entered into.

At page 300 of Street v. Mountford (supra) Lord Templeman cited with approval the judgment of Windeyer J. sitting in the High Court of Australia in Raddaich v. Smith (supra). A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to a landlord, either by contract or statute, of a limited right of entry, as for example to view or repair is not inconsistent with the grant of exclusive possession.

Having regard to the fact that Street v. Mountford was decided by the House of Lords, with all five Law Lords concurring, the earlier English cases decided under the franchise or rating laws, can only be of limited academic interest.

But the Court must consider the Jersey cases cited to us, in particular because Mr. Le Cornu suggested that if the Court decided against the defendant in the present case, it would in effect, be overturning four cases, which only a Higher Court could do. The first of these is Attorney General -v- Larbalestier in which four tests were drawn to the Court's attention and which the Court would have to consider in deciding whether Mr. Pope was a lodger or a tenant. These were first, the control of the landlord of the premises, secondly, the question of exclusive occupation, thirdly the residence on the premises by the landlord, and fourthly, the intention of the parties.

It may well be that the four tests require some revision in the light of Street v. Mountford but it is not necessary to overturn Attorney General v. Larbalestier in order to find against the defendant in the present case. The

question of control of the premises by the landlord and the matter of residence on the premises by him are relevant to the main test of exclusive possession and the intention of the parties can be relevant as where from the outset there was no intention to create legal relations or where possession was granted pursuant to a contract of employment. What is not relevant is an intention, manifested by the parties, to create a licence where, in fact, they created a tenancy.

A careful examination of the judgment in Attorney General v. Larbalestier shows that the Court directed itself correctly. At p. 225 the Deputy Bailiff, as he then was, said "...we think it is right to look at the true relationship which existed between Mr. Larbalestier and Mr. Pope"; and "...we have examined the present circumstances". And at page 227 he said this: "...we are satisfied that Mr. Pope did not have the necessary exclusive possession..."

But it is not difficult to distinguish the Larbalestier case from the present one. The bedroom was not locked, indeed the Court understood from Mr. Pope that it did not have a lock there to use. In the instant case all the occupants had keys. In the Larbalestier case the landlord provided attendance or service which required him to exercise unrestricted access to and use of the premises - he opened windows, did a little cleaning and emptied the ashtrays - he kept his belongings there - it was still his home, in which he had temporarily installed somebody else. None of those matters apply in the instant case.

Carrel v. Carrel (supra) was not a Housing Law case. The question was whether partners in a family grocery business occupied premises as tenants or licensees. The Court cited Shell-Mex and B.P. Limited -v- Manchester Garages Limited (supra) in which Buckley L.J.said that one must find whether in fact it was intended to create a relationship of landlord and tenant or that of licensor and licensee. The Court also cited Booker v. Palmer (1942) 2 All ER 674, where Lord Greene MR at p. 677 said that the law does not impute intention to

enter into relationships where the circumstances and the conduct of the parties negative any intention of the kind. Thus, there were special circumstances which negatived the presumption of a tenancy (one of the exceptions declared by Lord Templeman in Street -v- Mountford.)

Attorney General -v- de Carteret (supra) is wholly supportive of the prosecution in the present case. Each case has to be taken according to its circumstances. The Court said that all four tests mentioned in the Larbalestier case could be "looked at" but added a fifth, that "what the Court has to arrive at in the end is to discover the true relationship of the parties". The Court, in Attorney General -v- de Carteret, was, in effect, anticipating Street v. Mountford and there is no question of the decision being overturned.

The last of the four cases is Attorney General -v- F.R. Roberts & Son (Holdings) Ltd and others. The charge in that case accused the defendants of being parties to a device, plan or scheme whereby a Mr. and Mrs. Ashworth would occupy part of a flat inconsistently with a consent granted by the Housing Committee. There are similarities between Mr. Roger Marie in that case, who signed a "Particulars of exempted transaction" form for a two bedroom flat, intended to provide "cover" for Mr. and Mrs. Ashworth's occupation, but who regarded himself as a tenant of a single room, and Mr. Gallichan in the present case. The test was whether Mr. and Mrs. Ashworth were lodgers. The Court decided that they were not; they were tenants; they had exclusive enjoyment of one bedroom and joint enjoyment of the rest of the flat.

The ratio decidendi in Attorney General v. Larbalestier, in Attorney General v. de Carteret and in Attorney General v. F.R. Roberts & Son (Holdings) Ltd. was exclusive possession; in Carrel v. Carrel it was the lack of any intention to enter into legal relationships; thus none of those cases has to be overturned in order to apply, as the Court does apply, the decision of the House of Lords in Street v. Mountford.

The Court now applies the law, as it has found it to be, to charges 1, 2, 3 and 5 in the present case:-

1. The Court is satisfied that when Mr. Cullinane moved down from the first floor of 14, Museum Street, to the ground floor flat, and whatever his status may have been on the first floor, which we are not called upon to decide, he became the tenant of the ground floor flat from the defendant. The defendant has not discharged the burden of proving, on the balance of probabilities, that Mr. Cullinane was the lodger of Paul Smith, or of the defendant, or of Mr. Gallichan. On the true construction of the agreement, entered into between the defendant and Mr. Cullinane, he had been granted exclusive possession of the accommodation for a periodic term at a stated rent. No attendances or services required the defendant or Paul Smith or Mr. Gallichan to exercise unrestricted access to and use of the accommodation. The exclusive possession enjoyed by Mr. Cullinane was not affected by the conditions of the tenancy that reserved certain rights of entry. Services provided in the communal part of the premises have no relevance to the question of exclusive possession of the bed-sittingroom and kitchen that comprised the flat. The defence relies on the claim that services were always available and offered. But the Court does not believe that services were offered as part of the terms of Mr. Cullinane's tenancy of the ground floor flat. A crucial factor was that he wanted privacy i.e. exclusive possession and the defendant agreed. We accept the evidence of Mr. Cullinane as to the arrangements that were made.

2. The Court is satisfied that Miss Biggs and Mr. Jack had exclusive possession of the bed-sittingroom which they occupied on the first floor of 14, Museum Street and, therefore, that they were tenants of the defendant. Both parties were free to negotiate and the agreement they negotiated amounted to a tenancy. A highly relevant piece of evidence

was given by the defendant: Miss Biggs did not want the linen because she had her own and she also wanted to do her own cleaning because she wanted her privacy, i.e. exclusive possession, and the defendant agreed. Miss Biggs and Mr. Jack entered into occupation on the very day that Paul Smith moved out, so clearly there was no legal or any other relationship between them. Mr. Hogan's evidence regarding Miss Biggs and Mr. Jack was clearly unsafe; he thought that Paul Smith was present at the negotiations with them and yet later conceded that he could not say when Paul Smith would have met them, which was not surprising since they moved in on the day he moved out; and yet Mr. Hogan claimed to have told them that Paul Smith would be there to deal with any problems that might arise. Mr. Gallichan had not yet arrived on the scene, so clearly there was no legal or any other relationship between him and Miss Biggs and Mr. Jack at the time that they took up occupation. Miss Biggs and Mr. Jack had to be either the tenants or the lodgers of the defendant and she has failed to discharge the burden of proving that they were lodgers and thus that the consent of the Housing Committee was not required. All that she reserved was a right of entry from time to time to empty the meters, collect the rent and check that everything was in good order, which as we have said already, does not detract from exclusive possession.

3. The Court is satisfied that Miss Eyre and Mr. Mallarkey had exclusive possession of the bed-sittingroom which they occupied on the first floor of 14, Museum Street and, therefore, that they were tenants of the defendant. They moved in on the 28th March, 1987, a month after Paul Smith had moved out and at a time when the defendant's relationship with Mr. Gallichan had already broken down. The Court accepts the evidence of Miss Eyre that she was never introduced to Mr. Gallichan or told that he was the landlord and that she had had nothing to do with him. The defendant admitted that she negotiated terms of occupancy

with Miss Eyre which were to be exactly the same as those negotiated with Miss Biggs, i.e. exclusive possession with reserved rights of access. The Court believes that the defendant, Mr. Hogan and Paul Smith were all, at times, economical with the truth, but the defendant eventually conceded that Miss Eyre and Mr. Mallarkey entered into occupation after Mr. Gallichan had refused to have anything to do with the house and occupants and that she, the defendant had "taken over". Thus she conceded that they could not be Mr. Gallichan's lodgers but maintained that they were lodgers "in the house". Mr. Hogan, on the other hand sought to maintain that he acted as Mr. Gallichan's agent! The Court had no hesitation, in applying Street v. Mountford, in finding that the defendant let the accommodation to Miss Eyre and Mr. Mallarky.

4. The Court has to determine the true relationship between the defendant and Mr. and Mrs. Buchanan in relation to the chalet at 36, Aquila Road. It appears to us that we must ignore, in that determination, the history of the chalet, although it may be significant later on the question of sanctions should we find against the defendant. The Housing Committee had itself determined that the chalet did not constitute a separate unit of accommodation and the Planning Department Officer's view was that, strictly, no-one should be living in it, but, if it was occupied it had to be used as part of the main house. The Court has no doubt that the transaction entered into between the defendant and Mr. and Mrs. Buchanan created a tenancy and the defendant has failed to discharge the burden of proving a contractual licence. Where there is a conflict between the evidence of Mr. and Mrs. Buchanan on the one hand and that of the defendant, Mr. Hogan and Paul Smith on the other, the Court prefers the former. The evidence of the defendant, Mr. Hogan and Paul Smith conflicted in certain important matters, even between themselves. It is unnecessary for the Court to try to resolve all the points of difference. It is clear that the defendant misunderstood the effect of the meeting with Mr. Tucker. On the basis of her misunderstanding she

entered into a transaction with "unqualified" persons intending that they should be lodgers but she contracted a tenancy. Moreover, the Court is satisfied that Mr. and Mrs. Buchanan became the tenants of the defendant and not of Paul Smith. No services were provided to Mr. and Mrs. Buchanan. Mr. Buchanan carried out works to the premises that were consistent with a tenancy rather than a contractual licence. There was a lock on the chalet and a key and no-one else had right of access, although the defendant, or her agents, could check the chalet to satisfy themselves that everything was in order. Mr. and Mrs. Buchanan accepted this because, ignorant of legal definitions, Mr. Buchanan believed they were lodgers and Mrs. Buchanan, although believing that they were tenants, took the view that because the defendant and her husband were owners, they were entitled to check the state of repair and whether there was any damage. Applying Street v. Mountford, there can be no doubt, in the view of the Court, that Mr. and Mrs. Buchanan were tenants of the defendant.

Thus, the Court finds all four charges, Nos. 1, 2, 3 & 5, proved. We now have to consider charge 4, alleging that the defendant, in the "particulars of exempted transaction" form, relating to the lease with Mr. Gallichan, made a false or misleading statement that Mr. Gallichan had entered into a lease of a house at 14, Museum Street, i.e. the whole property, whereas Mr. Gallichan had entered into a lease of only the top flat of the premises, and that the false or misleading statement was made with intent to deceive.

The Court is in no doubt that the defendant was desperate to find a "qualified" tenant who would, ostensibly, rent the whole property and accept responsibility for the "lodgers". Similarly, the Court is in no doubt that Mr. Gallichan was desperate to lease a flat. Mr. Gallichan was nineteen years of age, of limited educational ability, and naive. The defendant and her husband, having taken legal advice, believed that it was possible to conduct a lodging-house, with no more than five lodgers, lawfully, provided one obtained

a "qualified" tenant to give "cover" for them. The defendant and her husband "used" or took advantage of Mr. Gallichan's youth and inexperience. Unfortunately for them, Mr. Gallichan did not permit himself to be manipulated to the extent that they wished and intended. It is not necessary for the Court to decide between the truthfulness of the defendant and Mr. Hogan on the one hand and Mr. Gallichan on the other. The scheme, whether or not Mr. Gallichan co-operated much more than he was prepared to admit, was a "sham". But the defendant, having taken legal advice initially, believed that provided she had a "qualified" tenant for the whole house, she could, in his name, take up to five lodgers in the house for her benefit. In this, she was clearly wrong. But the Court has no doubt that the Housing Department by its own conduct over many years was guilty of conduct conducive to that belief. Because the defendant, however wrongly, believed that what she was doing was a lawful way of circumventing the rigid controls set by the Housing Law, the Court is left with a doubt whether she had the necessary "mens rea" or guilty intent to deceive. Accordingly, because the benefit of the doubt must operate in favour of the defendant, bearing in mind that the burden, in this instance, is proof beyond reasonable doubt, the Court dismisses Charge 4.

AUTHORITIES CITED

A.G.-V- Hales (1978) 40 P.C. 519

A.G.-V- St.Roche Limited and Davey (9th March,1989,Unreported.)

A.G.-V- Larbalestier (1980) J.J. 223

A.G.-V- F.R.Roberts & Son (Holdings) Limited et.ors. (3rd March,1988, unr

Marchant -V- Charters (1977) 3 All ER 918 p.923

Carrel -V- Carrel and anr. (1981) J.J.53

Bradley -V- Baylis,Morfee -V- Novis,Kirby -V- Biffen (1881) QBD Vol.VIII,1

Addiscombe Garden Estates Ltd -V- Crabbe (1958) 1 QB 513

Kent -V- Fitall (1906) 1 KB 60

Street -V- Mountford (1985) 2 All ER 289 HL

A.G.-V- De Carteret (27th March,1984,unreported)

Carrel -V- Carrel and anr. (1981) J.J.53

Words & Phrases Legally Defined 2nd Edition pp.176-177

Dawson & Pearce : "Licenses relating to the occupation or use of Land"pp.6

Housing (Jersey) Law,1949