IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 3620 (Admin).

No. CO/4255/2020

Royal Courts of Justice

Thursday, 10 December 2020

Before:

RHODRI PRICE LEWIS QC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

BRENT LONDON BOROUGH COUNCIL — Applicant

- and -

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT
(2) CHAIM REINER — Respondents

MR E. ROBB appeared on behalf of the Appellant.

MR M. FRY appeared on behalf of the First Respondent.

MR M. HENDERSON appeared on behalf of the Second Respondent.

J U D G M E N T

(Transcript prepared from Zoom conference recording)

THE DEPUTY JUDGE:

1 This is an application for permission to appeal against the decision of the Secretary of State's inspector in his decision letter quashing an enforcement notice issued by the applicant council, the London Borough of Brent, in relation to the property at 70 Tadworth Road, London, NW2.

2 The enforcement notice alleged the material change of use of the premises to a mixed use as two flats and a 3-bedroom house in multiple occupation ("HMO"). "Two flats" was corrected to "three flats" as the decision letter makes clear. There were six bedrooms in the premises. The requirements of the notice were to cease the use and to reinstate the use as a single dwelling house and to remove the extension built when the premises contained flats and so did not benefit from permitted development rights.

3 The decision letter is a short one and I make no apology for reading extensively from it. It is important to read it in the round. The only appeal ground the inspector dealt with was the appeal on Ground (b), as he makes clear in para.3 of his decision letter. He explains that the basis of this ground is that the matters alleged have not occurred. Indeed, that means that the material change of use as alleged in the enforcement notice had not occurred as a matter of fact. He then deals with the correction of the notice that I have referred to. Then and, in my judgment most importantly, in para.3, he wrote this:

> "Pinning down exactly what each room is actually used for is an important part of the appeal and I shall deal with this below."

The allegation was never going to be able to describe the use of each room with any certainty. In my judgment, that sentence is of critical importance here and it is indeed conceded by Mr Robb on behalf of the council that the inspector was setting himself the correct test: pinning down exactly what each room is actually used for is an important part of the appeal. That is, indeed, what he was required to do in considering, under Ground (b), whether the matters alleged in the notice had actually occurred.

4 In para.4, he wrote: "The appellant also argues there is no mixed use and never has been. They purchased the building as a dwelling in 2014, converted it into a 6-bed HMO and then have used it as six self-contained flats from early 2015 onwards. This ground, and effectively Ground (d) as well, turns on the question of what is a flat. In planning terms, a self-contained flat is a separate dwelling, whereas an HMO is a single dwelling in use by people sharing or not having access to at least one facility." That, again, is not in dispute as the correct expression of the law. I think he meant "having access to" rather than "not having access to" and clearly everyone understands that, and counsel agree that that is a typo.

5 He continued: *"Gravesham* is the lead case on defining a "dwelling", from where springs the idea that a dwelling is a building that ordinarily affords the facilities required for day-to-day private domestic existence. The Housing Act, at s.254, deals with HMOs and creates a number of tests, including that those who occupy the building must share one or more basic facilities or the accommodation must lack one or more basic amenities. 'Basic amenities' is defined as a toilet, personal washing facilities and cooking facilities. A problem has arisen in many flat HMO cases because the idea of basic amenities has been confused with the *Gravesham* test, the facilities required for day-to-day private existence. The two are not necessarily the same."

6 In my judgment, the inspector is reminding himself of that important point, that these are not the same tests that he has to apply, not the same considerations, but they may overlap. He went on: "Thus, a room in an HMO might well consist of a bed, table and chairs and a small en suite bathroom. There is no doubt this lacks the basic facility for cooking. Add in a fridge under a worktop and storage cupboard and the room is still lacking cooking facilities. However, plug in a microwave and suddenly it is often argued you have a self-contained flat. This is clearly not the case. I refer to an appeal decision from 2012, where the inspector described the kitchenettes as "elfin units, which were freestanding combined units which had a built-in sink, a 2-ring electric hob, small fridge and a microwave oven". These, according to the inspector, clearly contained the basic amenities referred to in the Housing Act, but not the necessary *Gravesham* facilities. He said:

> "I do not accept that the separate facilities provided for cooking were what would necessarily be asserted with use as a dwelling house. The elfin units might be adequate for occasional use, but to my mind they are too small and basic for normal, everyday residential use."

In other words, they did not pass the *Gravesham* requirement of providing a facility for day-to-day domestic existence. This is not to say that it is impossible to use them in a day-to-day sense. Clearly, some people can happily survive on a microwave alone. But *Gravesham* is concerned with what generally would be considered to comprise the test for a dwelling, not the bare minimum that it is actually possible to survive on. Otherwise, the confusion which has occurred in this case sets in where if a plug-in hob is removed from the room it turns from a flat to a room in an HMO and back the next day; that is clearly nonsense. While I looked around the building on my site visit, I saw the rooms were very small."

7. This is clearly a critical paragraph, because the inspector is relying on his site visit and what he was able to see of the rooms on his site visit. He was looking at suitability and that is a relevant consideration. That is not in dispute. Suitability is relevant to the question of the use of the rooms and he is making that clear in this paragraph. He then described the various rooms and concludes:

> "Thus, whilst most of the rooms did contain the basic amenities, none could, by any stretch of the imagination, be said to provide the facilities required for day-to-day private domestic existence." That is, of course, the test from *Gravesham*. "From the evidence provided it appears this has been the case since they purchased the property."

7 I was at first persuaded by Mr Robb's argument if the decision letter had stopped there, that the appeal was at least arguable. However, to the disappointment of Mr Robb, it is important to read the decision letter as a whole, bearing in mind the test that the inspector sets himself in para.3, that pinning down exactly what each room is actually used for is an important part of the appeal. He then looks at the suitability and the facilities in para.7. But then he does go on in some detail in para.8 to say:

> "On that basis, I would find that the building had not been converted into a mixture of flats and HMO. However, the building also contained two shared kitchens. One on the first floor did not seem to be used, contained an oven…"

And he details the other units.

> "Another kitchen is clearly used by one of the occupants. The kitchen contained food, washing up and had a large oven/hob. There seemed nothing to stop this kitchen from being used by anyone in the building."

Again, that is an important finding of fact there that the inspector made on the basis of his site visit and in reliance on his planning judgment and his expertise. He wrote: "In my view, therefore, the rest of the building did have the opportunity to share one or more basic amenities. Number 70 was clearly being used as a 6-bed HMO. It follows from this conclusion that the mixed use as alleged has not taken place and the appeal succeeds on Ground (b), albeit not for the reasons claimed by the appellant. In my view, the building has always been used as an HMO for six people."

8 In my judgment, none of those grounds is arguable. Mr Robb put forward very persuasive points, but my task is to read this decision letter in the round. I am satisfied that the inspector did set himself the right test in para.3 in the sentence beginning "pinning down exactly which room is actually used for is an important part of the appeal." He set out in para.4 both the *Gravesham* test and the definition of an HMO and he understood the distinction between them, as is clear from the rest of the decision letter. In para.7 he looks at the suitability of use and in para.8 he is looking at the actual use to which the building is being put and to which each room is being put, in accordance with the test he set himself in para.3. So, despite Mr Robb's persuasive arguments, I do not accept that any of these grounds is made out.

9 Ground 1 is that the inspector erred by looking just at the physical attributes and that he should have looked at the use and he needed to look at the other evidence, such as council tax evidence, that related to actual use. In my judgment, read as a whole, fairly, that is not a fair criticism. He did not look just at physical attributes; he did look at evidence of use and that ground is not therefore arguable.

10 Ground 2 is failure to take into account the refusal of a certificate of lawful proposed use in 2015 and it is in this context where he says in one sentence, a "wrap around" or "wrap on", in para. of DL9, as Mr Henderson calls it, that the building has always been in use as an HMO for six people. In my judgment, this ground is also not arguable. The refusal of such a certificate simply means that the applicant for that certificate has not satisfied the burden of proof and the standard of proof upon him to justify the issue of such a certificate. It is not in any way fixing the position, as the reasons for the refusal state, as at that time.

11 On the third ground of inadequate reasons, the reasons, in my judgment, are sufficiently adequate and intelligible for an informed reader of this decision letter, knowing what the issues were, knowing what the allegation in the enforcement notice was, knowing that this was a Ground (b) appeal that the matters alleged had not occurred in fact, and that this was a matter for the inspector's expert judgment based on the evidence and what he saw on his site visit. In my judgment, he did not fall into error. He was under no obligation to recite all the evidence that was before him. In my judgment, none of these grounds is arguable.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.