

Case No: CO/3455/2001

Neutral Citation Number: [2002] EWHC 320 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
at Wolverhampton Crown Court

Wednesday 13th March 2002

Before :

THE HONOURABLE MR JUSTICE KEITH

Between :

Mgoli Dewa
- and -
Westminster City Council

Claimant

Defendant

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Rajeev Thacker (instructed by **Alan Edwards & Co.**) for the Claimant
Mr David Warner (instructed by **the Director of Legal Services, Westminster City Council**)
for the Defendant

Judgment
As Approved by the Court

Crown Copyright ©

Mr Justice Keith:

Introduction

1. This claim for judicial review raises a short but novel point on the proper construction of section 352 of the Housing Act 1985. The claim relates to the powers of a local housing authority over houses in multiple occupation. In particular, it concerns the extent to which a local housing authority may require works to be carried out to render such premises fit for occupation. The Defendant, Westminster City Council (“the Council”), decided that it had no power to direct the Claimant’s landlord to carry out works to provide him with satisfactory cooking facilities. It is that decision which is challenged on this claim for judicial review, permission to proceed with the claim having been granted by Elias J. All references in this judgment to sections of an Act are to sections of the Housing Act 1985.

The facts

2. The facts are not in dispute. The Claimant, Mr Mgoli Dewa, is a protected tenant of a bed-sitting room at 15 Leinster Gardens, London W2 (“the property”). The property is a house in multiple occupation. It consists of 21 individual units: 13 bed-sitting rooms, 6 studio flats and 2 one-bedroom flats. They are spread over four floors. Mr Dewa’s room is on the third floor. It is room 15A. He has lived in the property for almost 30 years, and in room 15A for the last 11 years. The room is small, measuring 8.13 sq. m. It has a food storage cupboard and a hand-basin. There is a bathroom and toilet on the same floor which Mr Dewa shares with other occupants.
3. Mr Dewa’s room is too small for the installation of cooking facilities. Both he and the Council agree on that. Indeed, as long ago as 1997, the Council asked Mr Dewa’s landlord to consider moving Mr Dewa into a larger room for that reason. It is true that when Mr Dewa moved into room 15A in 1991, there were cooking facilities already in there, but they were removed by the landlord at Mr Dewa’s request to give him more space. Mr Dewa has installed a small cooker of his own in there with two rings, but at the very least it is undesirable that he does any cooking in a room so small, and it may be that it would even be a breach of safety regulations: a room has to be a minimum of 10.2 sq. m. before it can have internal cooking facilities. By contrast, all the other 20 flats or rooms in the property have kitchen or cooking facilities, though to the extent that those units are occupied, the kitchens and cooking facilities in them cannot be shared with the occupiers of other units.
4. The Council pressed Mr Dewa’s landlord to accommodate Mr Dewa in such a way that he was able to enjoy cooking facilities. One of the things which it had in mind was to use its powers under section 354. It will be necessary to look at the precise terms of section 354 in due course, but for the moment it is sufficient to state that section 354 gave the Council the power to serve a notice on the landlord directing that the number of individuals or households occupying the property be reduced. The Council made such a direction on 8 April 1999. The direction was that the maximum number of households occupying the property be reduced from 21 to 20, and that that

was to be achieved by not permitting any household to occupy room 13. Room 13 was next to room 15A, Mr Dewa's bed-sitting room. Thus, the Council's strategy was to put pressure on the landlord to allow Mr Dewa to have exclusive use of the cooking facilities in room 13 when the current tenant of room 13 left, since the landlord would not be able to re-let room 13 then.

5. The tenant of room 13 left on 8 September 1999. Mr Dewa told the Council that on the following day. He pointed out that the Council had two options. The first was to wait and see whether the landlord would be prepared to allow him to use the cooking facilities in room 13 in view of the prohibition on the landlord re-letting room 13. Mr Dewa feared that that strategy would not work as the "landlord could choose to just leave [room 13] vacant and absorb the economic pressure". He therefore requested the Council to consider a second option, which involved the use of its powers under section 352. Again, it will be necessary to look at the precise terms of section 352 in due course, but for the moment it is sufficient to state that section 352 gave the Council the power to serve a notice on the landlord requiring him to carry out works to render the property reasonably suitable for occupation. What Mr Dewa wanted the Council to do was to direct the landlord to carry out works which would result in the physical amalgamation of rooms 13 and 15A and thus give Mr Dewa access to the cooking facilities in room 13 - a realistic option since the rooms were next to each other, and divided only by a wall. Mr Dewa accepts that the Council could not have served a notice on the landlord under section 352 requiring him to provide cooking facilities in room 15A, because although room 15A was large enough to be classified as living accommodation, it was too small to have internal cooking facilities.
6. The Council was not prepared to issue a notice under section 352. What it decided to do was to issue another notice under section 354. This notice was different from the previous one in one respect. Whereas the previous one had prevented a household from occupying room 13, the new notice linked room 13 with room 15A, and prevented those rooms as amalgamated from being occupied by more than one household or by more than two individuals. Thus, although the Council was not requiring rooms 13 and 15A to be physically amalgamated with direct access from one to the other (which was what a notice under section 352 would have achieved), the Council was directing that rooms 13 and 15A be amalgamated for the purpose of determining their maximum occupancy. However, there was no practical difference between the new notice under section 354 and the previous one: it would still have been open to the landlord to leave room 13 unoccupied and to absorb the loss of rent involved.
7. The new notice under section 354 was issued on 7 October 1999, and Mr Dewa's fears proved justified. He claims that the landlord re-let the room after the issued of the new notice under section 354, but this claim has not been verified by the Council. What is not in dispute is that the landlord continued to refuse to give Mr Dewa access to room 13 to use the cooking facilities there. Mr Dewa was no better off than he had ever been.

8. Why did the Council not issue a notice under section 352 requiring the landlord to carry out works which would have resulted in the physical amalgamation of rooms 13 and 15A? The witness statement of Mr Andrew Ralph, an environmental health officer with the Council who has been directly involved in Mr Dewa's complaint about the lack of cooking facilities since before the first notice under section 354, contains the following passage in para. 12:

“The power under section 352, requiring the execution of works to render a premises fit for the number of inhabitants should be used proportionately. The decision not to issue a section 352 notice in this particular case was made because cooking facilities could not reasonably have been made available anywhere else in the building. By choosing to issue a section 354 notice instead, and then by specifically requiring the two rooms [to] be linked, the Council sought to ensure compliance with the requirements of section 352, in that the outcome would mean that there were adequate facilities for the number of occupants within the whole building. Further, having one room without a kitchen does not make the whole building unfit, if there are adequate facilities for the number of occupants.”

The Council's substantive response to Mr Dewa's solicitors' letter before action confirmed that the Council had been advised that it had no power to issue a notice under section 352 of the kind sought by Mr Dewa in view of the existence of adequate cooking facilities for the number of occupants in the property.

The issues

9. In their helpful and concise submissions, Mr Rajeev Thacker for Mr Dewa and Mr David Warner for the Council were agreed on the issues which Mr Dewa's claim poses. The principal issue is whether the Council was correct to conclude that it did not have the power to serve on the landlord a notice under section 352 of the kind sought by Mr Dewa. If that conclusion was incorrect, and if the Council had had the power to serve on the landlord a notice under section 352 of the kind sought by Mr Dewa, Mr Dewa would be entitled, subject to one reservation, to (a) an order quashing its decision that it did not have that power and (b) an order requiring it to decide whether, in its discretion and having regard to the terms of this judgment, such a notice should be served. The only reservation relates to whether any useful purpose would be served by making an order along the lines of (b). Such an order would serve no useful purpose if the only way in which that discretion could reasonably be exercised in the circumstances, having regard (amongst other things) to issues of proportionality raised by the incorporation into domestic law by the Human Rights Act 1998 of the European Convention of Human Rights, would be by refusing to order the service of the notice under section 352.

The statutory provisions

10. The legislative provisions governing houses in multiple occupation are to be found in Part IX of the Housing Act 1985. That is the Part in which sections 352 and 354 are. Section 352, which is headed "Power to require execution of works to render premises fit for number of occupants", provides (so far as is material):

"(1)the local housing authority may serve a notice under this section where in the opinion of the authority, a house in multiple occupation fails to meet one or more of the requirements in paragraphs (a) to (e) of subsection (1A) and, having regard to the number of individuals or households or both for the time being accommodated on the premises, by reason of that failure the premises are not reasonably suitable for occupation by those individuals or households.

(1A) The requirements in respect of a house in multiple occupation referred to in subsection (1) are the following, that is to say(a) there are satisfactory facilities for the storage, preparation and cooking of food including an adequate number of sinks with a satisfactory supply of hot and cold water.....

(2)the notice shall specify the works which in the opinion of the authority are required for rendering the house reasonably suitable -

(a) for occupation by the individuals and households for the time being accommodated there, or

(b) for a smaller number of individuals or households and the number of individuals or households, or both, which, in the opinion of the authority, the house could reasonably accommodate if the works were carried out

but the notice shall not specify any works to any premises outside the house.”

11. It will be seen that subsection (1) requires an authority to have reached an opinion on two matters before its discretion to serve a notice is triggered. First, it has to have reached the opinion that the property fails to meet one or more of the requirements in subsection (1A). Secondly, it has to have reached the opinion that, by reason of that failure, the premises are not reasonably suitable for occupation. Three points should be made on that second matter on which the authority has to have reached an opinion:

- a) The authority must have regard to the number of individuals or households or both for the time being accommodated on the premises. That is not a consideration which the authority is required to take into account on the first matter on which it has to reach an opinion.
- b) The matter has to be determined by reference to the suitability of the premises for occupation by individuals or households who are for the time being accommodated on the premises.
- c) If the premises are to be found to be not reasonably suitable for occupation, that lack of suitability has to be as a result of the failure to meet one or more of the requirements in subsection (1A).

12. The statutory scheme recognises that the serving of a notice under section 352 is a serious step, which should not be taken until other avenues have been explored. That is the significance of the words which I have highlighted below in section 354(1). Section 354 is headed “Power to limit number of occupants of house”, and section 354(1) provides:

“(1) The local housing authority may, for the purpose of preventing the occurrence of, or remedying, a state of affairs calling for the service of a notice or further notice under section 352 (notice requiring execution of works to render house fit for number of occupants) -

- (a) fix as a limit for the house what is in their opinion the highest number of individuals or households, or both, who should, having regard to the requirements set out in subsection (1A) of that section, occupy the house in its existing condition, and

(b) give a direction applying that limit to the house.”
(Emphasis supplied)

And the fact that the authority’s powers under section 352 and 354 (as well as its powers under section 358, which provides for the service of notices to prevent a house in multiple occupation from being overcrowded) are to be exercised in tandem with each other is apparent from section 354(7), which provides:

“The powers confirmed by this section -

(a) are exercisable whether or not a notice has been given under section 352, and

(b) are without prejudice to the powers conferred by section 358 (overcrowding notices).”

This is confirmed by the guidelines given to local housing authorities by the appropriate governmental department (then the Department of Environment) in its circular 12/92 dated 14 May 1992. Para. 1.7 reads, so far as is material:

“In some cases, it may be considered appropriate to issue a direction under section 354 limiting the number of occupants. This may be in addition to or instead of a section 352 notice. Issuing a direction under section 354 may either obviate the need to serve a section 352 notice completely or alternatively reduce the works necessary to make [a house in multiple occupation] fit for the number of occupants.”

Incidentally, para. 1.7 makes another point. It continues:

“When a section 354 direction notice is issued, the reduction in the number of occupants and households may take place through natural wastage. It is suggested that authorities should inform occupants and their landlord that section 354 notices cannot affect existing tenancy agreements.”

That explains why the first notice served on the landlord under section 354 did not have the effect of requiring the current tenant of room 13 to leave, and why it only prevented the landlord from re-letting room 13 after the current tenant had left.

The application of these provisions

13. The terms of section 352(2) explain why the Council could not have served on the landlord a notice under section 352 simply requiring him to give Mr Dewa access to the cooking facilities in room 13. A notice under section 352 is required to specify the “works” to be carried out, and a direction requiring the landlord merely to give Mr Dewa access to room 13 would not involve the carrying out of any “works”. Thus,

the critical question is whether section 352 empowered the Council to serve the landlord with a notice requiring him to carry out works which would physically combine rooms 13 and 15A to enable Mr Dewa to have access to the cooking facilities in room 13.

14. The Council's argument is simple. The language of section 352(1) shows that a notice under section 352 may only be served by a local housing authority where the cooking facilities are inadequate, having regard to the number of occupants of the premises. Where, as here, the number of cooking facilities matches the maximum number of households permitted to occupy the premises, the requirements of section 352(1A) have been met, and even if they have not, the premises are nevertheless reasonably suitable for occupation by the individuals and households living there, because there are a sufficient number of cooking facilities in all.
15. I cannot go along with this argument for two reasons, one technical, the other substantive. The technical point is that the Council has to have regard to the number of the occupants of the premises when considering the second matter on which its opinion has to be formed, not the first. The substantive point is that the fact that there is a match between the number of cooking facilities in the premises and the number of households occupying the premises is beside the point if one of those households does not have access to any of the cooking facilities. For the occupants of one of the units, namely room 15A, there are no facilities for the cooking of food. The fact that, by the second notice under section 354, the Council had directed that rooms 13 and 15A be amalgamated for the purpose of determining the maximum occupancy did not affect that. That direction could not have amounted to a direction to the landlord to give the occupant of room 15A access to room 13, and without access to room 13, the occupant of room 15A continued to have no facilities for the cooking of food. It can hardly be said that the facilities for the cooking of food are satisfactory, or that the premises are reasonably suitable for occupation by the individuals or households who live there, if one of the households living there does not have access to the cooking facilities.
16. In reaching this conclusion, I have not overlooked the emphasis placed in section 352 on the number of occupants of the premises. In the context of cooking facilities, that would be important if the cooking facilities on the premises were shared. Premises become unsuitable for multiple occupation if too many occupants have to use the same shared facilities. But the words "having regard" in section 352(1) must mean "having proper regard", and where facilities are not shared, and all the occupants have their own cooking facilities, it is difficult to see how the Council's regard to the number of occupants of the premises would have been proper.
17. A second point is taken on behalf of the Council. The purpose of serving a notice under section 352(2) in the present case would have been to secure that one of the requirements of section 352(1A) would be met, namely the requirement that there was satisfactory cooking facilities in the premises. It is said that in these circumstances the language of section 352(2) permitted a notice to be served under section 352 only when the works to be carried out would result in the installation of additional cooking

facilities. The argument is that a local housing authority may not serve a notice under section 352 requiring works to be carried out which would only have the effect of providing access to cooking facilities which are already there.

18. I cannot go along with this argument either. It involves placing an unduly restrictive construction on section 352(2). If the Council thinks that the works to be carried out will render the premises reasonably suitable for accommodation by the occupants currently living there, it can require works to be carried out. If the premises can be rendered reasonably suitable by the carrying out of works which would make the existing cooking facilities available to the occupants of a particular unit in the house, the fact that the works do not involve the installation of additional cooking facilities is irrelevant.

19. For these reasons, I have concluded that section 352 gave the Council power to serve the landlord with a notice requiring him to carry out works which would physically combine rooms 13 and 15A to enable Mr Dewa to have access to the cooking facilities in room 13. However, the Council claims that it would now serve no useful purpose to require it to consider whether to serve such a notice, because it would inevitably conclude that it should not do so. Since there is nothing in Part IX of the Housing Act which confers on the Council the express power to direct the landlord to permit Mr Dewa access to the cooking facilities, the exercise of the power to serve a notice under section 352 would be an indirect way of achieving that which the Council has no express power to do. In any event, the Council would be required to balance the need for Mr Dewa to have access to the cooking facilities in room 13 against the interference with the landlord's right to "peaceful enjoyment of his possessions", a right protected by Art. 1 of Protocol 1 to the European Convention of Human Rights. To require the landlord to go to the expense of carrying out works which would have the effect of physically amalgamating rooms 13 and 15A would be disproportionate to the benefit to be derived by Mr Dewa.

20. I reject this argument. It is, in my opinion, by no means inevitable that the Council would regard these factors as justifying a decision not to exercise its powers to serve on the landlord a notice under section 352 of the kind sought by Mr Dewa. It may well conclude that the need for Mr Dewa to have cooking facilities outweighs these considerations, and by a significant margin. In any event, the Council could well regard as decisive the fact that in order to avoid having to carry out such works, the landlord could take two simple steps. He could give Mr Dewa access to room 13 to enable him to use the cooking facilities there. Alternatively, he could permit Mr Dewa to transfer his tenancy of room 15A to a tenancy of room 13. It is true that Mr Dewa would then get the benefit of a larger room with cooking facilities, but he has not said that he would not be prepared to pay more for that room. That was why he completed the appropriate form for an assessment of the amount of housing benefit to which he would be entitled if his tenancy could be transferred to room 13. He would then be able to make an informed decision whether he wanted to pay the difference between the benefit to which he would be entitled and the actual rent for room 13. That assessment could not be done because the landlord refused to countersign the appropriate form.

Conclusion

21. For these reasons,

- a) I quash the Council's decision that it did not have the power to serve on the person having control of or managing the property at 15 Leinster Gardens W2 a notice under section 352 specifying the works to be carried out to effect the physical amalgamation of rooms 13 and 15A,
- b) I declare that the Council has the power to serve such a notice, and
- c) I order the Council to consider, within three months of the handing down of this judgment, whether such a notice should now be served.

When I reserved judgment at the conclusion of the hearing, I was asked to deal in my judgment with permission to appeal and costs. I do not give the Council permission to appeal because I do not believe that its chances of success on any appeal are sufficient to warrant granting permission. I order the Council to pay Mr Dewa's costs of the claim, to be subject to detailed assessment if not agreed, and I order that Mr Dewa's costs be subject to detailed assessment for the purpose of CLS funding. I give the parties liberty to apply within 14 days of the handing down of this judgment if they wish to argue that any of these orders should be different, but if no such application is made within that time these orders will take effect according to their terms.