Ealing London Borough and others v Notting Hill Housing Trust and another
[2015] EWHC 161 (Admin)
Queen's Bench Division, Administrative Court (London)
Mostyn J
29 January 2015
Richard Drabble QC & Christopher Lewsley (instructed by Ealing Council Legal Services) for the Appellants

Ranjit Bhose QC & Andrew Lane (instructed by Glazer Delmar Solicitors and Devonshires Solicitors) for the Respondents

Hearing date: 23 January 2015

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Approved Judgment

Mr Justice Mostyn :

1. This is my decision on the appeal by three local authorities from a decision of the President of the Valuation Tribunal for England, Professor Graham Zellick QC, given on 24 May 2014. The respondents are two registered providers of social housing with charitable status1.

2. The appeal concerns the application of an exemption from council tax. The exemption in question is contained within the Council Tax (Exempt Dwellings) Order 1992 SI 1992 No. 558 (as amended) at Article 3, Class B. This provides:

"Class B: a dwelling owned by a body established for charitable purposes only, which is unoccupied and has been so for a period of less than 6 months and was last occupied in furtherance of the objects of the charity."

3. In the nature of things, when a tenant vacates, a property will be unavoidably unoccupied whilst the charitable housing association selects a new tenant, a tenancy is offered and accepted, the property is put in good order and the new tenant physically moves in, whereupon that new tenant will then become liable for council tax.

4. Until recent times Class B has been in hibernation. Another class, Class C, was concerned with vacant dwellings, irrespective of the questions of ownership. In its form from 1993 to 2013, it prescribed an exemption for "a vacant dwelling which has been such for a continuous period of less than six months ending immediately before the day in question" and was the exemption almost invariably sought for void periods between lets. A further class, Class A, was concerned with vacant dwellings that required or had just undergone major repair work or structural alteration.

5. As a result of the Government's localism agenda, the Council Tax (Exempt Dwellings) (England) (Amendment) Order 2012 SI 2012 No. 2965 repealed Classes A and C with effect from 1 April 2013. The repeal of Class C has caused Class B to be pulled into the sunlight. Now charitable housing associations have to rely on it, where they did not previously need to.

6. This change has caused applicants for exemption under Class B and billing authorities to focus on the meaning of the words in the Class B exemption. This appeal concerns the proper statutory construction of those words.

7. In para 5 of his judgment the President rightly broke down the words of the exemption into four conditions or requirements namely:

i) the dwelling must be owned by the body in question; and

ii) the body must be established for charitable purposes only; and

iii) the dwelling must have been unoccupied for a period of less than six months; and

iv) the last occupation must have been in furtherance of the objects of the charity.

8. It cannot be disputed that the law requires that proof be supplied of each of these elements. This much is conceded by the respondents and inasmuch as the President says otherwise his decision is not supported. The debate before me has revolved around the scope of the requisite evidence and on who falls the burden of adducing it.

9. The President's decision can be summarised as follows:

i) The applicant has to adduce formal evidence as to conditions (i) and (iii) (para 16).

ii) However, the billing authority's role in relation to conditions (ii) and (iv) is limited as Parliament cannot have intended an authority to act as a charity regulator by scrutinising an applicant's objects or evaluating a particular letting or other activity (paras 16 and 17).

iii) There is a presumption that a charitable provider of social housing is operating within its objects and that Class B is available (para 19).

iv) Not every lawful activity of a charity is necessarily charitable (*Oxfam v Birmingham City District Council)* [1976] AC 126). Nonetheless it is for the billing authority to show that the applicant has engaged in a manifestly non-charitable activity (para 18).

v) Even if there were no presumption (and a reversal of the burden of proof) the applicants still succeed as it is for the billing authority to specify clearly what information it requires in order to reach its decision. Here the authorities failed to ask for the relevant evidence and based its decisions on a factor that was probably irrelevant (paras 20 and 21).

vi) An application cannot be rejected on the sole or principal ground that the rent charged for the last letting was the market rent (para 22).

10. The question I have to decide is whether this decision amounts to legitimate (if adventurous) judicial interpretation or whether it crosses the line into illegitimate judicial activism.

11. Mr Bhose QC has demonstrated to me that there are strong policy grounds for supporting the decision of the President. Both respondents are private registered providers of social housing within the meaning of section 80(2) & (3) Housing and Regeneration Act 2008. Social housing extends to the provision of low cost rental accommodation where the rent is below the market rate (see sections 68 and 69). The statutory regulator is the Homes and Community Agency (HCA). This has issued a Rent Standard with which the respondents are expected to comply.

12. Mr Bhose submits that:

"Each respondent is also a private registered provider of social housing, registered under the Housing and Regeneration Act 2008, regulated by the HCA, and required to comply with the Rent Standard, and charge Social or Affordable rents which are “below the market rate”.

Therefore, at its most basic, and putting to one side all the other elements of housing need that are met by the respondents when allocating properties to the elderly, the physically disabled or ill, those with

mental impairments etc, each respondent is in the business of providing homes, below open market rents (with Social Rents, a long way below), without requiring the payment of deposits, to applicants who it is fair to assume are of limited means. This includes many whose means are such that they cannot even meet those discounted rents (either in whole or in part) without the assistance of housing benefit."

13. Accordingly he submits that:

"In cases where the provision of social housing is not the stated charitable object of the charitable body seeking exemption it may need to explain its qualification for such an exemption. However, in cases where the provision of social housing is the body's *raison d'être*, there is no call for such an explanation, save only for those cases where the last letting/use of the dwelling was clearly or likely outside its objects, triggering a need to investigate further."

14. In essence he supports the President's view that where the charity's *raison d'être* is the provision of housing a presumption, and a consequential reversal of the burden of proof is in play, although it is fair to say that in oral submissions he retreated somewhat and accepted that condition (iv) plainly requires that there must be some actual evidence to support it.

15. Mr Bhose points out that between them the two respondents own and manage over 63,000 properties. There are a huge number of short voids giving rise to small claims for exemption. For example in one of the appeals before me the exemption claimed was for £20.35. It would be grossly burdensome and would have the effect of emasculating the intent of the exemption if extensive evidence had to be supplied to support the application. Therefore there are strong policy grounds for supporting the President's decision.

16. If the President in fact fell into error, and there is a duty on the applicant to adduce the evidence in support of the application (as the normal rule of evidence requires – "he who asserts must prove", and general rating law confirms – see *Ratford v Northavon DC* [1986] RA 137), then Mr Bhose argues that the scope of such evidence should be distinctly limited, perhaps extending to no more than a few lines of written representations which are stated to be true to the best of the representor's belief .

17. Mr Drabble QC agrees with this, at least up to a point. I sensed however that he felt that the evidence should extend to production at least of the principal underlying documents as well.

18. In my judgment the President fell into error in holding that vis-à-vis charitable social housing providers there is a presumption that conditions (ii) and (iv) are satisfied with a consequential reversal of the normal burden of proof. I can see the need for such a presumption but in my judgment that should be done by the Secretary of State and approved by Parliament and not by an impermissible and artificial stretching of the plain words of the existing law.

19. In my judgment a short written representation by the applicant (which might usefully be done on some kind of standard form) which addresses all four conditions directly and which states (a) that based on the material held by the applicant the conditions are met and (b) that the statement is true to the belief of the representor, should normally be enough.

20. I would point out if such a representation turned out to be knowingly false that would be a serious business indeed as it would likely amount to an offence under section 2 of the Fraud Act 2006.

21. In the circumstances I turn to the evidence in the three individual appeals. These concern:

i) 184 Haymill Close, Greenford (the London Borough of Ealing appeal)

ii) Flat 25, 16 Nevern Place, London SW5 9PR (the Royal Borough of Kensington & Chelsea appeal)

iii) 198 Cheeseman Terrace, London W14 9XT (the London Borough of Hammersmith & Fulham appeal)

184 Haymill Close

22. This is a four bed house with garden, which was unoccupied from 12 August 2013 to 5 September 2013. The last occupier prior to 12 August 2013 was a Mrs Sriskanthan, who was approximately 60 years of age. She was required to pay a social rent of £154.53 per week. On any view she was a worthy candidate to receive a social rent.

23. By email dated 16 December 2013 the Notting Hill Housing Trust (NHHT) sought Class B exemption from the LB Ealing for the relevant period (some £211.84), and provided some basic information. This claim was initially denied. By email dated 19 December 2013 NHHT stated that "the last tenant of the property was not paying a “commercial rent” and was a secure tenant of the property paying a Social Rent who terminated the tenancy in order to live with her son.”

24. In my judgment there was just sufficient evidence before the authority to satisfy all four conditions2. Accordingly, on the facts, the appeal from the President is dismissed in that he reached the right decision for the wrong reasons.

Flat 25, 16 Nevern Place

25. NHHT granted a secure tenancy of this two-bedroom flat to Mrs Rashidi from 2 July 1990 at a weekly rent of £25.86 with a service charge of £5.64. This was a fair rent, registered in accordance with the Rent Act 1977. The tenancy was assigned under a statutory exchange, with NHHT’s consent, to Mr Ayaz Rehman and Ms Maryam Abdulrehman with effect from 4 September 2006. Upon their marriage breaking down, and by Order of the Kingston-upon-Thames County Court dated 12 October 2012, the tenancy was further transferred into Ms Abdulrehman’s sole name pursuant to Section 53 of and Schedule 7 to the Family Law Act 1996. She ceased to occupy on 2 September 2013, giving rise to the claim for the Class B exemption.

26. By e-mail dated 17 October 2013 NHHT sought a Class B exemption. The exemption was rejected on 31 October 2013. In its letter of appeal to the President NHHT argued that:

"[the property] was occupied until 2 September 2013 by a tenant on a secure lifetime tenancy on a registered fair rent. The tenancy would have been awarded in accordance with our allocations policy which gives priority to people in housing need (often determined by local authorities through their housing lists). This we believe was clearly in furtherance of the objects of the charity: the provision of social housing"

27. It can be seen that in this case there was no evidence at all concerning Ms Abdulrehman’s position and specifically whether she was the beneficiary of a social rent. She had inherited a Rent Act protected tenancy and ex hypothesi was paying less than a market rent, but in her case that may well have been an accident of fortune rather than actually reflective of her personal circumstances. Beyond that, and in contrast to Mrs Sriskanthan, nothing is known of her circumstances.

28. I can see that in a case such as this where there has been a statutory swap followed by a transfer of the swapped tenancy in financial remedy proceedings following divorce that it would be burdensome for the applicant to have to provide even some limited evidence about the circumstances of the last occupant, but this is unfortunately what the law requires. I do not accept that the decision of Peter

Gibson J in *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 Ch 159 alters that requirement.

29. Accordingly in my judgment there was no sufficient evidence to satisfy condition (iv) and accordingly the appeal is allowed. The applicant must resubmit its application to the authority with the appropriate evidence.

198 Cheeseman Terrace

30. An assured shorthold tenancy of this furnished 3 bed property was granted by Acton Housing Association to Ms Haweya Nur, from 2 June 2008, at a weekly rent of £420. Acton Housing Association later became A2 Dominion London ltd ("A2DLL").

31. The property had been leased to Acton Housing Association by private owners, Mr and Mrs Treachy. It then sublet to Ms Nur. She had been nominated by L.B. Hammersmith & Fulham under its Homelessness Prevention Scheme. I agree that the clear inference was that she was in need of housing and could not herself have obtained it, thereby needing the assistance of the local authority.

32. Ms Nur moved out of the property on 21 May 2013, prior to vacant possession under the mesne tenancy being returned to Mr and Mrs Treachy on 30 May 2013. On 27 August 2013 the L.B. Hammersmith & Fulham e-mailed A2DLL and sought £20.35 in outstanding council tax for the period 21 May to 30 May 2013. By email dated 28 August 2013, Class B exemption was sought for this 9 day period. This claim was rejected by L.B. Hammersmith & Fulham by a letter dated 18 November 2013.

33. The evidence before the President showed that Ms Nur had been in receipt of income support when her tenancy was granted, and she received full housing benefit until 9 January 2012 when her husband obtained employment (24 hours per week) as a bus driver. Thereafter only partial housing benefit was received in addition to child benefit and child tax credit.

34. In my judgment the evidence showing that the property was allocated pursuant to the authority's duties to homeless people in need and that at the point of departure housing benefit was paid was just sufficient to satisfy condition (iv). Accordingly on the facts the appeal is dismissed.

35. In the first and third appeals the evidence was only just sufficient to satisfy condition (iv). It would have been better if a little more detail was provided.

36. I repeat that it would be a good idea if a standard form could be devised for Class B applications which would conclude with a declaration of truth akin to that in CPR PD22 para 2.1.

37. I also repeat my view that the Secretary of State should consider promulgating a revision to the Class B exemption which provides for a presumption in relation to condition (iv) where the application is made by a charitable social housing provider.