Case No: CO/4828/2017

Neutral Citation Number: [2018] EWHC 373 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2018

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

SINNATHURAI PARAMAGURU	**Appellant**
- and -	
LONDON BOROUGH OF EALING	**Respondent**

- -
- -

William Webster (instructed by **Direct Access**) for the **Appellant**
Laura Phillips (instructed by **LB Ealing**) for the **Respondent**

Hearing date: 13 February 2018

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Judgment

Mr Justice Supperstone :

Introduction

1. The Appellant appeals by way of case stated against the preliminary ruling made by justices for the Local Justice Area of West London sitting at Ealing Magistrates' Court on 22 June 2017 that children up to the age of 18 are "residents" within the meaning of Class C4 of the Schedule to the Town and Country Planning (Use Classes Order) 1987 ("the Order").

2. On 24 February 2017 the Appellant was charged with one offence of breaching a planning enforcement notice contrary to section 179(2) of the Town and Country Planning Act 1990 ("TCPA 1990") which required him to cease the use of his property at 2 St George's Avenue, Southall ("the property") as a Class C4 house of multiple occupation ("HMO").

3. Class C4 covers the use of a dwelling house by not more than six residents as a HMO. There was no dispute that for at least some of the relevant period there were six adults and four children living at the property.

4. Following the ruling the Appellant entered a guilty plea and the case was committed to Isleworth Crown Court under s.70 of the Proceeds of Crime Act 2002 ("PCA") for confiscation proceedings to be considered, and sentence. The hearing before the Crown Court has been adjourned pending the outcome of this appeal.

The First Question: Did the Magistrates have jurisdiction to state a case?

5. The Magistrates have stated the first question for the opinion of the High Court as follows:

> "The High Court is invited to determine the preliminary issue of whether the Magistrates have jurisdiction to state a case and consider the issue of whether committal to the Crown Court can be considered a final determination, with reference to the cases of:
>
> *Gillan v Director of Public Prosecutions* [2007] EWHC 380 (Admin)
>
> *Streames v Copping* [1985] QB 920"

6. Section 111(1) if the Magistrates' Court Act 1980 ("MCA 1980") states:

> "Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved…"

7. Magistrates' courts have no jurisdiction to state a case under MCA 1980 s.111(1) unless and until they have reached a final determination on the matter before them (*Streames v Copping*, per May LJ at 928). There is no power to state a case in respect of interlocutory decisions. In *Streames* since the justices' decision that the information was not bad for duplicity did not finally determine the proceedings before them, they had no power to state the case.

8. Mr William Webster, who appears for the Appellant, and Ms Laura Phillips, who appears for the Respondent, agree that the Magistrates do have jurisdiction to state a case. In my judgment that is correct. The Appellant's conviction on a plea of guilty, following the preliminary ruling, was a final determination of breach of the enforcement notice with which he had been charged for the purposes of s.111(1). That determination cannot be re-opened in the Crown Court on the committal under PCA s.70.

9. The case of *Gillan* is to be distinguished. The application to state a case was not against a decision of the Magistrates' Court under s.111(1), but against a decision of the Crown Court under s.28 of the Supreme Court Act 1981 in relation to ongoing proceedings in the Crown Court.

The Second Question: Are children under 18 "residents" within the meaning of Class C4?

10. The second question for the opinion of the High Court if, as I have concluded, the Magistrates do have jurisdiction to state a case is:

> "Were the justices right to rule that children under 18 are included in the meaning of the term residents/persons in the case of property used for a Class C4."

11. Mr Webster took two points on the wording of the case stated, as he had done in his response on 7 September 2017 to the draft case stated, when he wrote:

> "I was at pains to contend that it was in fact dependent children who were not included within Class C4 use (and not persons under 18). Further, the reference should in fact be to the term 'residents' within Class C4 and not 'persons'."

12. Ms Phillips agrees, and so do I, that the reference should in fact be to the term "residents" within Class C4, and not to "residents/persons" within Class C4.

13. As for the words "children under 18", it is clear from the case stated that Mr Webster had sought a preliminary ruling from the justices as to whether "dependent children" are included within the meaning of the term "residents" in a qualifying Class C4 use (see paras 3 and 4). The four children living at the property were under the age of two years. However, a "dependent child" is a term that may, for example, cover a 23-year-old in full-time education. On reflection Mr Webster (and Ms Phillips) were content for the case stated to remain as drafted with the words "children under 18".

14. Accordingly, with the agreement of counsel the words "residents/persons" will be omitted and replaced by the word "residents" (and the words "children under 18" remain unaltered), so that the question will read as follows:

> "Were the Justices right to rule that children under 18 are included in the meaning of the term 'residents' in the case of property used for a Class C4."

Hereafter I will refer to the question posed in the case stated as "the modified question" and state my conclusion with regard to the "modified question" rather than the original one.

The Factual Background

15. Ms Phillips provided me with an extract from the Prosecution opening which sets out a summary of the relevant facts which are not in dispute.

16. The Appellant has been the owner of the property since 16 March 2004. The property is a two-storey semi-detached house with a loft conversion, with an internal layout consistent with a large HMO.

17. On 13 March 2012 the Respondent refused an application by the Appellant for retrospective planning permission for the change of use of the property to an HMO and the construction of a side and roof extension.

18. The Appellant appealed against this decision and his appeal was refused on 11 February 2013.

19. A planning enforcement notice was issued on 23 August 2013 and was served on the Appellant on 28 August 2013 requiring the change of use to cease and the extension to be removed.

20. The Appellant appealed against the enforcement notice. The appeal was dismissed on 27 March 2014 ("the Appeal Decision") and the enforcement notice was corrected and upheld. The requirements set out in paragraph 5 of the enforcement notice, as corrected, state:

> "a. Cease the use of the property as a house in multiple occupation not falling within Class C4 of the Schedule to the Town and Country Planning (Use Classes) Order 1987.
>
> b. Remove the kitchen facilities on the first floor of the property.
>
> c. Remove the rear roof extension OR modify the first floor side extension and rear roof extension to comply with drawing no.07/370/10 (received by Council on 12/06/2009) associated with planning permission Ref: PP/2009/1679.
>
> d. Remove all resultant debris."

21. In relation to the correction, the Inspector's reasons are stated at paragraph 11 of the Appeal Decision:

> "The first requirement of the notice (to cease the use of the property as an HMO) is excessive, because it would prohibit both its present use as a large HMO and its possible use as a small HMO with not more than six residents. The latter would be permitted development. The first requirement has therefore been varied so that it protects the right to use the house as a small HMO. The second requirement (to remove the kitchen facilities on the first floor) is not inconsistent with this variation, because only a large HMO would require more than one kitchen."

22. Following the appeal, the enforcement notice, as corrected, took effect on 27 March 2014, and the deadline for compliance was 27 September 2014, six months from the date the notice took effect.

23. On 15 November 2016 Mr Alex O'Neill, a planning enforcement officer with the Respondent, carried out a compliance site visit as a result of concerns that the property was still in use as a large HMO. At this visit Mr O'Neill saw that the first floor kitchen had not been removed as required by the notice (although subsequently the Appellant has complied with requirement (b)). Further, and most relevant for present purposes, Mr O'Neill formed the view that the property was in use as a large HMO.

Grounds of Appeal

24. The grounds of appeal (as set out at paragraph 6 of the "Grounds of Appeal" settled by Mr Webster and confirmed by his skeleton argument dated 19 January 2018) are as follows:

> "6.1 The magistrates misdirected themselves in law in finding that, on a proper construction of Class C4 use, dependent children should be treated as qualifying 'residents' in their own right.
>
> 6.2 The appellant contends that the magistrates should have applied a purposive rather than literal approach to construing the meaning of this provision. In other words, to interpret the enactment in its context consistently with the inferred objectives of Class C4 use, whilst at the same time taking account of the fundamental rights associated with family life and home."

The Parties' Submissions and Discussion

25. The Appellant contends that from the time the requirements in the corrected enforcement notice had to be complied with the property was in fact being used by no more than six adult occupiers and the dependent children of two couples who live

there, whom he did not consider would count as additional "residents" within the meaning of a Class C4 use.

26. Mr Webster submits that:

    i) Neither the Order, nor s.254 of the Housing Act 2004 ("HA 2004") (with which a HMO for the purposes of Class C4 must be read consistently) provides any definition of the word "residents" in Class C4. That being so, Mr Webster submits, it would have been open to the Magistrates to find that dependent children are not "residents" for the purposes of Class C4.

    ii) Although the limit of six residents defines the scope of Class C4 use, this does not imply that any excess of that number must constitute a breach of planning control.

    iii) To construe the word "residents" so that it includes dependent children, let alone children under the age of two years, can give rise to absurd results. Because of this the Magistrates should have asked themselves what was the purpose of Class C4. In this regard, it is contended that the object of Class C4 was to allow changes of use between dwelling houses or single households and HMOs to take place without the need for an application for planning permission. Class C4 was not intended to place limits on the number of dependent children comprised within a single household.

27. In relation to the third submission (namely, that to construe the word "residents" so that it includes dependent or very young children can give rise to absurd results) Mr Webster referred to *Bennion on Statutory Interpretation* (7th Ed), and in particular *section 12.1: Presumption that "absurd" result not intended* (see also *R v Central Valuation Officer* [2003] UKHL 20, per Lord Millett at paras 116 and 117; and *Haining v Warrington BC* [2014] PTSR 811, per Lord Dyson MR at para 30).

28. Mr Webster submits that it is irrational for a landlord in the position of the Appellant to be at risk of enforcement proceedings just because of the number of dependent children living in the property. For instance, it would not take account of the birth of children during the currency of fixed-term tenancies which cannot be ended in order that a landlord may reduce the number of "residents" living at the property to the permitted ceiling. Further it is irrational that a landlord in the position of the Appellant must protect himself against breaches of planning control by having to ask a prospective female occupier whether she is pregnant and/or what her intentions are with regard to having children or more children during the couple's tenancy. It also raises the very real possibility of a landlord being forced to evict couples with infant children.

29. I do not accept that there is need to consider a purposive interpretation of the word "residents" in Class C4. The Oxford English Dictionary defines "resident" as "a person who lives somewhere permanently or on a long-term basis". I agree with Ms Phillips that this definition is clear and plainly includes children, dependent or otherwise.

30. In any case Part 3 of Schedule 1 to the Use Classes Order provides for "Interpretation of Class C4" as follows:

"For the purposes of Class C4 a 'house in multiple occupation' does not include a converted block of flats to which section 257 of the Housing Act 2004 applies but otherwise has the same meaning as in section 254 of the Housing Act 2004."

31. The occupants of an HMO are referred to as "persons" in the HA 2004.

32. The relevant provisions of the HA 2004 provide as follows:

"**254 Meaning of 'house in multiple occupation'**

(1) For the purposes of this Act a building or a part of a building is a 'house in multiple occupation' if—

(a) it meets the conditions in sub-section (2) ('the standard test');

…

(2) A building or a part of a building meets the standard test if —

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

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

… and

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

…

258 HMOs: persons not forming a single household

(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2) Persons are to be regarded as not forming a single household unless—

(a) they are all members of the same family, …

(3) For the purposes of sub-section (2)(a) a person is a member of the same family as another person if—

…

(b) one of them is a relative of the other;

…

(4) For these purposes—

…

(b) 'relative' means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

…"

33. I agree with Ms Phillips that s.258 makes clear that children are counted as persons forming part of the household under s.254(2) (see also *Barnes v Sheffield City Council* [1995] 27 HLR 719 at 723, per Sir Thomas Bingham MR and *Rogers v Islington LBC* [2000] 32 HLR 138 at 141, per Nourse LJ, where no distinction is drawn between children and other members of the household). That being so, by reason of Part 3 of Schedule 1 to the Order, the word "residents" in Class C4 is to be interpreted such that children are to be counted as residents for the purposes of Class C4.

34. If Mr Webster were correct, then children would be excluded for purposes of Class C4, but included for purposes of HMOs which would be directly contrary to the express injunction in the Class C4 interpretation section (see para 30 above). As Ms Phillips points out, if Parliament had intended various categories of persons not to be included in the term "residents" it would have said so. Instead it said to the contrary, namely that for the purposes of Class C4 a HMO has (save in the case of a converted block of flats) the same meaning as in HA 2004 s.254.

35. In further support of her submission that children are counted as persons forming part of the household in HA 2004 s.254(2), Ms Phillips refers to HA 2004 s.264 which provides:

"**264 Calculation of number of persons**

(1) The appropriate national authority may prescribe rules with respect to the calculation of numbers of persons for the purposes of—

(a) any provision made by or under this Act which is specified in the rules, or

(b) any order or licence made or granted under this Act of any description which is so specified.

(2) The rules may provide—

(a) for persons under a particular age to be disregarded for the purposes of any such calculation;

(b) for persons under a particular age to be treated as constituting a fraction of a person for the purposes of any such calculation.

(3) The rules may be prescribed by order or regulations."

36. No such rules have been made. That being so it follows that a child of whatever age is to be treated as one person.

37. Further, if it was necessary to apply a purposive interpretation to the meaning of the word "residents" in Class C4 I agree with Ms Phillips that Mr Webster's proposed interpretation runs counter to the purpose of the HMO legislation. In *Brent London Borough Council v Reynolds* [2002] HLR 15, Buxton LJ explained the purpose of the HMO legislation at paras 2-5:

> "2. … HMOs are, or are usually, domestic premises originally designed for occupation by one family, which have been converted for occupation by a number of separate families or individuals. This process, which almost inevitably involves the sharing of bathing or kitchen facilities, and the use of parts of the premises for purposes for which they were not originally designed, raises obvious potential problems in terms not just of the amenity but also of the safety of the premises. In addition, government and Parliament have seen the need to make special provision in respect of HMOs because of the regrettable fact that it is often persons and families most in need of social protection, including families with young children, who find themselves obliged to occupy housing that, in the main, is likely to be much less adequate than purpose-built flats or houses.
>
> 3. These problems, and the special attention that they justify to be given to HMOs, have been graphically recognised by this court. In *Rogers v Islington LBC* [1999] 32 HLR 138 at 140 Nourse LJ quoted a passage from the *Encyclopaedia of Housing Law and Practice*, and then added some comment of his own:
>
> > 'Since the first controls were introduced it has been recognised that HMOs represent a particular housing problem, and the further powers included in this part of the Act are a recognition that the problem still continues. It is currently estimated that there are about 638,000 HMOs in England and Wales. According to the English House Condition Survey in 1993, four out of ten HMOs were unfit for human habitation. A study for the Campaign for Bedsit Rights by G. Randall estimated that the chances of being killed or injured by fire in an HMO are 28 times higher than for residents of other dwellings.'

> The high or very high risks from fire to occupants of HMOs is confirmed by the study entitled 'Fire Risk in HMOs', a summary report to the Department of the Environment, Transport and the Regions prepared by Entec UK Ltd in November 1997. HMOs can also present a number of other risks to the health and safety of those who live in them, such as structural instability, disrepair, damp, inadequate heating, lighting or ventilation and unsatisfactory kitchen, washing and lavatory facilities. It is of the greatest importance to the good of the occupants that houses which ought to be treated as HMOs do not escape the statutory control.'
>
> 4. Parliament has long recognised the need to guard against such dangers, by giving to local housing authorities [LHAs] significant powers of control over the activities of those who own and manage HMOs. Such powers were first effectively included in Part IV of the Housing Act 1969, which was consolidated into Part XI of the Housing Act 1985 [the 1985 Act]. …
>
> *Statutory control over HMOS*
>
> 5. The lynch-pin of control over HMOs is the power of an LHA to make a registration scheme that requires HMOs to be registered with the LHA. The scheme will contain 'control provisions' regulating the property (1985 Act, ss.346-347). …"

38. The Magistrates state (at para 7 of the case stated) that:

> "We strongly believe that Parliament did not intend to create a situation where you could have a property, for example the property we are dealing with, to have six adults and 40 children and still be within the law. If we were to find that children do not count that situation would be possible."

Mr Webster criticises the Magistrates for suggesting that the space being used by two couples and two single persons would be capable of being used by as many as 40 children which, he contends, would in any case be bound to trigger Part X of HA 1985 which deals with overcrowding.

39. Ms Phillips points out that the overcrowding provisions in Part X of HA 1985 do not apply to rooms in HMOs because they are not dwellings (s.343). However overcrowding in licensed HMOs (including the property) is addressed through compliance with strict living and safety standards (see the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006, Sch.3). Children are not referred to in these regulations. However a local housing authority ("LHA") has the power to impose license conditions specifying the type of person or persons who must occupy each room in order to comply with these standards (see *Nottingham City Council v Parr* [2016] UKUT 71 (LC)). I accept Ms Phillips' submission that there is therefore no reason why a LHA cannot specify in licence conditions that one or more rooms must, for

example, be shared with a child. The standards imposed by the Respondent state "The space standards apply irrespective of the age of the occupants". As for HMOs which do not require licences, HA 2004 ss.139-141 confer powers on LHAs to deal with overcrowding and these provisions include children as persons for the purposes of overcrowding, (s.141(2)(a) excluding children under the age of 10 for the purposes of s.141(1)(b)).

40. In any event the point being made by the Magistrates is that if the Appellant is correct in his construction of the word "residents" in Class C4 there is no limit to the number of dependent children who may additionally occupy an HMO as part of a household of adults.

41. On Ms Phillips' construction of the word "residents" there is no uncertainty. All children are to be counted as residents. However on Mr Webster's construction there may be considerable uncertainty. His submission before the Magistrates and at the outset of this appeal was that "dependent children" were not to be counted as "residents". As Mr Webster appeared to recognise, it may be unclear as to whether a child is a dependent or not. There would be no uncertainty if there was a cut-off age (for example, as suggested by the Magistrates in their formulation of the case stated, "children under 18"); but during the course of his submissions Mr Webster appeared to be suggesting that at the very least very young children should be excluded. Apart from the fact that it is very young children who are most in need of protection (see para 37 above), control over HMOs is likely to be made more difficult through the introduction of uncertainty if LHAs have to assess whether children are "young" or "very young". The categories of persons Mr Webster contends should be excluded from the term "residents", such as "dependent children", "infant children" and "very young children" (terms Mr Webster has used at various times in these proceedings), all introduce a degree of uncertainty into a definition of "residents" that is certain.

42. I reject Mr Webster's contention that newborn children or pregnant female occupiers present a problem (see para 28 above). If there are more than six residents in the HMO, then the HMO falls outside Class C4 and planning permission is required. However, the housing authority would still have a discretion as to whether to take enforcement action or not. By TCPA 1990 s.172(1)(b) the local planning authority may issue an enforcement notice where it appears to them that it is "expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations". Accordingly the authority is not obliged to issue an enforcement notice in the circumstances postulated by Mr Webster.

43. For the reasons I have given the modified question should in my view be answered in the affirmative.

Conclusion

44. In my judgment

    i) On the preliminary issue, the Magistrates do have jurisdiction to state a case; and

ii) On the modified question, the justices were right to rule that children under 18 are included in the meaning of the term "residents" in the case of property used for a Class C4. Accordingly I answer the question in the affirmative.

Accordingly the appeal is dismissed.