Neutral Citation Number: [2015] EWCA Civ 554

Case No: B5/2015/0421

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT CENTRAL LONDON
HIS HONOUR JUDGE MITCHELL
A40CL105

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/06/2015

Before :

LORD JUSTICE SULLIVAN
LADY JUSTICE GLOSTER
and
MR JUSTICE BLAKE

- -

Between :

JOHNSTON	**Appellant**
- and -	
CITY OF WESTMINSTER	**Respondent**

- -
- -

Mr Martin Russell (instructed by **Moss Beachley Mullem & Coleman**) for the **Appellant**
Mr David Warner (instructed by **City of Westminster**) for the **Respondent**

Hearing dates : Wednesday 18th March 2015

- -

Judgment

Lady Justice Gloster :

Introduction

1. This is a (second) appeal by Mr John Johnston ("Mr Johnston") against a decision of the respondents, Westminster City Council ("Westminster" or "the Council") made on 28 May 2014 pursuant to section 202 of the Housing Act 1996 ("the 1996 Act"). By that decision Westminster determined that Mr Johnston was not homeless within the meaning of section 175 of the 1996 Act. That decision was upheld by HHJ Mitchell in a judgment dated 3 December 2014 but handed down on 29 January 2015. On 25 February 2015 Lewison LJ granted Mr Johnston permission to appeal on the papers.

The principal relevant provisions of the Act

2. Section 175 of the Act so far as material provides as follows:

"**Homelessness and threatened homelessness**

(1) A person is homeless if he has no accommodation available for his occupation, whether in the UK or elsewhere, which he

(a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,

(b) has an express or implied licence to occupy, or

(c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.

…….

(3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy..."

3. Section 198 of the Act so far as material provides as follows:

"**Referral of case to another local housing authority**."

(1) If the local housing authority would be subject to the duty under section 193 (accommodation for those with priority need who are not homeless intentionally) but consider that the conditions are met for referral of the case to another local housing authority, they may notify that other authority of their opinion.

(2) The conditions for referral of the case to another authority are met if—

(a) neither the applicant nor any person who might reasonably be expected to reside with him has a local connection with the district of the authority to whom his application was made,

(b) the applicant or a person who might reasonably be expected to reside with him has a local connection with the district of that other authority, and

(c) neither the applicant nor any person who might reasonably be expected to reside with him will run the risk of domestic violence in that other district."

4. Section 200 of the Act so far as material provides as follows:

"**Duties to applicant whose case is considered for referral or referred."**

> (1) Where a local housing authority notify an applicant that they intend to notify or have notified another local housing authority of their opinion that the conditions are met for the referral of his case to that other authority—
>
> (a) they cease to be subject to any duty under section 188 (interim duty to accommodate in case of apparent priority need), and
>
> (b) they are not subject to any duty under section 193 (the main housing duty), but they shall secure that accommodation is available for occupation by the applicant until he is notified of the decision whether the conditions for referral of his case are met.
>
> (2) When it has been decided whether the conditions for referral are met, the notifying authority shall notify the applicant of the decision and inform him of the reasons for it.
>
> The notice shall also inform the applicant of his right to request a review of the decision and of the time within which such a request must be made.
>
> (3) If it is decided that the conditions for referral are not met, the notifying authority are subject to the duty under section 193 (the main housing duty).
>
> (4) If it is decided that those conditions are met, the notified authority are subject to the duty under section 193 (the main housing duty).
>
> (5) The duty under subsection (1) ceases as provided in that subsection even if the applicant requests a review of the authority's decision (see section 202).
>
> The authority may secure that accommodation is available for the applicant's occupation pending the decision on a review."

Factual Background

5. Mr Johnston is a single man of 50 years of age. For 7 years from 2004 until 2011 he lived in Eastbourne. In early 2011 he had to leave his rented property in Eastbourne because the landlord required it to be returned. Mr Johnston came to London because, he says, he felt harassed and intimidated in Eastbourne. He started sleeping on the streets in Victoria.

6. On 9 August 2011 he applied to Westminster for homeless assistance under Part 7 of the 1996 Act. On 1 November 2011 the Council wrote to Mr Johnston accepting that he was homeless, eligible for assistance, had priority need for housing, and had not become homeless intentionally but, stating that it had decided that he had no local connection with Westminster but did have a local connection with Eastbourne Borough Council ("Eastbourne"), Westminster informed him that that his application

was being referred to Eastbourne under section 198 of the Housing Act 1996. On 28 October 2011 Westminster duly referred the application to Eastbourne, but the referral was only accepted by Eastbourne on 4 March 2013. Mr Johnston was provided by Westminster with temporary accommodation pending Eastbourne's consideration of the matter.

7. On 6 March 2013, pursuant to section 200 of the Act, Westminster wrote to Mr Johnston to inform him of the fact that Eastbourne had accepted a housing duty towards him and that accordingly Westminster's housing duty towards him had come to an end. The letter stated:

> ".. following our referral of 28th October 2011, Eastbourne.. has accepted a housing duty towards you. Our housing duty has therefore come to an end."

The letter went on to state that accordingly Westminster intended to stop providing him with temporary accommodation on 12 March 2013. On 27 March 2013 Mr Johnston sought a statutory review of the decision to refer.

8. That request for a review led to a review decision on 24 May 2013 which was subsequently withdrawn and substituted with a review decision dated 14 June 2013. That decision upheld the original decision that Mr Johnston had no local connection with Westminster, but that he did have a connection with Eastbourne. It also concluded that Mr Johnston would not be at risk of violence in Eastbourne and that accordingly the conditions for a referral to Eastbourne under section 198 had been met. That decision was the subject of a statutory appeal under section 204 of the 1996 Act which was dismissed by HHJ Faber on 10 October 2013.

9. Mr Johnston then applied for permission to appeal that dismissal of his appeal to this court. However, that application for permission to appeal was compromised on the terms set out in a consent order of this court dated 26 February 2014. That order recited that:

> "Upon the Respondents having agreed to accept a fresh application from the Appellant under section 183 of the Housing Act 1996
>
> IT is ordered by consent
>
> 1. The Appellant seeks to withdraw his application for permission to appeal which stands dismissed without further formality".

We shall have to consider in greater detail below whether, by implication, and as suggested in oral argument by Mr Martin Russell, who appeared on behalf of Mr Johnston, there were any further terms of the compromise.

10. The same day, 26 February 2013, Mr Johnston lodged a new application under Part 7 of the 1996 Act. Westminster issued its fresh decision letter on 27 February 2014. This time the ground for refusal was not expressly that Westminster's duty had been discharged pursuant to section 200(1) and that the referral to Eastbourne still stood,

but rather, that in the light of Eastbourne's willingness to continue to accept Westminster's referral, Mr Johnston was not homeless for the purposes of section 175 of the Housing Act 1996 because Eastbourne had accepted a full housing duty towards him and, if he applied to Eastbourne, he would be accommodated by them somewhere. The relevant paragraphs of the letter were as follows:

> "As you are not homeless, we have no duty to find you a home and we cannot offer you somewhere to live.
>
> We believe you are not homeless because Eastbourne have accepted a full housing duty towards you and are prepared to provide you with temporary accommodation until you secure permanent accommodation in Eastbourne.
>
> You made a homeless application to Westminster Council on 6th July 2012. We accepted that you were owed a full housing duty. However this duty was owed to you by Eastbourne Council due to you having a local connection with Eastbourne.
>
> You requested a review of this decision on 27th March 2013. Our decision to refer you to Eastbourne was upheld by our reviews department on 22nd May 2013.
>
> We received an e-mail from the manager at Eastbourne's homeless person unit (Michael Feely) on 4th March 2013 advising us that Eastbourne have accepted a duty towards you and will provide you with accommodation.
>
> You re-approached Westminster Council on 26th February 2014 asking to make a fresh homeless application. As part of our enquiries we contacted Eastbourne Council and spoke to Michael Feely. Michael stated that you had not approached Eastbourne to take their offer of temporary accommodation. Mr Feely confirmed Eastbourne still owe you a housing duty.
>
> As you did not approach Eastbourne at the time the referral was completed Eastbourne Council still have a full housing duty towards you. Michael stated you are still able to approach Eastbourne Council to take their offer of temporary accommodation."

11. On 5 March 2014 Mr Johnston's solicitors, Moss Beachley Mullem & Coleman ("MB"), wrote to Westminster requesting a review and for accommodation pending review. The letter went on to say as follows:

> "As you are aware the Court of Appeal case was compromised pursuant to an order made by Lady Justice Rafferty on the basis that the appeal became otiose in that under the local connection rules our client was residing in Westminster for three out of the last five years and therefore did not have a connection with Eastbourne.

> As a result of that your authority agreed to accept a fresh application.
>
> We were extremely surprised literally on the same day as our client approached your authority they were able to come to a Section 184 decision saying that our client is not homeless because Eastbourne have accepted a full housing duty towards you.
>
> It is astonishing that you reach such perverse decision. We say that because clearly the decision maker has not considered the constituent parts of Section 175 of the Housing Act 1996.
>
> We don't propose sending you a copy of the Section because you should be aware of the Section. If you believe that he falls within section 175 please direct us to what party [sic] he falls within.
>
> He has no license [sic], he has no interest or tenancy in any accommodation. He may well have an opportunity of such but he has no interest therefore it is just simply wrong for you to find that he is not homeless."

12. On 6 March 2014 Westminster wrote a letter to MB stating that it had decided not to exercise its discretion to provide temporary accommodation pending the review. The letter stated that in arriving at its decision Westminster had considered the merits of the case, whether there was new material information or argument which had a real effect on the original decision and Mr Johnston's personal circumstances. The letter went on to say:

> "As agreed Westminster accepted a fresh application and reached a fresh decision that Eastbourne Council still owe a housing duty towards Mr Johnston.
>
> We have agreed that we will not provide accommodation as Mr Johnston is not considered to be homeless and can return to Eastbourne and has been advised to do so.
>
> Personal circumstances
>
> I have considered Mr Johnston's personal circumstances. The decision reached on his homelessness application is that he is 'not homeless' as Eastbourne Council will offer him accommodation. His homelessness should therefore not be a factor in this case and he should return to Eastbourne."

13. On 30 April 2014 Westminster provided a "minded to" letter under Regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999

indicating its intention to uphold the decision that Mr Johnston was not homeless and the reasons for that decision. It repeated the fact that in February Eastbourne had confirmed that it still had a duty to accommodate Mr Johnston and that it would provide him with accommodation if he approached them for assistance. The letter went on to say:

> "Mr Johnston requested a review of this decision and you have made submission in support of the review. Within you [sic] submission you have argued that Mr Johnston is homeless as he has no interest in any accommodation in Eastbourne.
>
> I note your comments, and whilst I acknowledge that Mr Johnston has not been offered accommodation, the fact remains that if he were to approach Eastbourne, they would make an offer of accommodation to him. As stated above, Eastbourne currently have a duty towards Mr Johnston, as such they are responsible for providing him with assistance.
>
> Having regard to all of the above factors I intend to uphold the decision that Mr Johnston is not homeless."

14. On the same day Westminster confirmed with Eastbourne that the latter authority had not issued a discharge of duty letter to Mr Johnston and that the duty which Eastbourne had accepted in March 2013 continued.

15. On 28 May 2014 Westminster issued its section 202 review decision upholding the earlier decision that Mr Johnston was not homeless on the basis that Eastbourne had accepted a duty to him and would provide him accommodation were he to ask. The letter said:

> "On 27th February 2014 Mr Johnston's application was rejected on the grounds that he was not homeless in line with s. 175 of the Housing Act (1996).
>
> Mr Johnston requested a review of this decision and you have made submission in support of the review. Within you [sic] submission you have argued that Mr Johnston is homeless as he has no interest in any accommodation in Eastbourne. You have stated that we have not explained why Mr Johnston does not fit the statutory definition of homelessness.
>
> I note your comments, and I acknowledge that Mr Johnston has not been offered accommodation by Eastbourne. The fact remains that if he were to approach Eastbourne, they would make an offer of accommodation to him. As stated above, Eastbourne currently have a duty towards Mr Johnston, as such they are responsible for providing him with assistance.
>
> Having considered the information contained within the file, I am not satisfied that Mr Johnston is homeless pursuant to Part VII of the Housing Act 1996.

> I would like to reiterate that if Mr Johnston looses [sic] accommodation through a deliberate act or omission, and consequently become homeless he is likely to have become homeless intentionally. If as a result of this he reapplied to this authority for assistance, the Council may deem that it has no duty towards him apart from providing you with advice and assistance."

The proceedings in the County Court

16. It was against that decision that Mr Johnston appealed on 17 June 2014 to the County Court. His grounds of appeal to the County Court were as follows:

> "The respondent's decision that the appellant was not homeless was irrational and failed to identify how the appellant had accommodation which satisfied the test in Section 175 of the Housing Act 1996:
>
> (a) the prospect of being offered accommodation in Eastbourne as yet unidentified did not mean that he had accommodation available to him in which he had an interest, a license or any right to remain in occupation;
>
> (b) the prospect of being offered accommodation in Eastbourne as yet unidentified meant that Westminster had no means of saying (as they would have to) why it was reasonable for the appellant to continue to occupy it."

17. As is clear from the judgment, Mr Russell's submissions to the County Court judge, on behalf Mr Johnson, were, not surprisingly, directed to these grounds of appeal. In summary he submitted that if there was not an identified property then it could not be accommodation available for occupation for the purposes of section 175(1) of the 1996 Act; and that if the property was not identified there was no basis upon which it could be reasonable for the appellant to occupy it for the purposes of section 175 (3) of the 1996 Act.

18. Mr Ian Peacock, counsel then acting for Westminster, submitted that the consequence of sections 198 and 200 of the 1996 Act was to transfer the duty to the local housing authority in Eastbourne, which had accepted that duty; and that the practicality of Westminster's approach was that, if Mr Johnston had applied to Eastbourne it would have provided him in the first instance with some form of temporary accommodation whilst it tried to sort out suitable long-term accommodation; see paragraph 15 of the judgement. He went on to submit that on any basis Mr Johnston fell within section 175 (1)(b) of the 1996 Act because he had at worst an implied licence to occupy accommodation in the light of Eastbourne's accepted duty to provide him with it. That, submitted Mr Peacock was:

> "rather similar to buying a cinema ticket for an advance performance in the cinema, namely that although the seat may

> not have been specifically reserved when you have turned up to the cinema to see a film, you expect to be able to have a seat and, indeed, that is what happens. He also uses the same analogy with regard to booking a hotel room, that you turn up on the evening of your booking and you expect to be able to occupy and have a license to occupy the room in question."

See paragraph 16 of the judgment.

19. The judge accepted Mr Peacock's latter argument and dismissed the appeal in the following terms:

> "17. In my judgment, this argument is entirely in accordance with the purpose of these Sections of the Act. Although it was not specifically argued, it does seem to me the local authority could have accepted a full housing duty and then referred the matter on to Eastbourne. It seems to me the result would have been the same. However, it is a technicality but in my judgment a technicality which does not affect the outcome of the case. I have reached the conclusion that the local authority is entitled to say that, as a matter of law, the local authority in Eastbourne has accepted the full duty to re-house the appellant and so the appellant is not in those circumstances, homeless. As I say, the alternative would have been for Westminster to accept full duty and then refer the matter or to accept a duty and then refer the matter on to Eastbourne. It seems to me that either option results in the same result, namely that if the appellant were to approach Eastbourne, they would accept a full duty to re-house him and he has not done so. In all the circumstances, therefore, it seems to me that I ought to dismiss the appeal."

The reasoning is somewhat opaque, but the basis of the judge's conclusion appears to have been that, because Eastbourne had accepted the full duty to re-house Mr Johnston, Mr Johnston had accommodation available to him and was not in those circumstances homeless for the purposes of section 175. I shall refer to this basis for the judge's conclusion as "the first ground".

20. The judge's statement that:

> "Although it was not specifically argued, it does seem to me the local authority could have accepted a full housing duty and then referred the matter on to Eastbourne. It seems to me the result would have been the same."

appears to be a conclusion on an alternative basis, namely that Westminster could have accepted that Mr Johnston was homeless, could then have referred him to Eastbourne again, and would then no longer have owed any duty to Mr Johnston pursuant to the provisions of section 200(1). I refer to this alternate basis for the judge's conclusion as "the second ground".

21. Accordingly the judge dismissed the appeal on 29 January 2015.

The grounds of appeal

22. Mr Johnston's grounds of appeal to this court were based on the single substantive ground that Westminster's review decision that Mr Johnston was not homeless for the purposes of section 175 of the 1996 Act was wrong, and the learned Judge was wrong to uphold that decision, because:

    i) the fact that an applicant might be offered accommodation by another authority which might satisfy section 175(1) did not entitle the decision maker to find that the applicant was not homeless; and

    ii) section 175(3) could not be satisfied where the relevant accommodation was hypothetical and unidentified.

The arguments presented by the parties

23. Mr Russell, on behalf of Mr Johnston, submitted in summary as follows:

    i) Section 175 was expressed in the present tense and required accommodation which an applicant had available for his occupation under an interest, a licence or a rule of law. Mr Johnston had no such accommodation.

    ii) Section 175(3) was not satisfied by a "notional" or hypothetical occupation. The definition contemplated residence not a notional residence: see *Re Islam* [1983] 1 AC 688, 716A per Lord Lowry. In *Fletcher v Brent LBC* [2006] EWCA Civ. 960; [2007] HLR 12, the Court of Appeal held (Peter Smith J. at [42] with whom Mummery and Rix LJJ agreed) that section 175 required a decision maker to ascertain the nature of the applicant's interest in property (identified in that case) and whether that interest conferred a right to occupy. In Mr Johnston's case, any interest or licence was hypothetical, and it cannot be said that it would be reasonable to continue to occupy accommodation when the accommodation was unidentified.

    iii) Westminster was not entitled to say that he had ceased to be homeless because Eastbourne had not discharged the duty they accepted in 2013 (either by performance or by ending it). Mr Johnston was no less homeless than an applicant who had a local connection with a borough for all time under section 199(6) (where he had been placed in NASS accommodation). When such an applicant made an application to a different borough, his undoubted local connection elsewhere did not prevent him being homeless.

    iv) In response to questions put by the court in the course of argument as to whether Westminster's decision could be supported on an alternative ground that, by virtue of section 200(1)(b), and its referral to Eastbourne, Westminster no longer owed any statutory duty to Mr Johnston, Mr Russell submitted that, once Westminster had agreed by the consent order of 26 February 2014 to accept a fresh application from Mr Johnston, it had to decide what, if any, duty was owed to him: section 184. He argued that, by the terms of the compromise, and its agreement to accept a fresh application, Westminster was effectively precluded from saying that it no longer owed any duty on the grounds that Eastbourne had previously accepted the referral; the basis of the

compromise was that, by the date of the consent order, both parties appreciated that, under the local connection rules, Mr Johnston had resided in Westminster for three out of the last five years and therefore it was arguable that he no longer had any connection with Eastbourne; Westminster therefore had to decide (as it had done on 1 November 2011) whether Mr Johnston was homeless, had a priority need for accommodation and had not become homeless intentionally and whether he still had no local connection with Westminster but had a local connection with Eastbourne. If Westminster had so decided, and had then referred Mr Johnston to Eastbourne, Mr Johnston would have challenged the conclusion that he still had a local connection with Eastbourne. In support of this argument Mr Russell referred to the letter dated 5 March 2014 from MB to Westminster which I have quoted above.

24. Mr David Warner, who appeared in this court for Westminster, contended that Westminster was correct to find that Mr Johnston was not homeless by virtue of an implied licence to occupy accommodation to be provided by Eastbourne in discharge of its statutory duty under Part 7 of the Act 1996 and that HHJ Mitchell was correct to uphold that conclusion on appeal. Like Mr Russell, the main thrust of his submissions addressed the arguments relating to the construction of section 175. In this context he submitted that:

i) Mr Johnston's case turned on the argument that any accommodation which was to be offered by Eastbourne was "notional" or "hypothetical". Although it was correct that that accommodation had yet to be specifically allocated, it was wrong to suggest that this made the accommodation either notional or hypothetical. Eastbourne was under a statutory duty to provide suitable accommodation to Mr Johnston from its stock of temporary accommodation. That duty was real as was the accommodation that would be provided in discharge of it.

ii) It was Westminster's case before HHJ Mitchell (as it remained in the Court of Appeal) that it would lead to an absurdity for section 175 to be construed so as to lead to an applicant being classed as homeless notwithstanding that another local housing authority was under a continuing statutory duty to provide him with accommodation upon his attending their offices to request it.

iii) The analogy drawn before HHJ Mitchell (and rightly accepted by him) was of an hotel guest who, having booked a room in advance, had an implied licence to occupy a room at the hotel even if the room was not specifically allocated until the guest attended at reception for that purpose. Mr Johnston would be allocated specific accommodation upon his attending at Eastbourne's offices. Until he did so, and was provided with that accommodation, it was not a distortion of the statutory language to conclude that he had an implied licence to occupy accommodation to be provided to him by Eastbourne.

iv) It was no answer to rely on section 175(3) as requiring specific accommodation to be identified in order to determine whether it would be reasonable for him to continue to occupy it, as any discharge of the statutory duty required the accommodation offered to be suitable. The suitability of Eastbourne as a place for Mr Johnston to live had already been addressed as

part of the earlier application and review and was upheld by HHJ Faber on appeal

25. In response to the court's suggestion in argument that Westminster's decision could be supported on the alternative ground that, by virtue of section 200(1)(b), and its referral to Eastbourne, Westminster no longer owed any statutory duty to Mr Johnston, Mr Warner supported the court's suggested analysis. He submitted that the terms of the compromise did not in any way prevent Westminster from considering all options that were open to it.

Discussion and analysis

26. In relation the first ground of the judge's decision, I agree with Mr Russell's submissions that the fact that an applicant might be offered accommodation by another authority which might satisfy section 175(3), does not entitle the decision maker, per se, to find that an applicant was not homeless and that, accordingly, the qualifications for homelessness contained in section 175(1) were not satisfied. My reasons for concluding that the first ground of the judge's decision was flawed are as follows.

27. First, the language of section 175 (1) is simply not apt to refer to unspecified accommodation which may in the future become available, if the applicant were to apply to another authority. Section 175(1)(a) refers to "accommodation which he *is entitled* to occupy by virtue of an interest"; likewise Section 175(1)(b) refers to "accommodation which he *has* an express or implied licence to occupy". That implies the present tense.

28. In the present case there was no such accommodation available to Mr Johnston at the date of the decision. The fact that Eastbourne was willing to provide unspecified accommodation did not prevent Mr Johnston from qualifying as homeless for the purposes of section 175(1).

29. Moreover the judge's approach is inconsistent with the decision of this court in *Fletcher v Brent LBC supra* per Peter Smith at [41] to [44] with whom Mummery and Rix LJJ agreed. In that case the applicant applied for housing as homeless after his spouse had given notice to quit in respect of their joint tenancy. There was some debate as to whether this had been a valid notice, and at one time the housing authority changed the locks and excluded the applicant. The authority subsequently concluded that, as the applicant had not been a party to the giving of the notice, he was not intentionally homeless, and further invited him to return to the premises on the basis that the notice to quit was invalid. The question on appeal was whether he was homeless, on the basis that, either he had a right to occupy the former matrimonial home as the notice to quit was invalid, or he was being invited back to the premises by the local authority and therefore had an implied licence to occupy it. Peter Smith J said:

> "41. With respect to the learned Judge that does not satisfy in my view the requirements of section 175 HA 1996. **The section can only be satisfied if the Appellant either has an interest at the time for consideration (namely the review) which confers on him an entitlement to occupy (subsection**

(a)) or he has an express or implied licence to occupy (subsection (b)).

42. The suggestion that he had a licence was entirely contrary to the Respondent's attitude which was throughout that the tenancy continued. Second the difficulty about the licence is determining the nature of the licence. Mr Russell sought to support the learned Judge's decision that it was not necessary for her to determine whether or not there was a tenancy or a licence. **It is difficult to see how the section can be satisfied unless one knows the nature of the interests and then satisfies oneself that the relevant interest confers on the Appellant a right to occupy the Property**. There is no problem if he was a Secure Tenant but, for the reasons I have set out above, this was not the case. There may be a basis for suggesting that he has some kind of licence express or implied to occupy the property. However there has been no inquiry as to the nature of that licence or its terms. This is important. For example the licence to occupy a dwelling house conferred by the Respondent would be a Secure Licence just like a Secure Tenancy see section 79 (3) HA 1985. In that context if the Appellant had a Secure Licence he would have such an interest as to justify a conclusion that he was not homeless. Conversely he might only have had an express or implied licence to store his furniture and possessions there temporarily whether for payment or gratuitously. Such an arrangement might not give rise to a Secure Licence and might not amount to a licence to occupy the Property as a residence.

43. It is possible that an actual decision as to whether an interest created a lease or a licence would not be necessary. For example if a document which purported to be a licence might in law be a lease but whatever the nature of the arrangements there was a Secure Tenancy or licence an investigation as to whether or not the document created a lease or licence would be sterile. Such a possibility is likely to be rare. It is difficult however to see how, as I have said a decision can be made that the Appellant's interest under a licence (if any) means that he is not homeless until the nature of that interest is actually determined and its terms.

44. **Merely because the local authority Respondent wishes to make the Property available is in my view insufficient. It is not a question of offering alternative accommodation but examining the precise terms upon which the Property is alleged to be available for occupation by the Appellant at the date for determining that issue, namely the Review date** (although Mr Watkinson conceded that if the circumstances had changed from the Review date those changed circumstances

> ought to be taken into account when the matter is considered by the Court).” (My emphasis.)

30. Thus *Fletcher v Brent LBC* effectively held that section 175 required a decision maker to ascertain the nature of the applicant’s interest in property and whether that interest conferred a right to occupy. The present case is *a fortiori Fletcher v Brent LBC*, in that there is no specific property identified for Mr Johnston to occupy; and the nature of any interest he would have in such property is not clear. Nor, in the absence of any identified property, would it be possible to ascertain for the purposes of section 175(3) whether such accommodation “would be reasonable for him to continue to occupy”. In my view the mere fact that Eastbourne was willing to discharge whatever duty was owed to Mr Johnston would not be sufficient to prevent him from being homeless within the meaning of section 175.

31. For the above reasons, I am not persuaded that the judge’s acceptance of Mr Johnston’s argument that the situation is analogous to a hotel reservation, which there is every reason to believe will be honoured, is consistent either with the statutory language, or the purpose of the Act.

32. As to the possible second ground for the judge’s decision, again I am not persuaded that one can simply approach the issue on the basis of a hypothetical scenario that Westminster could have accepted that Mr Johnston was homeless, could then have referred him to Eastbourne again, and would then no longer have owed any duty to Mr Johnston pursuant to the provisions of section 200(1). That was not what happened. I thus conclude that in fact Mr Johnston was homeless as at the date of the review decision and that the judge was wrong to hold otherwise.

33. However, nonetheless, my analysis of the actual position is that which was put by the court to counsel in argument. The reality was that, as had been stated in Westminster’s letter dated 6 March 2013, once Eastbourne had accepted that the conditions of referral were met, Westminster's housing duty towards him had come to an end and the section 193 housing duty was owed to him by Eastbourne: see sections 200(1), (2),(4) and (5) of the Act.

34. That in fact remained the position, notwithstanding the appeal to this court in February 2014 and the subsequent fresh application made by Mr Johnston to Westminster. The court asked Mr Russell: (i) to articulate precisely the terms of the estoppel or agreement which he claimed precluded Westminster from saying that it no longer owed any housing duty to Mr Johnston because Eastbourne had accepted, and continued to accept, the duty; and (ii) to identify the evidential basis for such alleged estoppel or agreement. He was unable to do either, other than pointing to the assertions in MB’s letter dated 5 March 2014 which I have already quoted above.

35. But, in my judgment, there is nothing in the terms of the Court of Appeal’s consent order dated 26 February 2014, or in any of the correspondence between the parties, or any other evidence to support the claim that Westminster, by agreeing to accept a fresh housing application from Mr Johnston, had, for example, agreed to accept that Mr Johnston no longer had any connection with Eastbourne (whether because he had resided in Westminster for three out of the last five years or otherwise), or that the previous referral to Eastbourne was of no effect, or that Eastbourne was no longer under a housing duty to Mr Johnston. If there had been such an agreement or

representation by Westminster it would – or certainly should - have appeared in the terms of the Court of Appeal's consent order.

36. Moreover, it is significant that no such argument featured in Mr Johnston's subsequent grounds of appeal to the County Court or indeed in any of the arguments put before that court or the Reviewing Officer. Nor was any such point taken in the grounds of appeal to this court or the written skeleton argument.

37. The fact that all the relevant correspondence (namely the decision letter dated 27 February 2014, the letters dated 6 March 2014 and 30 April 2014 and the section 202 review letter dated 28 May 2014) stated the writer's erroneous conclusion that Mr Johnston was not homeless is, in my view irrelevant. All the letters correctly stated that Eastbourne currently had, and continued to have a housing duty towards Mr Johnston. The necessary implication of that was that by virtue of section 200 Westminster no longer had such a duty.

38. The fact that Westminster stated the wrong reasons for its decision on the review (namely that Mr Johnston was not homeless) did not prevent the County Court and does not prevent this court from upholding the decision on another basis. Section 204(3) of the Act provides that, on an appeal by an applicant pursuant to section 204(1), the County Court is not limited to allowing or dismissing the appeal but may make such order varying the decision as it thinks fit. This court has power to exercise any of the powers available to the court below.

39. Accordingly, in my judgment the appropriate course in this case is for this court to make an order:

    i) dismissing the appeal;

    ii) confirming Westminster's review decision to the extent that it concluded that Eastbourne had accepted a duty to house Mr Johnston, and were under a continuing duty to house him;

    iii) varying by deletion that part of the decision which concluded that Mr Johnston was not homeless; and

    iv) substituting a finding that in the circumstances Westminster no longer owed any housing duty to Mr Johnston.

Mr Justice Blake:

40. I agree.

Lord Justice Sullivan:

41. I also agree.