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Local Government/Public Sector

Divisional Court decides RSL is a public authority

Background

The Divisional Court on 24 June 2008 gave a clear statement that the London and Quadrant Housing Trust (LQHT – a registered social landlord (RSL)) was a public authority under section 6 of the Human Rights Act 1998 and was accordingly amenable to judicial review. The case (*R (Weaver) v. London and Quadrant Housing Trust* [2008] EWHC 1377) also paid a useful visit to legitimate expectation, finding against the Claimant tenant in the process. The judgment was given by Richards LJ, with Mrs. Justice Swift DBE concurring.

The Claimant (Mrs. Susan Weaver) had been an assured tenant of LQHT since 1993. She challenged LQHT's decision to seek an order for possession against her under ground 8 in Schedule 2 to the Housing Act 1988 which requires the court to make an order for possession if there are at least eight weeks' rent arrears. The Claimant contended that LQHT was in breach of a legitimate expectation in failing to pursue all reasonable alternatives before resorting to a mandatory ground for possession. As Richards LJ noted, this raised prior issues as to the amenability of LQHT to judicial review on a conventional public law basis and as to whether it is a 'public authority' within section 6(3)(b) of the Human Rights Act 1998. This provides that a public authority includes any person certain of whose functions are those of a public nature.

The Court considered the legal nature of RSLs and their regulator, the Housing Corporation (an executive non-departmental public body responsible to the Secretary of State) under the Housing Associations Act 1985 and the Housing Act 1996. It noted that LQHT was a society registered under the Industrial and Provident Societies Act 1965 and is a non profit-making charity with the primary object of carrying on for community benefit the business of providing housing, accommodation and assistance to help house people and associated facilities, amenities and services for poor people or for the relief of aged, disabled, handicapped or chronically sick people. It is a housing association under the 1985 Act. During 2004 - 2006 LQHT received from the Housing Corporation capital grants of £268.7 million.

What is a public authority?

By section 6(5) of the 1998 Act a person is not a public authority by virtue only of section 6(3)(b) if the nature of the act is private. In considering whether or not LQHT was in the circumstances a public authority, Richards LJ considered

the evolutionary stream of previous caselaw. He noted that since in *R v. Servite Houses, ex parte Goldsmith* [2001] LGR 55 the source of the RSL's power was found to have been purely contractual with no statutory underpinning, its material decision was not amenable to judicial review. And in the leading case of *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48 the RSL was found to have been a public authority since in the circumstances its role was so closely assimilated to that of the local authority that it was performing public and not private functions.

However, the most recent leading case was the key decision of the House of Lords in *YL v. Birmingham City Council* [2007] 3 All ER 957. There the question was whether or not a private care home (Southern Cross) owed public authority duties to a resident who had been placed there by Birmingham City Council pursuant to its duty under section 21 National Assistance Act 1948. Lord Mance in that case had noted from the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2004] 1 AC 546 that the essential question under section 6(3)(b) is whether the person or body is carrying out the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg Court. Richards LJ also noted in *YL* the reference by Lord Mance to the dicta of Lord Nicholls in *Aston Cantlow* concerning:

'... the characteristics of persons or bodies which might constitute core or hybrid public authorities, including the view that there is no single test of universal application to decide whether a function is of a public nature, but that factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service ...'.

And in considering the hallmarks of a core public authority Lord Mance had stated that:

'Democratic accountability, an obligation to act only in the public interest and (in most cases today) a statutory constitution exclude the sectional or personally motivated interests of privately owned, profit-earning enterprises. Public funding and the provision of a public service are most easily understood in a similar sense. In a much looser sense, the self-interested endeavour of individuals usually works to the general benefit of society, as Adam Smith noted'.

But in relation to section 6(3)(b) the difficulty is where to draw the line. For public funding takes various forms. And:

'The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangements with a company aiming to profit commercially thereby is potentially quite another. In every case, the ultimate focus must be upon the nature of the functions being undertaken. The deployment in *Poplar Housing* [2002] QB 48, apparently as a decisive factor in favour of the application of section 6(3)(b), of the close historical and organisational assimilation of Poplar Housing with the local authority is in my view open to the objection that this did not bear on the function or role that Poplar Housing was performing.'

In the circumstances Lord Mance concluded that Southern Cross acted as a private profit-earning company in its provision of care and accommodation. Whilst it was subject to close statutory regulation in the public interest, that was no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature.

And Lord Scott in *YL*, agreeing with Lord Mance, found Southern Cross to be a company carrying on a socially useful business for profit. However, it was neither a charity nor a philanthropist and entered into private law contracts with the residents in its care homes and with the local authorities with whom it does business. Also it received no public funding, enjoyed no special statutory powers and was generally at liberty to accept or reject residents as it chose. It was operating in a commercial market with commercial competitors.

Is LQHT a public authority?

Whilst Richards LJ had not 'found this an altogether easy issue to resolve' ultimately he concluded that there were factors which pushed this case further towards the public function side of the line than in the *YL* case. He consequently concluded that the management and allocation of housing stock by LQHT is a function of a public nature and that LQHT was therefore to be regarded for relevant purposes as a public authority within section 6(3)(b).

The Court found that the social rented housing sector was 'permeated by state control and influence with a view to meeting the Government's aims for affordable housing, and in which RSLs work side by side with, and can in a very real sense be said to take the place of, local authorities'. And of particular importance is the nature and extent of public subsidy of LQHT and other RSLs:

'... LQHT's business as a whole is heavily subsidised by the state and ... this funding is attributable to the role that LQHT, like others RSLs, plays in the implementation of government policy. In the words of Lord Mance at paragraph 105 of *YL v Birmingham City Council*, this is a clear case of "[t]he injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest."

This is an important finding which is significant not just in matters of housing but in considering the nature of public authorities generally in the context of partnerships and the contracting-out of public services.

Legitimate Expectation

This aspect of the claim was based on the Claimant's reliance on a provision in LQHT's standard terms and conditions of its assured tenancy agreement which stated that:

'In providing a housing service we will comply with the regulatory framework and guidance issued by the Housing Corporation.'

As indicated above, Ground 8 upon which LQHT's claim for possession had been based is a mandatory ground. Relevant guidance in the Housing Corporation Regulatory Circular(s) indicates that before using Ground 8 '... associations should first pursue all other reasonable alternatives to recover the debt'.

Richards LJ noted that:

'A legitimate expectation arises where a decision-maker has led someone affected by the decision to believe that he or she will receive or retain a benefit or advantage, whether procedural or substantive, and it is unfair or an abuse of power to thwart that expectation.'

However, there was no evidence from the Claimant that she had the expectation alleged nor even that she knew of the term of the contract from which the expectation was said to have arisen. Therefore the expectation was 'simply an artificial construct derived from the standard terms and conditions and attributed to the claimant, rather than a genuinely held expectation of her own'. In this case not only did the Claimant not rely on the representation in question, she did not even know about it. However, even if there had been a legitimate expectation, Richards LJ would not on the facts have found any breach. Given the overall history of LQHT's dealings with the Claimant the Court was not persuaded that LQHT had failed to use all reasonable

alternatives to recover the debt before resorting to Ground 8. In the circumstances use of Ground 8 was in accordance with the relevant guidance and was justified.

Conclusion

This decision was perhaps surprising in the light of earlier caselaw. It has apparently caused some consternation in the RSL area which has for many purposes often regarded itself as part of the private sector and sought private finance accordingly, in addition to public subsidy. In the circumstances and given the public importance of the case LQHT has been given permission to appeal.

In the meantime the Housing and Regeneration Bill (which proposes to split the powers of the Housing Corporation between the new Homes and Communities Agency and the Office for Tenants and Social Landlords) may well only serve to enhance the public authority status of RSLs. For Clause 191 proposes enabling the regulator to set standards for registered social housing providers as to the nature, extent and quality of their accommodation, facilities or services. And the areas to be covered (as spelled out in Clause 191(2)) are extensive and pervasive.

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