The Weaver case

A summary and some implications

Case update

The Weaver case – a summary and some implications

Author: Rory Fordyce, Senior Counsel

Date: July 2009

Contents

- The Court of Appeal's decision
- Implications of the Court's decision

The controversial Court of Appeal judgement in the Weaver v London and Quadrant Housing Trust case will attract a great deal of interest and provoke comment for some time. The case involved a Mrs Susan Weaver, an assured tenant of London and Quadrant Housing Trust (L&Q). Weaver had a long history of accruing rent in arrears and L&Q had previously served a number of NSPs (notices of seeking possession) upon her. L&Q subsequently instigated possession proceedings against Weaver on Ground 8 in Schedule 2 to the Housing Act 1988. This is a mandatory ground requiring the court to make an order for possession if more than eight weeks rent is owed.

In her defence, Weaver argued that L&Q, in line with housing corporation guidance, should only have sought to evict her as a last resort, having exhausted all other options. Weaver went on to contend that there was a legitimate expectation that L&Q would not seek to evict her on the basis of Ground 8. However, because the legitimate expectation defence is only available against a public body capable of being subject to judicial review, Weaver needed to prove that L&Q was a public body. Weaver also argued that L&Q's reliance upon Ground 8 constituted a breach of Article 1 of Protocol 1 of the European Convention on Human Rights.

Weaver's lawyers also reasoned that L&Q's action fell foul of section 6(1) of the Human Rights Act 1998, which states that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Crucially, a public authority includes any company whose 'functions are functions of a public nature' (section 6(3(b), HRA 1998). Weaver claimed that L&Q fell under this definition. The Court needed to bear in mind, however, that an RSL is not a public authority by reason of section 6(3)(b) if the nature of a particular act is private (section 6(5), HRA 1998).

The Court of Appeal's decision

Weaver's legitimate expectation argument was unsuccessful, as was her argument that L&Q had failed to exhaust alternatives to Ground 8. Nevertheless, the Court did consider L&Q to be undertaking a public function and that it was therefore a hybrid public body, and a public body within the meaning of the Human Rights Act for the purposes of its housing, management and allocation functions. In arriving at its decision, the Court considered L&Q's following characteristics:

- L&Q is no ordinary commercial business. It is special by the nature of its activities and its role in society. As such, it deserves special treatment.
- L&Q is a non-profit-making charity acting for the benefit of the community. This is opposed to the situation in YL v Birmingham where the residential home concerned in that case performed a singularly private function and had a purely contractual relationship with the local council.
- L&Q operates in the social rented sector – a sector heavily regulated and influenced by the Government as a means of achieving its aims for affordable housing. In this context, RSLs work closely with public authorities and in, many instances, assume

Charles Russell LLP is a limited liability partnership registered in England and Wales, registered number OC311850, and is regulated by the Solicitors Regulation Authority. Any reference to a partner in relation to Charles Russell LLP is to a member of Charles Russell LLP or an employee with equivalent standing and qualifications. A list of members and of non-members who are described as partners, is available for inspection at the registered office, 5 Fleet Place, London EC4M 7RD.

their responsibilities.

- Control and influence is exerted through the then Housing Corporation. Although statutory guidance is optional, RSLs are encouraged to comply. An example of the extent of control is demonstrated by the approach RSLs take towards the implementation of policy on rent setting in the Code of Guidance.

- The presence and extent of public subsidy received by L&Q was crucial. Of particular relevance is the receipt of large capital grants, especially social housing grants under s.18 HA 1996. That they are for particular developments, rather than block grants, makes no difference. The funds are designated for increasing the amount of affordable social housing present and are therefore integral to the government's social policies. L&Q relies heavily on government subsidies and this therefore sets it aside from other apparently private organisations.

- A large proportion - 10% - of L&Q's housing stock was ex-local authority following voluntary transfer, illustrating the quasi local authority role RSLs have, and continue, to play.

- The duty of co-operation with Local Authorities under s.170 HA 1996 means that the relationship between RSLs and local authorities is much more than purely commercial. Indeed, RSLs operate under a statutory framework and over half of L&Q's new lettings were nominations from local authorities.

- Serving a notice to quit was not a statutory power but a private law right did not prevent an RSL being a public authority. It would be wrong to separate out 'management', including termination, as private if allocation is classed as a public function. Allocation and management two sides of the same coin and represent a single function.

L&Q has subsequently taken the case to the House of Lords whose judgment is pending. As such, RSLs will have to wait a little longer before the final outcome of this fundamentally important case.

Implications of the Court's decision

First and foremost, it must be made clear that the Court's decision will not necessarily mean that all RSLs are categorized as 'hybrid pubic bodies'. Indeed, the Court made sure to emphasise that each RSL was different and that whether or not an RSL constituted a public body needed to be determined on the specific facts of each case.

However, it has been widely accepted that those RSL's sharing many of L&Q's characteristics will be considered a public body. It should also be noted that the factors which the Court took into account when categorising L&Q as a hybrid public body should not necessarily be given equal weighting. Those RSLs with a similar level of public funding and level of state guidance to L&Q, in particular, are likely to be categorised as hybrid public bodies.

These 'public body RSLs' will need to prepare for the consequences of their new

Charles Russell LLP is a limited liability partnership registered in England and Wales, registered number OC311850, and is regulated by the Solicitors Regulation Authority. Any reference to a partner in relation to Charles Russell LLP is to a member of Charles Russell LLP or an employee with equivalent standing and qualifications. A list of members and of non-members who are described as partners, is available for inspection at the registered office, 5 Fleet Place, London EC4M 7RD.

designation. The implications may include:

- Having to defend actions taken from a human rights point of view and a judicial review perspective. This will mean defending claims not only in relation to mandatory possession orders but also in relation to other decisions taken by RSLs in the course of exercising their usual allocation and management functions.

- However, the Weaver decision will not mean that RSLs can be challenged in relation to the private functions they perform. Therefore, decisions to cancel or vary commercial contracts with suppliers, for example, will not be susceptible to challenge.

- Section 6(3)(b) of the HRA 1998 identifies and brings a hybrid authority within the scope of the HRA 1998. Where the acts of the hybrid public body RSL are in issue, the relevant question is whether the nature of a particular act is private. If it is, then under section 6(5) of the HRA 1998 the RSL is not a public one in relation to the particular act.

Housing associations have often been criticised for being organisations which enjoy huge Government grants yet behave like private bodies. Difficult questions will inevitably be raise: Will housing associations be brought under public borrowing restrictions and be regarded as part of the Government's mounting public sector borrowing problem? Will private funding be much more difficult to raise? Will housing associations become subject to the full force of the Freedom of Information Act?

The Housing and Regeneration Act 2008 does, after all, confirm the role of registered providers in meeting the Government's objectives of providing accommodation at subsidised rents to those in housing need. This is the basis of defining "affordable housing". The TSA has also assumed responsibility for enabling the Government to achieve its broad social objectives.

RSLs must also be wary of the Weaver case becoming a 'slippery slope'. It is not inconceivable that in the near future an RSL lacking the degree of L&Q's public funding and Government direction will find itself accused of constituting a public body. Could the proponent in such a case argue for an extension of the Weaver argument and claim that it is simply a person's human right to live in their home? The Court will therefore need to look carefully at drawing a line in the sand regarding the categorization of RSLs as public bodies before the floodgates open

The real impact of the Weaver case remains to be seen. If the House of Lords affirm the Court of Appeal's decision, the consequences may be profound. RSLs will need to carry out an impact assessment to examine their constitution, liability, accountability in light of the decision. They will also have to examine the way in which they allocate and terminate tenancies and the effects of the Human Rights Act and the Freedom of Information Act on their management policies.

More information

Rory Fordyce

+44 (0)1483 255202

rory.fordyce@charlesrussell.co.uk

This information has been prepared by Charles Russell LLP as a general guide only and does not constitute advice on any specific matter. We recommend that you seek professional advice before taking action. No liability can be accepted by us for any action taken or not taken as a result of this information. Charles Russell LLP is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide

Charles Russell LLP is a limited liability partnership registered in England and Wales, registered number OC311850, and is regulated by the Solicitors Regulation Authority. Any reference to a partner in relation to Charles Russell LLP is to a member of Charles Russell LLP or an employee with equivalent standing and qualifications. A list of members and of non-members who are described as partners, is available for inspection at the registered office, 5 Fleet Place, London EC4M 7RD.