Court of Appeal confirms that Housing Associations are susceptible to challenge on Human Rights and Public Law Grounds

The Court of Appeal has recently given judgment in ***London & Quadrant Housing Trust v R (on the application of Weaver) & Equality and Human Rights Commission*** [2009] EWCA Civ 587, a decision which is of considerable importance to tenants of housing associations who wish to defend possession proceedings on human rights or public law grounds. The case of Weaver started its life in the High Court as a challenge by way of judicial review to the decision of London & Quadrant to terminate Ms Weaver's tenancy, and bring proceedings pursuant to Ground 8 of Schedule 2 of the Housing Act 1988. A legitimate expectation argument was advanced and unceremoniously rejected, but the real point of importance was whether the housing association was a public authority for human rights and judicial review purposes. The High Court held that London & Quadrant was a public authority and they in turn appealed this point. By a majority decision (Rix LJ dissenting) the Court of Appeal dismissed the appeal. The following points can be extrapolated from the Court of Appeals decision:

(1) London & Quadrant Housing Trust are a hybrid public authority within the meaning of s6(3)(b) Human Rights Act 1998. Section 6(3)(b) is concerned with bodies that exercise both public and private functions. That London & Quadrant HT is a hybrid authority was conceded on limited grounds, namely, that it had the power to obtain an ASBO or parenting order. However, it was also recognised by the court that the housing association had other public powers concerning demoted tenancies and family intervention tenancies. It follows from this that all housing associations would be hybrid authorities.

(2) The termination of the tenancy by L&QHT of Ms Weaver's tenancy was a public not private act (this was the central point in the Court of Appeal, but not in the High Court). The importance of this point is that if a particular act is a private act the housing association will not be a public authority for the purpose of that act or function (s6(5) Human Rights Act 1998). In determining whether the termination of the tenancy was a public or private act Elias LJ (giving the leading judgment of the Court) said that a useful starting point was to consider the housing association's function of allocation and management of housing. Four factors of potential general application were relevant to this issue, being: (i) that there was significant reliance on public finance; a substantial public subsidy was provided which enabled the trust to achieve its objectives, (ii) the trust worked in "very close harmony" with local government assisting the local authority in achieving its statutory duties and objectives in the allocation of social housing, (iii) the provision of social housing as opposed to the provision of housing per se was considered to be the "antithesis" of private commercial activity and a function which could be termed governmental, (iv) As a larger RSL the trust made a valuable contribution to achieving the governments objective of providing subsidised housing which could properly be described as a public service. In this context the act of termination of the tenancy was considered, and it was concluded that the grant and termination of a tenancy were not private acts but were part and parcel of determining who can take advantage of the public benefit of social housing.

(3) It does not follow that all RSL's will be considered a public authority. The issue is fact sensitive. However, if the four criteria above are satisfied it seems likely that the termination of a tenancy by an RSL will be a public act.

(4) It was conceded that if an RSL is a public body for the purposes of the Human Rights Act 1998 it is likewise a public body for Judicial Review purposes. This concession was expressly approved of by the court

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UPDATES IN HOUSING LAW BY RUSSELL JAMES

The Practical Implications of Weaver

The practical effect of Weaver is far reaching. It follows from this decision that many RSL's will be public authorities for the purposes of the Human Rights Act 1998 and public law challenges. This means that tenants of RSL's will be able to defend possession proceedings on public law grounds even in cases where there would otherwise be no defence, such as claims for possession in respect of probationary tenancies, or claims for possession pursuant to Ground 8 of Schedule 2 of the Housing Act 1988, or claims for possession where one joint tenant has served notice to quit severing the tenancy. If a tenant wishes to pursue such a defence he must show that it is seriously arguable that the decision to recover possession was one that no reasonable person would consider justifiable (***Kay v Lambeth LBC*** [2005] QB 352) which includes a challenge on conventional judicial review grounds (***Doherty v Birmingham CC*** [2008] 3 WLR 636), such as failing to take into account relevant factors or failing to respect a legitimate expectation that the public authority has created. If he/she can do this then he/she can defend the proceedings in the County Court.

Further or alternatively, it will be open to tenants to challenge other acts or decisions of RSL's, if they are public acts, by way of judicial review, such as, for example, an objection to a transfer application by an RSL.

Homeless Children: Who is Responsible?

The judgment of the House of Lords in ***R (on the application of G) v Southwark LBC*** [2009] UKHL has conclusively confirmed that a child in need who falls within section 20 of the Children Act 1989 must be accommodated by the local children's services authority in accordance with their duty under s20(1) of that Act and should not be referred to the housing authority to be accommodated under Part VII of the Housing Act 1996. In the case of G it was argued by the local authority that under s20 the authority was entitled to take into account other sources of accommodation that were available to a child in need, such as through the homelessness department, and conclude that the child did not need social services accommodation but instead all the child required was help pursuant to s17 of the Children Act 1989, which could be provided by the homelessness team. In support of this argument the local authority relied upon the Local Authority Circular (2003) 13 entitled "Guidance on Accommodating Children in Need and their Families." The House of Lords unanimously rejected this argument. Further, they described the reasoning of the local authority as "circular" on the basis that:

(i) A child in need must be provided with accommodation pursuant to s20.
(ii) The local authority sought to avoid that conclusion by arguing that the child could be provided with accommodation by homelessness as the child would be in priority need pursuant to the Homelessness (Priority Need for Accommodation) (England) Order 2002.
(iii) However, a child in need was specifically excluded from the 2002 order.

It follows from this decision that if a child is a child in need, and is within the local authority's area, and requires accommodation as a result of there being no person who has parental responsibility for him, or he is lost or has been abandoned, or the person who has been caring for him is prevented from doing so, he must be provided with accommodation by the children's services authority and cannot simply be passed over to the homelessness unit of the local housing authority.