



Shelter from the storm? Does judicial review help sheltered housing tenants?

Introduction

As a consequence of the Court of Appeal decision in *R (on the application of Weaver) v London & Quadrant Housing Trust* (in which the Court held that London & Quadrant ('L&Q') was a public authority and therefore amenable to challenge by Judicial Review), housing associations are faced with a period of uncertainty in relation to which of their Acts are of a public nature and susceptible to challenge on Judicial Review grounds. The uncertainty has been compounded by the new Supreme Court having refused L&Q permission to appeal. In the circumstances, it seems inevitable that there will be further case law over the coming years until the position of housing associations is clarified.

A very current issue for housing associations is the re-provisioning of services in sheltered housing schemes and in particular, the move away from resident wardens. The recent case of *R (on the application of Garbet) v Circle 33 Housing Trust* concerned this issue. Some expected it to be a test case, helping to define the extent of the *Weaver* decision. However, the Court (in its judgment handed down on 7 December 2009) did not determine whether Circle 33 was a public body, deciding the case on private law grounds only.

Background

Circle 33 employed a resident warden at a sheltered housing scheme in Eastbourne ('the Scheme') who was retired in line with Circle 33's retirement policy. Having done so, Circle 33 considered it to be a good opportunity to consider the services provided at the Scheme. However, it decided to put interim services in place (which were of a substantially similar nature) prior to consultation about the future of the Scheme. Following subsequent consultation with the residents of the Scheme, a new arrangement of services (not including the services of a resident warden) was implemented.

In the interim, Circle 33's decision to retire the resident warden was challenged by way of Judicial Review. One of the residents of the Scheme

argued that she had legitimate expectations of a resident warden always being present at the Scheme and also that residents would be consulted as to any change in services prior to that change being effected. The decision was also challenged on the basis that it breached Article 8 of the European Convention on Human Rights (being an interference with the right to respect for private and family life).

The arguments put forward by the Claimant rested on the basis that Circle 33 was a public body carrying out acts of a public nature in respect of the resident warden services because the service provided was more than just a contractual right, given the nature of the relationship the warden had with residents and the wide range of duties provided. The Claimant further argued that the provision of a resident warden service was so bound up in the provision of sheltered housing that there was a public interest in the provision of such accommodation and therefore the act was necessarily one of a public nature.



Source: istockphoto

Circle 33 argued that the relationship between it and the residents was one of a purely private nature, given that there was no Local Authority involvement in allocations, no public funding used to build or maintain the scheme, no statutory obligation to provide accommodation at the scheme and because the services in question were paid for through the service charge, pursuant to the terms of the tenancy. Further, it had not consulted prior to the resident warden's retirement because it felt that consultation would not be about the post but about the individual.

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The judgment

Having heard the matter in early April and the parties having made further submissions in writing following judgment in *Weaver*, Mr Justice Munby (now Lord Justice Munby) first considered the decision under challenge. He made clear that there could be no argument that the Claimant was bringing proceedings on a representative basis. Mrs Garbet was not suing in any representative capacity; she was suing only on her own behalf. Nor could there be any conceivable claim in relation to Circle 33's decision to retire the resident warden: there was no right to demand that the individual concerned would continue in employment as a resident warden. Munby LJ also noted that there had not been, since the issue of proceedings, any application to amend the existing grounds for judicial review, nor to bring fresh judicial review proceedings following the replacement of the interim services with a new type of service. He therefore considered that the only decision which he needed to look at was the decision not to continue to provide a resident warden for the interim period following the warden's retirement and prior to the implementation of the new services.

Munby LJ considered the obligations which were owed to the Claimant by Circle 33 and concluded that the "only relevant obligations of any kind (whether sounding in public law or private law)" were those contained in Mrs Garbet's tenancy agreement. The fact that the warden had provided services over and above those required by her contract of employment "demonstrated no remotely arguable basis for any assertion that the obligations owed to her [the Claimant] by the Defendant [Circle 33] extended any further than the duties owed by Mrs Billich [the warden] to the Defendant".

However, Munby LJ held that the terms of the tenancy agreement, when read together, necessarily meant that the services to be provided by Circle 33 were those of a resident warden, rather than any other form of warden service. The tenancy agreement also stated that Circle 33 would consult with tenants prior to any change in services provided. Consultation had not been carried out prior interim services being put in place and which had not included the provision of a resident warden.

Although the case was presented on the basis that the obligation to provide a resident warden arose because of a legitimate expectation held by the residents, Munby LJ held that this argument failed on the facts. Notwithstanding the fact that Mrs Garbet had failed to make out any such representation on behalf of Circle 33, or presumption on behalf of the residents, any obligation which did arise, did so under the terms of the tenancy agreement. The Judge therefore held that Circle 33 had

breached the terms of Mrs Garbet's tenancy agreement by varying the services provided prior to carrying out any consultation with tenants.

As to the public law issues, Munby LJ did not feel that there was any need to consider this issue in view of the private law position. However, he did state that in light of *Weaver*, this issue was "not at all straightforward". In view of the fact that the Claimant only succeeded with her claim in part, the Claimant was only awarded 50% of her costs.

Conclusion

The fact that Munby LJ did not decide that Circle 33 was a public authority, subject to Judicial Review, may be seen as side-stepping an important legal issue. However, it could also be said that this decision perhaps demonstrates that *Weaver* is not as determinative of the issue of the application of Judicial Review to housing associations as originally thought. As the Claimant has not sought leave to appeal, it would appear that this particular issue will not be reconsidered in this case and it will be a matter for another case on another day. In the interim however, housing associations would be well advised to proceed with caution in relation to their decision-making, particularly where decisions impact heavily on tenants (please see our earlier bulletin "The post-*Weaver* landscape – what do housing associations need to know?" for details).

This case also demonstrates the importance of ensuring that associations do not forget to look at obligations arising under tenancy agreements when looking to make changes to services and consult at the right time. Whilst Circle 33 had good business reasons for proceeding as it did, that was not sufficient to persuade the Judge in this case that it had not breached the Claimant's tenancy.

Lucy James and Charlotte Clayson represented Circle 33.

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