Do Housing Associations still exercise “public functions”?

The Office of National Statistics (ONS) announced recently that private registered providers (PRPs) were being reclassified as private rather than public, non-financial corporations, an announcement which has generated a lot of optimistic commentary as to its impact and immediate importance.

In particular, there has even been a suggestion that the move should lead to a reappraisal of whether housing associations are exercising public functions for the purpose of any human rights or public law challenge or defence.

Whilst the real impact on day to day management issues is not especially significant to PRPs, it is without question that for Government its importance lay in the reduction in public sector borrowing and debt.

1. Why was it important to get the classification right?

On 30 October 2015, the ONS announced that, as a result of new European accounting guidance, government powers over appointing board members to PRPs and consenting to their mergers and sales, and the establishment and operation of the Homes & Communities Agency's predecessor by means of the Housing and Regeneration Act 2008, it was reclassifying PRPs in England as in effect public bodies for accounting purposes backdated to July 2008.

For the Government, this decision led to an immediate (and estimated) £63 billion increase in public sector net debt, as well as an estimated additional £3.6 billion in public sector borrowing. There was also a concern that the Government might choose to go down the route of greater input and control over the operation and regulation of PRPs.

How serious that possibility in fact was is open to some doubt and was very quickly allayed, not least by the government's agreement to make the much-trumpeted extension of the Right to Buy to housing association tenants "voluntary" - and indeed the same approach being adopted in broad terms to the often forgotten 'pay to stay' policy.

The direct importance was therefore more one for central government, the real relevance to PRPs being what direction it might encourage them to take.

2. Does this reclassification mean that PRPs do not exercise "public functions"?

No. That assessment requires consideration of a number of factual factors beyond the simple fact of ONS classification, as is clear from the Court of Appeal's judgment in

London & Quadrant Housing Trust v Weaver [2009] EWCA Civ 587; [2009] 4 All ER 865. For example:

Does the local authority enjoy nomination rights to the PRP's premises?

Does the PRP's stock, at least in part, consist of former local authority stock?

Did the PRP receive central or local government funds towards its purchase, construction or maintenance of the premises in issue?

3. Why is the question of "public function" important in any event?

As indicated above, it can be crucial for housing management purposes because its presence means that PRPs could be susceptible, for example, to judicial review challenge, or subject to the oversight and application of the Human Rights Act 1998 and public sector equality duty.

4. Does Weaver remain good law?

Yes. Weaver was decided at a time when PRPs had been accepted as private bodies by the ONS, and confirmed the approach to be taken to interpreting what a public function was.

The public function concerned in Weaver was the termination of an assured tenancy by means of a possession order made on the mandatory rent arrears ground. Lord Justice Elias and Lord Collins concluded this was the exercise of a public function, being especially taken by (see paragraphs 67-71, and 101 of the judgment in particular):

•The public subsidy received by the Trust

•The allocation agreements they enjoyed with local housing authorities

•Their charitable objectives

•Control over their activities by means of regulation

Whilst *Weaver* did contain a dissenting judgment from Lord Justice Rix, it is fair to report that it has been followed and approved since its handing down in June 2009, even in cases where the court decided the challenged activity was not a public function (see for example *R (on the application of MacLeod) v The Governors of the Peabody Trust [2016] EWHC 737 (Admin*) in which Jon Holbrook of Cornerstone Barristers acted for the successful PRP).

5. What of the future?

The broadening of many PRPs activities and products, including shared ownership arrangements, rent to buy products and affordable rent applications, alongside the

weakening of local authority influence as signposted by the Housing and Planning Act 2016 - see for example, sections 92-94 of the 2016 Act, and the recent Regulation of Social Housing (Influence of Local Authorities) (England) Regulations 2017/1102 (which allowed the ONS re-designation) - suggest that as in *MacLeod* there may in future be a closer consideration given to the appropriateness of admissions of exercising a public function. This may also lead to the need to revisit certain activities in particular, such as the termination of tenancies and assignment of or succession to the same.

Whilst such an approach is unlikely to lead to immediate change or significant move away from the well-established Weaver 'doctrine', it is equally indicative of a renewed caution in accepting without additional thought and, perhaps, evidence the public nature of the act in question.

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