R (WEAVER) v LONDON AND QUADRANT HOUSING TRUST

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Introduction

R (Weaver) v London and Quadrant Housing Trust[2] (*Weaver*) is regarded in the social housing sector as one of the most significant cases of the last ten years. It determined whether London and Quadrant Housing Trust (LQHT), a reasonably typical large housing association, was a public authority for the purposes of the Human Rights Act 1998 (the HRA).

The significance of an organisation being a public authority is that it is susceptible to claims and defences under the HRA that are based on rights under the European Convention on Human Rights (the Convention). It is also likely be a public body for administrative law purposes, meaning that its decisions are amenable to challenge by judicial review in the same way as decisions of central and local government.

This paper aims to explain the decision in *Weaver*, to put it in the context of previous and subsequent case law and to explore its implications for charities outside the social housing sector.

The Facts

Mrs Weaver

Susan Weaver became an assured tenant of LQHT in 1993. She lived in the property with her three children. During her tenancy she had been in work, out of work and on maternity leave. As a result, her housing benefit status was variable

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2 [2009] EWCA Civ 587.

and rent payments were disrupted. From early 2004 she had a history of rent arrears, which is summarised in paragraphs 79-81 of the judgment of Lord Justice Richards at first instance in the Divisional Court.[3] LQHT went to great lengths to try to solve the arrears problem and Mrs Weaver agreed a number of payment programmes, none of which she complied with.

London & Quadrant Housing Trust

LQHT is one of the country's largest housing associations. At this time it was a Registered Social Landlord (RSL) under the Housing Act 1996. It is now a Registered Provider (RP) under the Housing and Regeneration Act 2008. It was then regulated by the Housing Corporation - followed by the Tenant Services Authority and now by the Homes and Communities Agency.

LQHT is an exempt charity and is non-profit making (though it generates operational surpluses that are re-invested). It provided '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'.[4] It was funded from rental income, grants (from central government via the Housing Corporation[5]) and private borrowing. 10% of its stock came from stock transfers from local authorities. In the year to 31 March 2006, 64% of new lettings were to people nominated by local authorities.

Grounds for Possession

The grounds for possession available to landlords of assured tenancies, such as Mrs Weaver's, are set out in schedule 2 of the Housing Act 1988. There are three rent arrears grounds, which can be summarised as follows:

- Ground 8 – 8 weeks rent arrears (assuming that it is a weekly periodic tenancy) both at the date of the notice seeking possession[6] and at the date of the hearing;
- Ground 10 – some rent arrears at the date of the notice and the date of the hearing; and

3 [2008] EWHC 1377 (Admin).

4 ibid [17] (Richards LJ).

5 Between 2004 and 2006, it received grants of £268.7 million.

6 Under the Housing Act 1988, s 8. This is a preliminary notice served before commencement of proceedings that specifies the grounds for possession that will be relied on.

- Ground 11 – persistent rent arrears (but it is not necessary for there to be any actual arrears at the date of the notice or the hearing).

There is a crucial distinction between Ground 8 and the other two grounds. Ground 8 is a mandatory ground for possession, meaning that if the ground is proven the Court has no discretion and it must make an outright possession order. By contrast, Grounds 10 and 11 are discretionary; meaning that the ground must not just be proven but the Court must also be satisfied that it is reasonable to make a possession order, the enforcement of which the Court can suspend or postpone.

Historically, most housing associations have relied on ground 10, under which it is the Court and not the landlord that decides whether a tenant is going to be evicted. LQHT had a different approach, which was described in the evidence of its own solicitor as 'firm'.[7] Having given the tenant a reasonable opportunity (or in Mrs Weaver's case, several opportunities) to sort out the problem it would take possession proceedings based on Ground 8 with a view to obtaining an outright possession order and evicting the tenant. The aim of this approach seems to be to persuade tenants to prioritise their rent payments over other payments. As a consequence, LQHT's arrears levels were below the average but its eviction rates were higher.

Mrs Weaver's Challenge

Mrs Weaver had no defence to LQHT's Ground 8 possession claim. She therefore sought to challenge LQHT's decision to take possession proceedings based on Ground 8 by judicial review. Her challenge was based upon the proposition that LQHT was in breach of a legitimate expectation by failing to pursue 'all reasonable alternatives' before resorting to Ground 8. She also challenged the use of Ground 8 on the grounds that it was a breach of her rights under Article 8 of the Convention.

To be able to pursue this line of argument, Mrs Weaver had to first establish that LQHT was amenable to judicial review and that it was a 'public authority' within the meaning of section 6(3)(b) of the HRA.

The Statutory Background

Section 6(1) of the HRA makes it unlawful for a 'public authority' to act in a way that is incompatible with a Convention right.

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7 *Weaver HC* (n 3) [74] (Richards LJ).

Section 6(3)(b) of the HRA provides that a 'public authority' includes 'any person certain of whose functions are functions of a public nature'.

This is qualified by section 6(5) of the HRA, which provides that 'in relation to a particular act, a person is not a public authority by virtue of subsection (3)(b) if the nature of the act is private'.

In consequence, organisations can be classified in three different ways:

- Core authorities:[8] being central and local government who must at all times act in accordance with Convention rights;
- Hybrid authorities: being bodies that exercise functions some of which are of a public nature and must therefore be exercised in accordance with Convention rights;
- Private bodies:[9] none of whose functions are public and whose activities therefore lie outside the scope of the HRA.

Weaver concerned the second category – hybrid authorities. LQHT conceded before the Divisional Court that it was a hybrid authority and did not seek to argue that it was a private body. This concession, which was accepted by the Divisional Court and the Court of Appeal, was on the basis that some of its 'functions', in particular the power to obtain parenting orders and anti-social behaviour orders,[10] were public functions.[11]

The Divisional Court's Decision

Public Authority

On amenability, the Divisional Court held that LQHT was a public authority. Lord Justice Richards commented 'I think it unlikely to be of great practical

8 The terms 'body' and 'authority' are used interchangeably throughout the judgments in *Weaver*.

9 Not a term used in *Weaver*.

10 Parenting orders and anti-social behaviour orders (ASBOs) can only be obtained by certain core authorities and RSLs/RPs and not by private landlords.

11 Elias LJ queried this concession. In his judgment in *Weaver CA* (n 2) [52], he questioned whether the powers to obtain parenting orders and anti-social behaviour orders were 'simply powers and not functions'. Lord Neuberger, in his keynote address to the Social Housing Law Association Annual Conference in 2009, described the concession as 'rather unsatisfactory', indicating a possible route for appeal in a future case.

significance in many other cases'.[12] That certainly isn't how the social housing sector sees it!

The actual wording of the Divisional Court's declaration was:

> … the management and allocation of housing stock by … [LQHT] (including decisions concerning the termination of a tenancy) is a function of a public nature, with the effect that … [LQHT] is to be regarded as a public authority in that respect for the purposes of … section 6(3)(b).

It was also held that:

> Insofar as a function of LQHT is a public function which makes it a public authority for the purposes of the Human Rights Act 1998, then … it should equally be amenable to judicial review on conventional public law grounds in respect of its performance of that function.[13]

Lord Justice Richards however went on to say that if he had reached a different conclusion on the public authority issue, he would have held that LQHT was not amenable to conventional judicial review.[14]

Substantive Grounds of Challenge

The Divisional Court rejected Mrs Weaver's substantive grounds of challenge. It held that there had been no legitimate expectation and, even if there had been one, it had not been breached and that there was no infringement of her Convention rights.

Mrs Weaver was subsequently evicted and at that point her personal involvement and interest in the case ended. However, LQHT decided to appeal the finding that it was a public authority for the purposes of the termination of Mrs Weaver's tenancy.

The Divisional Court gave permission to appeal. The Court of Appeal therefore faced the unusual situation of having to deal with an appeal in which one of the parties had no interest in its outcome.[15]

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12 *Weaver HC* (n 3) [63] (Richards LJ).

13 ibid [64] (Richards LJ).

14 ibid [65] (Richards LJ).

15 Which the Court of Appeal regarded as unsatisfactory – see the comments of Elias LJ in *Weaver CA* (n 2) [6] and Lawrence Collins LJ (n 2) [87-91]. This is echoed in Lord Neuberger's 'surmise' that the likely reason for the Supreme Court's later refusal of permission to appeal (also in his keynote address to the Social Housing Law Association Annual Conference in 2009) was 'the artificial nature of the appeal and the procedural device employed to produce an advisory opinion'.

The Court of Appeal's Decision (Elias and Lawrence Collins LLJ)

The Court of Appeal's 2-1 majority decision (Lord Justice Elias and Lord Justice Lawrence Collins in the majority with Lord Justice Rix dissenting) was based upon the concession made by LQHT that it was a hybrid authority.

Lord Justice Elias began his judgment by criticising the form of the declaration made by the Divisional Court (set out above). This focused on the nature of the function of housing management rather than the nature of the act of terminating a tenancy. He said that this did not 'satisfactorily encapsulate the real issue in this case which is whether the termination of this tenancy was a private act within section 6(5)'.[16]

Lord Justice Elias identified two House of Lords decisions that were binding on the Court of Appeal and which set out the approach that should be taken to determine whether a body was a public authority within the meaning of the HRA: *Aston Cantlow and Wilmcote with Billisley Parochial Church Council v Wallbank*[17] (*Aston Cantlow*) and *YL v Birmingham City Council*[18] (*YL*).

Principles from Aston Cantlow and YL

Lord Justice Elias derived the following principles from these cases[19]:

1. The purpose of section 6 is to identify bodies carrying out functions in respect of which the UK government could be held responsible before the European Court of Human Rights (the ECHR). However, case law from the ECHR provides no clear guidance on this issue.
2. This does not mean that bodies performing such functions are necessarily public authorities. Many functions historically performed by government are also performed by private bodies, especially since privatisation. The terms 'public function' and 'governmental function' are not necessarily synonymous. Therefore the performance of functions previously undertaken by core authorities can be used as a guide but is not determinative.
3. Courts should adopt a 'factor-based approach'. This means that courts must 'have regard to all features or factors which may cast light on a particular function under consideration as a public function or not, and then weigh them in the round'.

16 *Weaver CA* (n 2) [6] (Elias LJ).

17 [2003] UKHL 37.

18 [2007] UKHL 27.

19 *Weaver CA* (n 2) [35-36] (Elias LJ).

4. A 'broad or generous' interpretation of section 6(3)(b) must be adopted.[20]

5. Factors to be taken into consideration include:

   - Whether the body is publicly funded or is exercising statutory powers;
   - Whether the body is taking the place of central or local government;
   - Whether the body is providing a public service.

6. In considering whether an organisation is publicly funded the payment of a subsidy for undertaking a non-commercial role or 'activity of general public interest' is not the same thing as the payment for services pursuant to a contractual arrangement under which the organisation aims to make a profit.[21]

7. The exercise of statutory powers 'may be a factor supporting the conclusion that the body is exercising public functions' and can 'often be determinative'.[22]

8. Where the body is 'taking the place' of a core authority, this may indicate that the function is a public one.[23]

9. Providing a public service should not be confused with performing functions which are in the public interest or for the public benefit. Lord Justice Elias referred to the following observations from *YL*:

> … the self-interested endeavours of individuals usually works to the general benefit of society (para 105, Lord Mance, echoing Adam Smith); and
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> [It] cannot mean that those who provide such commodities on a commercial basis (including private hospitals, private schools, private landlords, and food retailers and distributors) therefore fall within the scope of section 6(3)(b) (para 135, Lord Neuberger).

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20 It is not clear whether this generosity is to be directed to the claimant seeking to establish that the defendant is a public or hybrid authority or the defendant seeking to avoid this conclusion.

21 Presumably aiming to make a surplus to fund other activities under a contractual arrangement will be regarded as the same as aiming to make a profit. This is discussed further below.

22 *Weaver CA* (n 2) [35(7)] (Elias LJ), derived from the speeches of Lord Mance and Lord Neuberger in *YL* (n 18). This may be why LQHT conceded that it was a hybrid authority.

23 The distinction between 'taking the place' of a core authority and providing a service to enable a core authority to discharge a duty is surely a fine one.

10. Some factors will have little, if any, weight:

a) 'The fact that the function is one which is carried out by a public body does not mean it is a public function when carried out by a potentially hybrid body'.[24] Otherwise a contractor engaged by a local authority to provide lifeguards at a municipal swimming pool could become a public authority as could individual employees of that contractor.[25]

b) '… it will often be of no real relevance that the functions are subject to detailed statutory regulation'.[26]

c) It is of only 'limited significance' that the function could be subject to administrative law principles, which are different to the purpose of section 6 (see (1) above).[27]

Public Authority

Applying these principles, Lord Justice Elias held that LQHT was a public authority for the following reasons:[28]

- LQHT had a 'significant reliance on public finance'. This was through subsidy rather than a contractual arrangement in which it was paid for providing services of public benefit.
- When allocating housing, LQHT 'operated in very close harmony' with local authorities to assist them in meeting their statutory duties.[29]
- Providing subsidised housing (as opposed to proving housing generally) is a governmental function.
- LQHT is a charity and as such acts in the public interest rather than for profit.
- As a RSL (now a RP), LQHT is subject to detailed regulation.[30]

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24 *Weaver CA* (n 2) [36] (Elias LJ).

25 As Lord Scott pointed out in *YL* (n 18) [30].

26 *Weaver CA* (n 2) [36] (Elias LJ). Lord Neuberger pointed out in *YL* (n 18) [134] that otherwise companies providing financial services and running restaurants, both of which are subject to detailed regulatory control, could be said to be public authorities.

27 *Weaver CA* (n 2) [37] (Elias LJ).

28 ibid [68-71] (Elias LJ).

29 Housing Act 1996, s 170 imposes a statutory duty on RSLs/RPs to co-operate with local authorities with regard to the allocation of housing to applicants with priority.

30 This appears to contradict (10)(b) above.

Lord Justice Elias went on to consider whether, despite the fact that LQHT was a hybrid authority, the act of terminating a tenancy could be considered to be a private act because it involved the exercise of a contractual right (derived from the tenancy agreement) rather than a statutory power. He held that it could not because:

> … the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts.[31]

Lord Justice Elias concluded his judgment by observing that the determination of a body's public status was 'fact sensitive' and therefore it was 'potentially arguable' that the status of bodies that did not share all of LQHT's characteristics (such as not receiving public subsidy) 'could be different'.[32] However, as we will see, no other RSL/RP has so far taken up the challenge of demonstrating that it is different.

Lord Justice Lawrence Collins gave a shorter judgement supporting Lord Justice Elias' reasoning.[33]

The Dissenting Judgment (Rix LJ)

Lord Justice Rix began his judgment by reviewing the proceedings in the Divisional Court. Echoing Lord Justice Elias' identification of the main issue in this case, he pointed out that the submissions before the Divisional Court and before the Court of Appeal concentrated on section 6(3)(b) of the HRA (which focuses on functions) rather than on section 6(5) of the HRA (which focuses on acts). He further criticised the parties' submissions as being 'on the whole … on all sides … addressed at a very broad level of abstraction'.[34]

Lord Justice Rix reviewed the ECHR and domestic jurisprudence. He endorsed the view that there was no ECHR case law 'in which the non-governmental provider of social housing has been the cause or object of the complaint of victimhood within the meaning of the Convention'.[35]

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31 *Weaver CA* (n 2) [76] (Elias LJ).

32 ibid [84] (Elias LJ).

33 ibid [85-102].

34 ibid [114] (Rix LJ).

35 ibid [118] (Rix LJ).

Conclusions from the Case Law

Lord Justice Rix drew the following conclusions from his review of the case law:[36]

1. ECHR jurisdiction does not support the conclusion that LQHT is a public authority.[37]

2. Domestic case law does not support the conclusion that LQHT is a public authority. In particular *Aston Cantlow* emphasises the importance of section 6(5) of the HRA and supports LQHT's claim that the act of termination was 'in support of a private contractual right'. Lord Justice Rix said that he regarded Mrs Weaver's claim on this issue as being much weaker than that of the claimant in *YL*.

3. The issue should be whether the termination under the terms of the tenancy is a private act even if the allocation of housing is a public function.

4. The management of LQHT's housing stock (as referred to in the Divisional Court's declaration) cannot be said to be entirely a function of a public nature. It involves private acts such as the acquisition and development of properties, the financing of such development and the repair and maintenance of stock. By focusing on generalised concepts, such as management, the true issue is obscured. This is whether the act in question (termination of the tenancy) is a private act.

5. *YL* is authority for the proposition that even where a public authority has a statutory duty, the provision of the services needed to satisfy that duty is not necessarily a public function. Whereas allocation of social housing may be a public function, the termination of a social housing tenancy may still be a private act as it relies upon contractual rights and statutory provisions[38] that apply to all landlords (including private landlords). Lord Justice Rix could see no reason, either under case law or as a matter of policy, to 'impose Convention solutions on top of the working out of private law contracts' such as tenancy agreements.

6. There was nothing about the regulation of social housing which 'changes that picture'.

7. There was nothing about the nature of LQHT (or a typical RSL/RP) 'to promote the concept that in the everyday administration of its tenancy agreements it is performing functions of a public nature'. Lord Justice Rix went on to say:

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36 ibid [148-159] (Rix LJ).

37 It does not support the opposite conclusion either.

38 Housing Act 1988, in respect of assured tenancies like Mrs Weaver's.

> As a charity, it operates for the public benefit rather than for commercial profit, but its operations are essentially in the private and business world, rather than in the world of government, for all that. Richards LJ in the court below and Elias LJ in this court consider that … [LQHT's] charitable status places it outside the sphere of commercial providers. In my judgment, however, the world of charity is essentially private and, although a charity does not operate for profit in the ordinary way, nevertheless when its function is to provide a service such as housing in return for the payment of rent and to do so on a substantial scale … it has to operate according to (for want of a better word) business disciplines or else it is very likely to fail.[39]

8. The majority of LQHT's finance comes from private lenders and the proceeds of housing sales and its reliance on public grants was decreasing.

9. As a matter of policy, the provision of services by the private sector should be encouraged because some services 'are better carried out by private expertise'.[40] This is consistent with the subsequent relaxation of the regulation of the social housing sector which now concentrates on financial viability rather than consumer standards (meaning, how landlords deal with their tenants).[41]

10. The protection of tenants in social housing can be addressed through statutory provision, regulation, public subsidy, the duties inherent in charitable status and in the form of tenancy agreements that are used. Lord Justice Rix concluded that it is:

> … unnecessary to give to decisions, under contract, of an essentially private nature an artificial status as acts of a public nature or in performance of public functions, in order to ensure proper protection.[42]

Lord Justice Rix concluded that:

> … for the purpose of section 6(5) … [LQHT's] decision to exercise its contractual rights by invoking a claim for possession

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39 *Weaver CA* (n 2) [155] (Rix LJ).

40 ibid [158] (Rix LJ).

41 The current main regulatory guidance, Homes & Communities Agency, *The Regulatory Framework for Social Housing in England from April 2012*, (Homes & Communities Agency 2012) is far less detailed and prescriptive than the Housing Corporation's guidance in force in 2008-9.

42 *Weaver CA* [159] (Rix LJ).

under Ground 8 cannot be attacked in public law or by reference to the Convention.[43]

Case Law pre-*Weaver*

Aston Cantlow and YL

In *Aston Cantlow*, a parochial church council attempted to compel owners of former rectorial land to pay the costs of a repair to the chancel of the local church. There was a clear liability under domestic law. The issue in this case was whether the parochial church council was a public authority.

In *YL*, the operator of a care home wished to evict an 84 year old tenant suffering from Alzheimer's disease because of the behaviour of her visitors. Southern Cross operated the care home for profit and the tenant had been placed there by the local authority pursuant to its statutory duty to arrange for her care under section 21 of the National Assistance Act 1948. The issue in this case was whether Southern Cross was a public or hybrid authority.

Both of these cases were decided against the claimants with the parochial church council and Southern Cross being found to be neither public nor hybrid authorities. It would therefore appear, at first blush, that the authorities were against Mrs Weaver. This may be why the competing judgments of Lord Justices Elias and Rix went to such length to analyse these cases and distil principles from them.

Poplar Housing and Regeneration Community Association Limited v Donoghue[44] **(*Donoghue*)**

Another case mentioned in *Weaver* is the Court of Appeal's decision in *Donoghue*. In this case a housing association that was created for the purposes of taking a transfer of stock from a local authority was held to be a public body because of the circumstances of its creation and the fact that the local authority exercised some control over its activities. This decision was criticised by Lord Mance and Baroness Hale in *YL*, as it was based on historical ties and the 'factor-based approach' described in section 5 above was not applied. It therefore appears that *Donoghue* is no longer to be regarded as good law.

43 ibid [160] (Rix LJ).

44 [2001] EWCA Civ 595.

R (Heather) v Leonard Cheshire Foundation[45] (*Heather*)

The Court of Appeal case of *Heather* is mentioned by Lord Justice Rix in *Weaver* and is also referred to *YL*. This case was brought by two residents of a residential care home run by Leonard Cheshire Foundation (LCF), in which they sought to judicially review LCF's decision to close the home. LCF was a charity and 86% of the residents in the home were placed by local authorities in the discharge of their duties under section 21 of the National Assistance Act 1948.

The main issue was whether LCF was a public authority under section 6(3) (b) of the HRA. The Divisional Court and the Court of Appeal both held that LCF's role did not constitute a public function for the following reasons:[46]

- The services being provided to self-funding residents were the same as those provided to publicly funded residents. While the degree of public funding is a relevant factor it is not determinative.[47]
- There was no 'public flavour' to LCF's functions. It did not 'stand in the shoes' of the local authorities and it did not exercise any statutory powers.

Case Law post-*Weaver*

There is no significant subsequent case law that either refines or distinguishes *Weaver* in any material way. *Weaver* seems to have been accepted by the social housing sector. The usual response from a housing association to a human rights defence is to accept that it is bound by *Weaver* and concede the public authority point but reserve the position if the case goes further (in other words, all the way to the Supreme Court). Nothing has yet come, in terms of case law, of inventive tenants' lawyers' attempts to increase the scope of *Weaver* to catch housing co-operatives and private landlords.

Have a go?

When the Supreme Court refused to grant LQHT permission to appeal, it said that the issue in the case was 'clearly one for the Supreme Court' and that though *Weaver* was not 'a suitable case on the facts … If a suitable case can be identified consideration should be given to apply for a leap-frog to the Supreme Court'.

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45 [2002] EWCA Civ 366.

46 ibid [35] (Woolf LCJ).

47 It could also be added that LCF's public funding was contractual and not by subsidy or grant.

It might be thought that this encouragement and the cogent dissenting judgment of Lord Justice Rix may result in one of the larger housing associations chancing its arm by taking a similar case to the Supreme Court. A number of factors may explain why this has not, so far, happened. Firstly, austerity has bitten hard in the social housing sector. RPs arguably have better things to do with their funds than spending a six figure sum on legal costs (and risking a similar amount in respect of the other side's costs if the case is lost) on a case with an uncertain outcome. Some are probably sitting on their hands and waiting for one of their fellow RPs to have a go. Secondly, the direct financial savings resulting from overturning *Weaver* for the adventurous RP taking up the gauntlet are not immediately obvious, though there would clearly be savings in administration and legal costs incurred in fighting off human rights defences.[48] Thirdly, and finally, there seems to be a certain amount of pessimism as to the outcome of any such case.[49]

Are Charities Public Authorities?

Like many RPs, LQHT is an exempt charity. An exempt charity is one that is not registered with or normally regulated by the Charity Commission and is listed within schedule 3 to the Charities Act 2011.[50]

The charitable status of a body under consideration is not mentioned as a relevant factor in the ten principles extracted by Lord Justice Elias from *Aston Cantlow* and *YL*.[51] However, it can be argued that the fact that charities are non-profit making means that they are non-commercial, a factor that could point towards being public or hybrid bodies. One of the factors relied on by Lord Justice Elias, when concluding that LQHT was a public authority, was that it was a charity and as such acted in the public interest rather than for profit.

Lord Justice Rix took a contrary view as appears from the passage from his judgment set out under his seventh principle in section 6 above. In his view 'the world of charity is essentially private' and its everyday operations has more in common with the world of business than with state enterprise. Lord Justice Elias' judgment is, of course, the law. However, there is support for Lord Justice Rix's view in *YL*:[52]

48 However, the savings to the sector as a whole would probably be significant.

49 The observations in this paragraph are based on anecdotal evidence from my practice.

50 This includes non-profit registered providers of social housing.

51 See above.

52 *YL* (n 18) [135] (Lord Neuberger).

> The fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature. Nor does it follow as a matter of logic or policy. Otherwise, the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities would be caught by section 6(1).

In para 110, Lord Mance quotes, with approval, Lord Woolf CJ in *Heather*:[53]

> If the authority itself provides accommodation, it is performing a public function. It is also performing a public function if it makes arrangements for the accommodation to be provided by LCF. However, if a body which is a charity, like LCF, provides accommodation to those whom the authority owes a duty under section 21 in accordance with the arrangement under section 26, it does not follow that the charity is performing a public function.

Lord Justice Elias' conclusion, that charitable status supports the conclusion that LQHT is a public authority, does not appear to sit well with *YL* or *Heather*.

Charitable purposes

All of the purposes listed in section 3(1) of the CA, with the possible exception of (c), can be described as 'governmental' or 'public' functions. Furthermore, section 2(b) (and section 4) of the CA expressly requires any charitable purpose to be 'for the public benefit'.

Functions and acts

Applying section 6(3)(b) of the HRA in isolation is likely to result in the conclusion that a charity (perhaps other than a religious charity) is a public authority because it appears that its charitable purpose will be a 'function of a public nature'. It is difficult to see a meaningful distinction between the terms 'purpose' and 'function' in this context[54] and charitable purposes are necessarily for the public benefit.

However, section 6(3)(b) of the HRA cannot be considered in isolation, as it is qualified by section 6(5) of the HRA. Is it conceivable that a body could have

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53 *Heather* (n 45) [15].

54 It can be argued that 'purpose' is used to denote intention, whereas 'function' refers to a means of achieving an intention. This would make the function/act distinction in Human Rights Act 1988, s 6 difficult to sustain.

functions that are all public but perform acts that are all private? If so it would be a private body. Consider some of the examples referred to by Lord Neuberger in *YL*[55] - private hospitals and private schools (both of which are also likely to be charities).

The majority and the dissenting judgments in *Weaver* both asserted the primacy of 'acts' (section 6(5) HRA) over 'functions' (section 6(3)(b) HRA) when analysing the public status of a body. How is this done? How can courts decide if an act is private or public?

Lord Justice Elias concluded that:[56]

> … the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts.

Acts must be assessed in context. Establishing the context of an action will sometimes require consideration of the function which the act is carrying into effect. When this happens, it is likely that there will be an inextricable link between acts and functions.

How will the operation of a typical charity (if there is such a thing) measure up against Lord Justice Elias's ten principles and, most importantly, the particular factors that led him to conclude that the termination of tenancies by LQHT was a public function or action?[57]

Public body:

- Charitable purposes, by their nature, are very similar to governmental functions.
- Charities are publicly funded; not now very often by grants,[58] but by tax breaks.
- Charities, by their nature, provide a public service.[59]

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55 *YL* (n 18) [135].

56 *Weaver CA* (n 2) [76] (Elias LJ).

57 See above.

58 Except in historic cases.

59 Excepting religious charities.

- Charities are non-profit making. As stated above and below, it is open to argument whether this is a significant pointer towards them being public bodies.
- Charities do sometimes 'take the place' of core authorities, for example by running childrens' homes - or is this merely assisting the relevant core authority to discharge its statutory duties?[60]
- Charities are subject to regulation, though probably not as detailed as that applying to RSLs/RPs in 2009.

Private body:

- Very few charities exercise statutory powers.
- Most charities that provide services to assist core authorities to discharge their duties do so under contractual arrangements (often entered into following a competitive tender). Whilst charities are non-profit making, they will often try to generate a surplus from such contracts from which they subsidise their charitable activities.
- When charities operate in 'close harmony' (to use Lord Justice Elias's phrase) with core authorities, it is usually under a contractual arrangement and is very rarely pursuant to a statutory duty (unlike RPs, who have a statutory duty to co-operate with local authorities in respect of the allocation of social housing).

Conclusions

Weaver is a less than perfect leading case. It was based on a 'rather unsatisfactory' concession that LQHT was a hybrid authority, the Court of Appeal appears to have been less than impressed with the focus of the submissions before it and, as Mrs Weaver had no interest in its outcome, the appeal could be regarded as a 'procedural device employed to produce an advisory opinion'.[61]

There may also be reasons for preferring the reasoning in the dissenting judgment of Lord Justice Rix to that in the lead majority judgment of Lord Justice Elias. It is arguable that *Weaver* is in some respects inconsistent with *YL* and *Heather*.

For all this, *Weaver* remains good law after four years (or five years on if you go back to the Divisional Court decision).

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60 As in *Heather* (n 45).

61 See n 15.

It is unlikely that RPs, unless they are significantly different to LQHT, can sidestep the effect of *Weaver*. However there may be good grounds for arguing that many charities do not fulfil public functions and perform only private acts. As Lord Justice Rix said (with some support from the House of Lords in *YL* and the Court of Appeal in *Heather*), the operations of charities 'are essentially in the private and business world, rather than the world of government'.

A charity facing a claim brought under the HRA or for judicial review will need to carry out a detailed analysis of the way that it operates to establish whether the function or act in question is a public or private one. The ten principles set out in Lord Justice Elias's judgment in *Weaver* can be used as a checklist. Assessing whether a particular act of a particular charity is a private act or not will always be fact-sensitive.

Hopefully sooner or later a suitable case re-visiting the issues in *Weaver* will find its way to the Supreme Court so that the law can be clarified or changed.