Contracting out Homelessness decisions

It is just over 10 years since the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 SI No. 3205 came into force but local authorities are still facing challenges, in section 204 Housing Act 1996 appeals, on whether they have validly contracted out their homelessness functions pursuant to article 3 of the 1996 Order.

It is of course clear, as Mr Justice Jay in *Tachie v Welwyn Hatfield Borough Council* [2013] EWHC 3972 (QB) stated, that any ultra vires issue is capable of being the subject of a section 204 appeal. However, to the frustration of many a local authority, in a significant number of appeals there is a stark focus on what is perceived to be arid and technical points which demonstrate no prospect of a different decision on the public law merits of the review decision itself.

If this is the case, it is always worth stating so upfront – you may attract the sympathy of the court. For example, Recorder Geraint Jones QC in *Kryczka v Westminster* unreported 23 December 2016 was fairly scathing, '*It is beyond doubt that arguments of this kind are now current in cases where it is perceived that the more usual grounds of challenge to a part VII decision will not or may not avail an appellant. In my judgment this approach is to be deprecated. The practice of trawling through any given Council's Constitution and Standing Orders in the hope that some internal provision might have been offended or not complied with to the letter, is utterly wasteful of public funds (most appellants in this kind of appeal being legally aided) and often indicative of a want of other properly arguable grounds of appeal.*'

It is also worth pointing out that there is likely to be no point to many of these types of challenges. Section 135(4) of the Local Government Act 1972 provides, '*A person entering into a contract with a local authority shall not be bound to enquire whether the standing orders of the council which apply to the contract have been complied with and non-compliance with such orders shall not invalidate any contract entered into by or on behalf of the authority*'. As such, notwithstanding say a failure to tender the contract (should the value of the contract require it), or to complete the written agreement as set out in the standing orders, the contract remains valid and thus the review has been validly authorised to make the homelessness decision.

Often it is asserted that a breach in the contract renders the review decision ultra vires. But on the contrary, this is a contractual matter between the local authority and the contractor. If there has been a breach it is for the wronged party to decide if it wishes to rely on any breach, a breach of contract does not automatically vitiate the agreement unless and until recession is sought from the court and granted or the parties terminate the contract. As such a breach of contract is unlikely to render a decision taken pursuant to that contract unlawful in public law terms.

It will however, likely be necessary for the local authority to prepare a witness statement to evidence that there has been a proper and lawful contracting out. Unless the directions specifically allow it do make an application using form N244 for permission to rely on the witness statement. Where all the local authority is doing is elucidating the factual

situation in relation to the claim a court is very likely to allow the authority to rely on it applying *R. v Westminster City Council Ex p. Ermakov* (1996) 28 H.L.R. 819.

A witness statement may be particularly useful where it is alleged is that the local authority has not complied with its public sector equality duty (PSED) as that is non-delegable and cannot be contracted out.

While we wait for the Court of Appeal to hear and decide the issue in *Smith v London Borough of Haringey* B5/2016/3856 on 10 or 11 May 2017, one way in which local authorities are winning on this point is to rely on paragraph 94 of *R(Brown) v SSWP* [2008] EWHC 3158 (Admin) where Lord Justice Aikens states, *'Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (i) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (ii) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty…'.*

The witness statement should address how the local authority has due regard to the PSED by evidencing the willingness and capability of the contractor to fulfil the due regard duty and that it maintains a proper supervision over the contractor.

Further or alternatively, the local authorities have also been successfully relying on section 149(2) Equality Act 2010 to defeat this claim. Section 149(2) provides, '*A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).*' The contractor is not a public authority but is exercising a public function and so itself can have due regard to the PSED. There is no need to delegate as the Act has done it already: section 149(2) postdates *Brown* and provides for a further body '*charged with*' the duty in *Brown* terms.

It may be ten years since local authorities were able to contract out but these issues continue to rumble on – please do proactively check that your authority has lawfully contracted out its homelessness functions. It is extraordinarily annoying when a lot of time and effort has gone into making a lawful section 202 review decision that is not itself challenged (or credibly challenged) on its merits to have to withdraw that decision (perhaps with costs) because of a flaw in the contracting out process.

For example, some local authorities were caught out because the contractor itself had then gone on to subcontract the actual decision making. This is impermissible – article 3 of the 1996 Order requires that the decision is exercised by, or by employees of, the authorised contractor.

However, all may not be lost if you face a contracting out claim and there is a flaw in your process – in an appropriate case local authorities can always consider a subsequent ratification of the position that is, depending, on the facts, likely to defeat the claim (aka *Tachie*).

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