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Wirral BC v MF [2013] UKUT 291 (AAC); [2014] AACR 12 (CH/1528/2012)

Case law

Case law date	21/06/2013
Commission/Judge	Mr Justice Charles CP

Exempt accommodation status – definition of a voluntary organisation

Background and outcome

The claimant was a tenant of Salisbury Independent Living ("SIL"), a not for profit organisation which provided private housing with support services to people with learning difficulties. The accommodation it provided was either owned by SMS, another company, or by other partnerships. One person, Mr C, was involved with all three elements: he was a consultant to SIL (which he had established), a director of SMS and also a member of the other partnerships (with his wife). The local authority decided that the arrangements between SIL, SMS and the partnerships meant that SIL was not a voluntary organisation, or a housing association, for the purposes of the "exempt accommodation" provisions, and restricted the claimant's HB. A First-tier Tribunal allowed the claimant's appeal and concluded that SIL had not made any profits and that no disguised profits had been made by SMS, Mr C or anybody else.

Before the Upper Tribunal the local authority's primary argument was that in determining the issue, account needed to be taken of Mr C's connection and association with (i) SIL and (ii) SMS and the C partnerships, and the possibility that SMS and the C partnerships could make profits from payments made to them by SIL. The Upper Tribunal dismissed the appeal holding that, in line with the finding of the FTT, the local authority had failed to establish the existence of any arrangements, over-charging or profits (actual or disguised) that would make good its argument.

Practice points

Does the definition of a "voluntary organisation" exclude the possibility of making profits?

The Upper Tribunal said that the starting point was the statutory phrases defining the "Non-profit making Condition" (HB Regulations 2006, reg 2). It was an obvious possibility that a provider of accommodation and support (a "Provider") may well enter into arrangements with others whose purpose is to make a profit from them ("Property and Service Contractors"). Parliament could not have intended that this possibility, by itself, would prevent a Provider from satisfying the Non-profit making

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Condition (and so from being a housing association or a voluntary organisation). The Upper Tribunal held that Parliament's primary intention was to ensure that HB continued to meet rents charged to residents that reflected the higher costs of providing them with specialist supported accommodation with care, support and supervision. The statutory definitions did not draw any distinction between those cases where the Provider and the Property and Services Contractors were connected and those cases where they were not connected.

Mr Justice Charles said he agreed with Commissioner (now Upper Tribunal Judge) Jacobs in CH/39/2007, that Parliament intended that a landlord (a Provider) and the legal entities with whom it contracts (Property and Services Contractors) may so arrange their affairs in a bona fide and commercial way to take advantage of the opportunities presented by the "old scheme" rules. The Upper Tribunal therefore held that the local authority's primary argument, (which was based on an acceptance that the arrangements between SIL and SMS and the C partnerships were bona fide commercial arrangements which did not involve any overcharging or disguised profits) was therefore wrong in law.

How to determine whether a landlord is "trading for profit"

As for the local authority's alternative argument that SIL was making a profit, the Upper Tribunal said that it was important to remember that the ability to make a surplus did not mean that the company was "trading for profit"; Customs and Excise Commissioners v Bell Concord Educational Trust ltd [1990] 1 QB 1040, considered. The case law reflected the commercial reality that, for each accounting period, a company or other body providing accommodation or other service or product would not be able to balance its books on a specific date. The real issue was what the Provider does with any surplus or profit and whether it was used in a way that was in breach of its Non-profit making Condition. In the instant case, the objects and powers of SIL did not permit any of its divisible profits to be paid or distributed to its members. It followed that so long as SIL had acted in accordance with its objects and powers, profits made by any third parties did not fall to be taken into account.

A sequential approach required

On the question of how to deal with allegations that the Provider was in breach of its Non-profit making Condition, Mr Justice Charles recommended a three-staged approach. First, the decision maker could check whether the Provider complied with its own objects and powers and whether the accounts accurately reflected its activities and affairs. At the second stage, the decision maker could consider the Provider's actual activities. Decision-makers would need to identify with care the bases upon which they asserted that the definition of "exempt accommodation" was not met or any anti-abuse provision was engaged, given that this was likely to involve an allegation of unlawful and/or dishonest conduct. Thirdly, there may be cases where the decision maker could look outside of the Provider's constitution to determine whether the accommodation it provided was exempt. An example might be where, for tax or other reasons, the Provider covenanted its profits to a charity to which it was a wholly owned subsidiary.