

THE CHARITIES ACT (NORTHERN IRELAND) 2008
THE CHARITIES ACT (NORTHERN IRELAND) 2013
THE CHARITY TRIBUNAL RULES (NORTHERN IRELAND) 2010

THE CHARITY TRIBUNAL FOR NORTHERN IRELAND

Appeal Reference: 9/19

Between

JOBY FOX

Appellant

-and-

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent

-and-

THE ATTORNEY-GENERAL FOR NORTHERN IRELAND

Intervening Party

Heard in public in the Tribunal hearing Centre, Belfast on 28 November 2019.

Before

Damien J. McMahon

Mr. T. McKee appeared for the Appellant.

Mr. R. McCausland, of counsel, appeared for the Respondent.

Ms. A-L Toal, solicitor, appeared for the Intervening Party.

DECISION

The appeal is dismissed.

The Appellant is not a person affected, or who may be affected, by the making of the Order and does not, therefore, have locus standi to bring this appeal.

The Appellant's application for a direction to conjoin the instant appeal with Appeal References 1/19 and 2/19 is refused.

REASONS

Introduction

1. This appeal was determined in a preliminary hearing, pursuant to Rule 14 of the Charity Tribunal Rules (Northern Ireland) 2010 ('the Rules') to consider whether the Appellant had locus standi to bring this appeal.
2. The Appellant appealed against an Order of the Respondent dated 10 July 2019 ('the Order') made under s. 33(1)(vii) of the Charities Act (Northern Ireland) 2008 ('the Act') appointing an interim manager ('IM') of Victoria Housing Estates Limited ('the Charity') to the exclusion of the trustees of the Charity, being satisfied, pursuant to s.33(1) of the Act, that there is or has been misconduct or mismanagement in the administration of the Charity; or that it was necessary or desirable to act for the purpose of protecting the property of the Charity or securing a proper application for the purposes of that property or of property coming to the Charity.
3. A necessary condition precedent to the making of the Order was that the Respondent had to have instituted a statutory inquiry by the Respondent into the Charity, pursuant to s. 22 of the Act.
4. An appeal against the making of the Order can only be brought, pursuant to Table 1 to Schedule 3 of the Act, by the trustees of the Charity (or the Charity itself if the Charity is a body corporate) or any person who is or may be affected by the Order.
5. The Appellant submitted that he was, or may be, a person affected by the Order.
6. The Appellant also sought a direction, pursuant to Rule 3 of the Rules to consolidate this appeal with two other appeals brought by him (Appeal Ref. 1/19 and 2/19) on the ground that this would ensure the just, expeditious and economical determination of all three appeals. (However, in a written submission for the instant appeal the Appellant only sought to consolidate the instant appeal with Appeal Ref. 1/19). This application was opposed by the Respondent on the basis that the instant appeal related to a decision made by the Respondent after the decision of the High Court in three other conjoined appeals from decisions of the Tribunal, where the said decision of the High Court was currently under appeal to the Court of Appeal.

The Appeal

7. The Appellant, in his said appeal, sought to have the Order quashed on two grounds, namely, that the Order affected his legal rights as a tenant of the Charity and that the necessary condition precedent of a valid statutory inquiry having been initiated, he submitted, did not exist.

Factual Background

8. The Appellant is a tenant of the Charity.
9. On 25 July 2012 the Respondent opened a statutory inquiry into the Charity pursuant to s.22 of the Act to examine a number of regulatory concerns.
10. This appeal did not, and could not, involve a challenge by the Appellant to the opening of the said statutory inquiry by the respondent.
11. On 10 July 2019, pursuant to the fact that a statutory inquiry had been opened, the

Respondent made an Order under s.33(1)(vii) of the Act appointing a IM to take over the management and administration of the Charity to the exclusion of the trustees.

12. A previous Order, pursuant to s.33(1)(vii) of the Act had been made by the Respondent on 14 October 2015. The instant Order, made on 10 July 2019, was in the exact same terms. The Respondent submitted that this was done, for expediency purposes, in light of the said decision of the High Court that, in itself, was now subject to an appeal by the Respondent to the Court of Appeal. However, this appeal was concerned only with the appeal brought by the Appellant against the making of the instant Order.
13. The sole issue for determination in this appeal at this preliminary hearing was whether the Appellant was, or may be, a person affected by the making of the Order and, secondly, whether a direction should be made to conjoin this appeal with the other two appeals brought by the Appellant (Appeal Ref. 1/19 and 2/19).
14. The term 'person affected' is not defined in the legislative regime governing appeals to the Tribunal.
15. There is no binding precedent, nor, indeed, any existing precedent, in the Tribunal, or in the High Court, interpreting the meaning of the term 'person affected' for the purposes of charity law in Northern Ireland. The equivalent term has, however, been interpreted by both the Charity Tribunal for England and Wales and by the Upper Tribunal in that jurisdiction in proceedings that have come before those judicial bodies. Those authorities are, however, not binding on this Tribunal but are of highly persuasive value.
16. The parties helpfully adduced an agreed bundle of authorities described as a 'Joint List of Authorities' and relied upon these to a greater or lesser extent in their respective submissions to the Tribunal. In addition, the Intervening Party drew attention that there had been a further decision on the subject of locus standi in the Charity Tribunal for England and Wales brought by the same Appellant (Nicholson) involved in a previous locus standi proceeding before that Tribunal that had been the subject of an appeal to the Upper Tribunal. In the second appeal too, the Appellant, Nicholson, was again unsuccessful on the question of locus standi.

The Submissions of the Parties

17. It was submitted on behalf of the Intervening Party submitted that he had no position on the particular question of locus standi in this appeal but merely wished to assist the Tribunal by providing an overview of the case law. It was submitted that the question of locus standi was fact specific and that the Appellant needed to show that, in this case, the making of the Order had an identifiable impact on his legal rights at the date the Order was made. The Intervening Party agreed that the facts in the Colman case (CA/2014/0001), also an appeal before the Charity Tribunal for England and Wales, were more directly on the facts of the instant appeal but submitted that Colman had been largely overtaken by Nicholson in the Charity Tribunal for England and Wales, a decision confirmed by the Upper Tribunal in that case. It was submitted that the Upper Tribunal in Nicholson [2016] UKUT 0198 EWHC (Admin) 3446, with particular reference to paragraphs 44,45 and 47 of that decision, set out the approach to take on the issue of locus standi involving a challenge to a decision of the Respondent by an Appellant, as in the instant appeal, who maintained he was a person affected, or who may be affected, by such decision – a test that was narrower than a 'sufficient interest' test or a 'public interest' test.

18. The Respondent agreed with the overview of the relevant case law set out by the Intervening Party and further submitted that, on examination of the Order, there was nothing in the Order that could affect the legal rights of the Appellant at the date the Order was made. It was submitted that, as confirmed in the Notice of Appeal, the Appellant was a tenant of a private housing association. The Respondent submitted that the Order did not affect his legal rights as a tenant. It was submitted that, in order to succeed in this appeal, the Appellant had to point to an identifiable impact on his legal rights as a tenant. It was further submitted that the Appellant was in an even lesser position than the Appellant in Colman when it came to considering locus standi since the Appellant in Colman had been a trustee of the charity in question. The Respondent submitted that the Appellant in the instant appeal was in no different position concerning any impact on his legal rights as a tenant of the Charity by the making of the Order. The Respondent submitted that the Appellant did not explain how or why his rights as a tenant were altered by the making of the Order and submitted that those rights were not, in fact, altered. Finally, the Respondent submitted that it was premature to make a Direction consolidating the instant appeal with the Appellant's other two appeals pending a decision on the locus standi of the Appellant to bring the instant appeal.
19. The Appellant submitted that the fact that he was a tenant of the Charity over which the IM had exclusive authority meant that he, the Appellant, had 'sufficient interest' to bring the instant appeal. He submitted that the Order was made to the exclusion of the tenants of the Charity and that the making of the Order had allowed the IM to alter a number of the tenants' rights, including the removal of an Option to Buy facility and the alteration of succession rights, alterations that were approved by the IM. These were the ways, it was submitted at the hearing, that the Appellant's rights were affected by the making of the Order. In his Notice of Appeal, four other alleged ways in which his alleged legal rights were affected by the making of the Order were listed. All of these assertions are addressed below in the Findings and Conclusions section of these Reasons for the Tribunal's decision. Significantly, however, the Appellant stated that he was entirely in agreement with the authorities included in the agreed bundle. Finally, the Appellant submitted that if it was more likely than not that he was a person affected by the Order, then the appeal should be allowed to proceed on the basis that the Appellant had, in consequence, the required locus standi.

Findings and Conclusions

20. This appeal is dismissed. The Appellant is not a person affected, or who may be affected, by the making of the Order by the Respondent.
21. The Appellant's application for a direction to conjoin this appeal with his other two appeals (Appeal Reference 1/19 and 2/19) is refused.
22. The test for determining whether a person is a 'person affected' or a person who may be affected by a decision of the Respondent is set out in the decision of the Upper Tribunal of England and Wales in Nicholson. While that decision is not binding on the Charity Tribunal of Northern Ireland, it is of highly persuasive value and is adopted as a correct statement of the law to be applied in Northern Ireland.
23. On the basis of the said decision in Nicholson, it is necessary to focus upon the particular decision, namely, in the instant appeal, the making of the Order. To be affected by the making of the Order, the Order must relate to the Appellant in some way and, secondly, the Appellant's legal rights must have been impinged or affected by the making of the Order. Further, to be a person who 'may' be affected, there must be an identifiable impact on the Appellant's legal rights which is likely to occur. It is insufficient that the Appellant merely disagrees with the making of the Order

however sincerely he holds that opinion.

24. The making of the Order merely gave the IM power to manage the administration of the Charity to the exclusion of the Charity's trustees in order to protect the Charity and its assets having regard to the finding and decision of the Respondent that there had been misconduct and mismanagement in the administration of the Charity that justified the opening of a statutory inquiry. Ironically, therefore, the making of the Order had, prima facie, the effect of protecting the Appellant, as a tenant of the Charity, from adverse impacts of misconduct and mismanagement of the Charity by its trustees.
25. As stated in paragraph 19 of this decision, the Appellant submitted at hearing two ways by which he asserted the actions of the IM affected his legal rights. However, the only issue in this appeal was whether the Appellant was a person affected, or who may be affected, by the making of the order appointing the IM – not any actions that may or may not have been undertaken by the IM following their appointment within the terms of that appointment. The Charity itself, if a statutory inquiry had not been lawfully opened and, consequently, the Order appointing an IM made, could have undertaken the actions complained of by the Appellant: those actions were not dependent on the appointment of an IM by virtue of the making of the Order. The Appellant presumably would have disagreed with those actions if made by the Charity itself but his remedy to obtain redress would have lain only in the legal position governing the landlord and tenant relationship. It should be carefully noted that where an IM is lawfully appointed, he or they are, for all relevant purposes, the Charity.
26. As also stated in paragraph 19 of this decision, the Appellant, in his Notice of Appeal, listed four other ways in which he claimed his legal rights as a tenant were affected by the making of the Order. However, the precise same considerations apply to those assertions as to the two assertions made at the hearing: it matters not whether the Charity itself, or a lawfully appointed IM, makes decisions that the Appellant maintains affects his legal rights as a tenant. The sole issue in this appeal was whether the Appellant's legal rights were impacted by the making of the Order appointing an IM. This was the only way that the Appellant could successfully claim to be a person affected by the making of the Order. However, the Appellant failed to show that this was the case. Accordingly, the Appellant did not have locus standi to bring this appeal.
27. Since the Tribunal concluded that determination of the preliminary question in the appeal, namely whether the Appellant was a person affected, or who may be affected, by the making of the Order, substantially disposes of the appeal, the parties, and each of them, are advised that any party to these proceedings has a right of appeal from this decision of the Tribunal to the High Court. This is subject to a request being made by any party wishing to appeal being made to the Tribunal in writing within 28 days of the date upon which the notification of this decision is sent to the parties to seek permission from the Tribunal to appeal, stating the name and address of the applicant and that of any representative of the applicant; that identifies the decision to which the request relates and that states the grounds on which the applicant seeks to rely before the High Court.

Dated 27 January 2020

Signed:

Damien J. McMahon
President