IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 248 (LC)
Case No: LRX/12/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – PITCH FEE REVIEW – ADMINISTRATION CHARGES – CHARGES FOR UTILITIES – WHETHER THE PITCH FEE FOR A GIVEN YEAR CAN INCLUDE A SUM IN RESPECT OF A SERVICE PROVIDED IN THE PREVIOUS YEAR – WHETHER THE PITCH FEE CAN VARY WITH THE COST OF SERVICES PROVIDED

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

P R HARDMAN AND PARTNERS **Appellant**

- and -

MRS MARILYN FOX
MRS BRENDA GREENWOOD AND OTHERS **Respondents**

Re: Shortferry Caravan Park,
Ferry Road,
Fiskerton,
Lincoln, LN3 4HU

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

The following cases are referred to in this decision:

Britaniacrest Limited [2013] UKUT 521 (LC)
PR Hardman & Partners v Brenda Greenwood and Marilyn Fox [2015] UKUT 587 (LC)
PR Hardman & Partners v Greenwood and another [2017] EWCA Civ 52

DECISION

Introduction

1. This appeal raises a short point: can a pitch fee for a park home, for a given year, be increased by an amount intended to recoup a cost incurred by the site owner in providing a service during the previous year?

2. The First-tier Tribunal ("the FTT"), in a decision about the review of the pitch fee charged by the appellant to the respondents for the year beginning 1 February 2018, held that it could not. The appellant, who is the site owner, appeals that aspect of the FTT's decision. I have upheld the FTT's decision, although my reasons differ from those given by the FTT.

3. This decision has been made on consideration of the written representations of both parties; the appellant is represented by Tozers solicitors, and the respondents have not had legal representation.

The relevant law

4. The respondents live in mobile homes on a site owned by the appellant; it is a "protected site" under the Mobile Homes Act 1983 ("the 1983 Act"). Therefore the agreement between the site owner and each occupier contains the implied terms set out in Chapter 2 of Schedule 1 to the 1983 Act, and if they are inconsistent with the express terms of the agreement the implied terms prevail.

5. The implied terms that are relevant to this dispute include obligations on the part of the occupier, in paragraph 21 of the Schedule, to:

> "(a) pay the pitch fee to the owner;
>
> (b) pay to the owner all sums due under the agreement in respect of gas, electricity, water, sewerage or other services supplied by the owner".

6. Paragraph 29 defines "pitch fee" for the purposes of Chapter 2 of the Schedule as:

> "the amount which the occupier is required by the agreement to pay to the owner for the right to station the mobile home on the pitch and for use of the common areas of the protected site and their maintenance, but does not include amounts due in respect of gas, electricity, water and sewerage or other services, unless the agreement expressly provides that the pitch fee includes such amounts;"

7. It follows that the implied terms do not create any obligation to pay; the pitch fee referred to in paragraph 21(a) is defined as the one required to be paid by the agreement, and the payment due under 21(b) is the "sums due under the agreement." If the agreement does not impose a pitch fee, the 1983 Act does not impose one.

8. Paragraphs 16 to 20 contain implied terms about the pitch fee. It is to be reviewed annually (paragraph 17), and can be changed by that procedure only with the agreement of the occupier or if the "appropriate judicial body" (that is, the FTT) considers it reasonable for it to be changed and makes an order setting out the new fee. Paragraph 18(1) provides as follows:

> "When determining the amount of the new pitch fee particular regard shall be had to—
>
> (a) any sums expended by the owner since the last review date on improvements—
>
> (i) which are for the benefit of the occupiers of mobile homes on the protected site;
>
> (ii) which were the subject of consultation in accordance with paragraph 22(e) and (f) below; and
>
> (iii) to which a majority of the occupiers have not disagreed in writing or which, in the case of such disagreement, the court, on the application of the owner, has ordered should be taken into account when determining the amount of the new pitch fee;
>
> (b) any decrease in the amenity of the protected site since the last review date; and
>
> (c) the effect of any enactment, other than an order made under paragraph 8(2) above, which has come into force since the last review date.

9. Paragraph 18 does not prevent other matters being taken into account; it only lists matters to which "particular regard" is to be had. Paragraph 20 adds an important proviso:

> "There is a presumption that the pitch fee shall increase or decrease by a percentage which is no more than any percentage increase or decrease in the retail prices index since the last review date, unless this would be unreasonable having regard to paragraph 18(1) above."

10. Paragraph 20 does not give the owner an entitlement to raise the pitch fee in line with the RPI; it imposes a presumption that the pitch fee will not increase by more than the RPI, but it provides that that presumption can be displaced if it would generate an unreasonable result having regard to paragraph 18(1).

11. The elaborate mechanism contained in paragraphs 16 to 20 for the review of the pitch fee, referred to in paragraph 21(a), is not replicated for the payment referred to in paragraph 21(b), being any sum due to the owner under the agreement "in respect of gas, electricity, water, sewerage or other services supplied by the owner". The view has been expressed by this Tribunal that paragraph 21(b) has effect where the parties have agreed "that utilities or other services will be provided by the owner and will be paid for by the occupier (with or without an element to cover the owner's costs of administration)": *PR Hardman & Partners v Brenda Greenwood and Marilyn Fox* [2015] UKUT 587 (LC) at paragraph 53 – in other words, it refers to what would generally be described as a service charge. But the implied terms do not impose a liability to make a payment where the agreement does not expressly provide one; therefore if the agreement does not provide for a service charge, neither do the implied terms. Nor will they extend the scope of an express service charge.

The factual background

The agreement between the parties

12. The agreements between the appellant and the respondents are all in a common form recommended by British Holiday Homes and Parks Association. Like the implied terms in the 1983 Act it makes provision for two payments by the occupier, in paragraph 3:

> "(a) to pay to the owner the annual pitch fee of [left blank] subject to review …
>
> (b) to pay and discharge all general and/or water rates which may from time to time be assessed charged or payable in respect of the mobile home or the pitch (and/or a proportionate part therefore where the same are assessed in respect of the residential part of the park) and charges in respect of electricity gas water and other services."

13. These provisions have already been the subject of litigation between the parties; I referred above to the Tribunal's decision at *PR Hardman & Partners v Brenda Greenwood and Marilyn Fox* [2015] UKUT 587 (LC). That litigation arose because the occupiers asked the FTT to determine whether the owner was entitled to charge under that paragraph not only the cost of water, electricity etc but also for its own services in reading the meters, administration of the services and so on.

14. That question had already been addressed by the Tribunal in *Britaniacrest Limited* [2013] UKUT 521 (LC) where the agreement was in the same standard form. It held in that case that the payment required by paragraph 3(b) required simply the payment to the supplier, or

the reimbursement to the site owner (depending how the individual utilities were billed), of the supplier's charges for the utilities for the individual pitch and did not enable the site owner to make an additional charge for administering the services or for its own activities such as reading the meters.

15. In *PR Hardman* [2015] the Tribunal maintained its view about paragraph 3(b), and the Court of Appeal agreed: *PR Hardman & Partners v Greenwood and another* [2017] EWCA Civ 52. So it is beyond dispute that paragraph 3(b) is not an agreement that the occupiers shall pay charges imposed by the site owner for his own services. It simply requires payment direct to third parties, or a reimbursement of the site owner for such direct payments. The site owner's administration charges are included in the pitch fee, in the absence of any express provision for them to be charged separately. As the Tribunal put it at paragraph 37 of its decision in *PR Hardman* [2015], referring to its decision in *Britaniacrest*:

> "… as there was no express provision of a charge to cover repairs or insurance of common parts or conduits through which the services are provided, the parties must be taken to have agreed a pitch fee at the commencement of the arrangement which took those matters into account as part of the benefits received by the occupier and the costs and risks assumed by the owner. In exactly the same way, in the absence of a service charge covering the cost of reading meters and administering the utilities, the parties must have regarded those matters as part of the benefits covered by the pitch fee."

16. In the Court of Appeal Sir Terence Etherton MR (as he then was) at paragraph 50 pointed out that the pitch fee is defined by paragraph 29 of Schedule 1 to cover maintenance of the common areas of the site, and added at paragraph 51:

> "There is nothing in the agreements or the [1983 Act] which precludes Hardman from claiming such costs on account, that is to say in anticipation of them being incurred, as well as after they have been incurred. By virtue of paragraph 16 and 17(4) of Chapter 2 of Part 1 of Schedule 1 to the [1983 Act], whether and to what extent and in what way they are recovered as part of the site fee on review depends on what is agreed … or, in the absence of such agreement, is determined by the First-tier Tribunal to be reasonable. There is, therefore, nothing inherently improbable about costs and expenses incurred by Hardman in respect of work done and services provided by them in connection with utilities to the pitches being recoverable as part of the site fee rather than under paragraph 3(b)."

17. That left the site owner with two difficulties. One is that it had overcharged in the past by adding an undisclosed charge to cover its own service and administration cost (for example for reading the meters and monitoring the sewerage tanks) to the cost of utilities charged to the occupiers under paragraph 3(b) of the agreement. The FTT had made provision for repayment to the occupiers by way of set-off against future liabilities, with any balance

unpaid by 9 February 2018 to be repaid in a lump sum. There was no appeal from that element of the FTT's decision.

18. The other difficulty was that the site owner wanted to be able recover its service and administration charges in the future, and took the view that the pitch fee had been set at a level that did not include them. In the closing paragraphs of his decision in *PR Hardman* [2015] the Deputy President said that he had been asked to provide guidance to the parties about how the site owner could, as counsel for the owner put it, "amend their charging structure" so as to recover the costs formerly covered by the surcharge on the cost of utilities that it had imposed under paragraph 3(b). He expressed the view that there were two ways to manage this. One was for the parties to agree to amend the agreement so as to include an express charge for the site owner's administration and services. The other was to negotiate an adjustment to the pitch fee. The present appeal arises because neither of those options has been possible.

The present appeal

The FTT's decision about the 2018 pitch fee

19. The appellant applied to the FTT for approval of an increase in the pitch fee for the year commencing 1 February 2018. It sought to impose not only an increase in line with the RPI but also an additional sum representing the apportioned charge for sewerage services, refuse collection, playground inspections, street lighting, the electricity standing charge and the site licence fee.

20. It appears that the respondents did not dispute that the FTT had power to adjust the pitch fee so as to include these elements of service charge. The FTT therefore did not hear argument on the point. It observed that (at its paragraphs 5 and 6) that although paragraph 18 of Chapter 2 of Schedule 1 to the 1983 Act sets out matters to which particular regard is to be had, it does not preclude other matters being taken into account, and also that the Court of Appeal had "authorised the reassessment of the pitch fees at Shortferry so as to include a reasonable amount for services and facilities provided by [the site owner]."

21. The FTT went through the various itemised charges that the appellant sought to add into the pitch fee, and concluded that the pitch fee for the year commencing 1 February 2018 was to be the pitch fee payable in the previous year plus an RPI increase of 3.9% plus £8.10, the latter being the individual's occupier's share of what the FTT regarded as reasonable charges for the various services.

22. There is no appeal from the FTT's decision to add the £8.10 to the 2018 pitch fee.

The charge for sewerage services

23. The one element of the FTT's decision that is appealed is its refusal to include in the 2018 pitch fee a charge for a number of itemised sewerage services in the year commencing 1 February 2017, although the FTT did include such charges (subject to reduction to make them reasonable) in respect of services provided in 2018.

24. To understand why the appellant wanted to include those charges we have to go back to the Tribunal's decision in *PR Hardman* [2015].

25. The park is not connected to the mains sewerage network. There are three sewage treatment plants on the park and six tanks, one of which serves 39 of the permanent pitches while the others also serve the holiday pitches. The appellant has to pay for a permit from the Environment Agency, charges levied by a contractor for emptying the tanks and by another contractor for servicing the tanks every quarter, and the cost of the electricity required to operate the system. The appellant is required by the Environment Agency to monitor the system twice daily; the evidence given for the appellant to the Tribunal in the 2015 proceedings was that the cost of that monitoring was not passed onto the occupiers.

26. The Tribunal decided that the cost of the electricity required to operate the sewerage system could be recovered as part of the payment under paragraph 3(b) because it is a charge for a system that delivers a sewerage service to the individual pitch.

27. As to the rest of the charges for the sewerage services the occupiers (who are the respondents in this case) conceded in the earlier proceedings that all the other payments sought to be recovered for the sewerage service, which I have set out at paragraph 25 above, fall within paragraph 3(b) because they are payments to third parties (see *PR Hardman* [2015] paragraph 57). Because that was conceded the Tribunal did not make any decision to that effect.

28. Accordingly the outcome of the Tribunal's decision in *PR Hardman* [2015] was that the costs incurred by the appellant in providing the sewerage service could all be recovered under paragraph 3(b), although there was no provision for it to impose a separate charge for the twice daily monitoring of the system.

29. The Court of Appeal took a different view. At paragraph 58 Sir Terence Etherton MR said that the Tribunal had held that the reimbursement of payments to third parties in respect of the sewerage system, and the cost of electricity required to run the sewerage system, fall within paragraph 3(b). He expressed the view that that decision was wrong, "since the provision of the sewerage system is a communal service." Noting that there was no appeal from the Tribunal's decision in respect of the sewerage charges, he added that "in the future, however, all such costs and expenses are recoverable only in the pitch fee."

30. As I noted above the Tribunal made no decision about the reimbursement of payments to third parties for maintenance of the sewerage system, because liability was conceded to fall within paragraph 3(b); the Tribunal made a decision only about the payment for the electricity for the sewerage system. However, it appears that the appellant now seeks to recover all the charges for sewerage services – payments to third parties, the cost of electricity and, in a change of tack, its own charges for monitoring – as part of the pitch fee.

31. As we have seen, the FTT accepted that the 2018 pitch fee could include those charges for the year beginning 1 February 2018, subject to reduction from what the appellant wanted to charge to a level that the FTT regarded as reasonable, and there is no appeal from that decision. But it refused to add the same charges for the year beginning 1 February 2017, finding that it is not possible for the pitch fee for a given year to include charges made in respect of a different year.

32. In arguing for the inclusion of the 2017 charges, the appellant said that it intended to remove that element of the pitch fee before calculating the RPI-related increase for the year beginning 1 April 2019. It relied upon paragraph 51 of the Court of Appeal decision, quoted at my paragraph 16 above and referring to the site owner's ability to recover costs both on account and after they have been incurred.

33. The FTT disagreed. It regarded paragraph 51 of the Court of Appeal's decision as a reference to the ability to include in the pitch fee for a given year the anticipated costs for that year as well as any costs already incurred in relation to that year. But it took the view that the implied terms precluded the inclusion of anything that did not relate to that year. It referred to the requirement for an annual review, to the requirement to give notice of that review in a specified time period, to the requirement to have regard to expenditure by the owner on improvements since the last review dates, and to the annual RPI-related increase. All this, the FTT said, tied the pitch fee to charges for the specific year. The FTT took the view that the 2017 sewerage charges could have been included in the 2017 pitch fee, but observed that no notice of review of the 2017 pitch fee had been served even though it would have been possible to serve a late notice in respect of that year after the Court of Appeal's decision was handed down. Accordingly the FTT rejected the proposal to include the 2017 sewerage charges in the 2018 pitch fee.

34. The appellant appeals that aspect of the FTT's decision. It continues to rely on paragraph 51 of the Court of Appeal's decision. It says that these charges were properly and reasonably incurred in the delivery of services to the Respondents. It points out that it had already begun the process of reviewing the 2017 pitch fee, on time in December 2016, before the Court of Appeal's decision was handed down. It says that in effect it is being penalised for reviewing the 2017 pitch fee on time.

35. The respondents disagree and rely upon the FTT's assessment of the meaning of the implied terms.

The legal issues raised by the appeal

36. As the FTT said, the pitch fee is regulated in the implied terms on the basis that it is an annual fee, with a prescribed timetable for review each year. It would be surprising if it included an element of payment for services rendered in a previous year, and particularly so if the mobile home had changed hands; it makes no sense for an occupier who arrives in 2019 to pay, as part of the 2019 pitch fee, for a service provided in 2018.

37. Moreover, the presumption that the pitch fee will fall or rise by no more than the RPI would appear to preclude the addition of one-off items such as a payment for a previous year, which would then have to be excluded when the RPI is applied to the proposed rise or fall in the fee. That is required in the interests of fairness, and the appellant has offered to make that adjustment, but such a requirement does contradict the implied term because it means that the maximum rise has to be less than the RPI.

38. But there is a more fundamental consideration. It was agreed by the parties before the FTT, and therefore not the subject of argument, that it was in principle possible to adjust the pitch fee by adding itemised charges for services. In the light both of the implied terms and of the decisions made by this Tribunal and the Court of Appeal that is unexpected, as I now go on to explain.

39. I begin by repeating that the pitch fee is defined, in paragraph 29 of the implied terms, as follows:

> "the amount which the occupier is required by the agreement to pay to the owner for the right to station the mobile home on the pitch and for use of the common areas of the protected site and their maintenance…"

40. In other words, it is the consideration paid by the occupier for the right to live in the mobile home on the pitch. It is described as a single fee, and there is no reference in the implied terms to its comprising a number of different items or including specific charges. The exercise that the FTT carried out was, in practical terms, very like the determination it might make in the more familiar context of a leasehold flat when asked to decide upon the payability and reasonableness of service charges. That is not what the draftsman of the implied terms seems to have thought would normally happen. The pitch fee should fluctuate by no more than the RPI, although it might go up or down by more than that modest percentage if the site is improved, or the quality of the site deteriorates, or where compliance with a new enactment imposes a cost on the site owner. The very fact that absent such circumstances it is supposed to fluctuate by no more than the RPI suggests that it is not intended to be a collection of individual items, and that it should not fluctuate with the cost of individual services (as does a service charge contained in the lease of a dwelling, as defined by section 18(1)(a) of the Landlord and Tenant Act 1985).

41. It is certainly the case that the factors listed in paragraph 18(1) are not exclusive. Other factors may be brought in. As the Tribunal put it in *Sayer* [2014] UKUT 0283 (LC):

> "if there are weighty factors not referred to in paragraph 18(1) which nonetheless cause the [FTT] to consider it reasonable for the pitch fee to be changed, the presumption in paragraph 20(1) that any variation will be limited by reference to the change in the RPI since the last rpeview date may be displaced."

42. It might be thought that the omission of the 2017 sewerage charges from the pitch fee was just such a weighty factor. But it is significant that the factors listed in paragraph 18(1) do not include fluctuations in the cost of providing services, nor is there any reference to extraordinary one-off charges for services. That is because the intention was that the pitch fee was a global fee, set at a level agreed to cover the services provided to the occupier as well as a charge for the right to station the mobile home on the pitch and live there.

43. As the Tribunal said in *PR Hardman* [2015] at paragraph 37, given that paragraph 3(b)covers only the reimbursement of the cost of gas, electricity and all other services provided by third parties, it follows that the parties agreed a pitch fee which took into account the provision of services by the site owner (see paragraph 15 above).

44. In the light of that it is difficult to understand how that fee could be adjusted on an annual basis by itemising the charges for services provided. I do not read the Court of Appeal's decision as authorising the re-assessment of the pitch fee. There is no reference to re-assessment. I understand the Court of Appeal to have said that certain charges could only be recovered through the pitch fee, but in doing so it upheld the decision of this Tribunal and must be taken to have approved what was said about the pitch fee at paragraph 37 of *PR Hardman* [2015].

45. That is particularly important in the circumstances of this case. The dispute arose because in addition to that inclusive pitch fee the appellant added an undisclosed surcharge to the utility charge made under 3(b). The appellant was not entitled to do that. To add that surcharge into the pitch fee now would amount to a windfall, in the form of double recovery.

46. Accordingly I take the view that the 2018 pitch fee cannot be adjusted by the addition of the 2017 sewerage charges; the appeal fails and the FTT's decision stands, although not for the reasons it gave.

47. It remains the case that the parties to this dispute have agreed that payments to third parties in respect of sewerage services, for servicing the system, emptying the tanks, and for the environment discharge permit, are recoverable through the charge authorised by paragraph 3(b) of the agreement. That was conceded by the respondents in *PR Hardman* [2015] and therefore the Tribunal made no decision about it; and the concession must be correct. Sewerage is not a communal service. The Court of Appeal expressed a view, in paragraph

51 of its decision in *PR Hardman & Partners v Greenwood and another* [2017] EWCA Civ 52, about the reimbursement to the site owner of costs incurred in future years; it may be that the Court of Appeal had not appreciated that this is not a communal service because the private sewerage system is connected to the individual pitches. At any rate the Court of Appeal made no order about the reimbursement to the site owner of payments to third parties in future years which were not the subject of the appeal before it.

Dated 13 August 2019

Elizabeth Cooke

Upper Tribunal Judge