

**UPPER TRIBUNAL (LANDS CHAMBER)**



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**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

*CARAVAN SITES – site licence application – Caravan Sites and Control of Development Act 1960 s. 3 – application for site licence in respect of land including areas for which no planning permission granted for the use of the land as a caravan site – local authority in consequence declining to consider the application in the absence of planning permission – whether applicant entitled to appeal to the First-tier Tribunal – Mobile Homes (Site Licensing) (England) Regulations 2014 – whether purported appeal should be struck out – Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 rule 9*

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

**BETWEEN:**

**LONDON BOROUGH OF HAVERING**

**Appellant**

**and**

**WYLDECREST PARKS (MANAGEMENT) LTD**

**Respondent  
(and Cross-Appellant)**

**Re: Lakeview Park,  
Cummings Hall Lane,  
Noak Hill,  
Romford,  
Essex. RM3 7LE**

**His Honour Judge Huskinson**

**The Royal Courts of Justice  
22 October 2018**

*David Matthias QC*, instructed by London Borough of Havering, for the Appellant  
*Jon Payne*, instructed by Wyldecrest Parks (Management) Ltd, for the Respondent

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The following cases are referred to in this decision:

*R (on the application of Hope and Glory Public House Ltd) v City of Westminster Magistrates and others* [2011] EWCA Civ 31

*Barnes v Black Horse Ltd and Others* [2012] EWHC 1950 (QB)

## Decision

### Introduction

1. This is an appeal from the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 20 April 2018 whereby the FTT, in relation to certain proceedings brought before the FTT by the respondent, declined both (i) to strike out those proceedings and (ii) to proceed with those proceedings, but instead decided to stay the proceedings until a certain event had occurred. The relevant event was the issue of a final substantive decision that disposes of an appeal which had been brought against a planning enforcement notice and stop notice which had been served by the appellant in respect of the relevant land.

2. The proceedings which had been brought before the FTT by the respondent constituted an appeal (or as the appellant would say a purported appeal) under The Mobile Homes (Site Licensing) (England) Regulations 2014 regulation 6 against what the respondent contended was the decision by the appellant (as the relevant local authority) not to issue a site licence with respect to the relevant land under the Caravan Sites and Control of Development Act 1960 section 3.

3. The respondent is the occupier of land at Lakeview Park, Cummings Hall Lane, Noak Hill, Romford, Essex RM3 7LE. The land comprises certain areas which need to be individually noted for the purpose of the present appeal, namely:

(1) An area which I will call the original site – being an area which has been used as a caravan site since before 1960 and in respect of which various site licences have been issued under the 1960 Act the latest such licence being dated 20 August 2002 and being granted to predecessors of the respondent. The area of land comprised within the original site is shown hatched on the plan at page 12 of the bundle.

(2) An L-shaped area on the north-western boundary of the original site and an irregular shaped area on the southern boundary of the original site – these are shown edged in red on the plan at page 19 of the bundle.

(3) A triangular area on the eastern boundary of the original site shown on the plan at page 61 of the bundle, which I will call the enforcement notice site. (When referring to the two areas referred to in subparagraph (2) above and the enforcement notice site together I will call these three areas together “the additional land”)

4. By an application made by the respondent to the appellant dated 10 May 2017 the respondent applied for the grant of a site licence in respect of the land shown yellow on the application plan attached thereto. This showed that the application was in respect of the original site plus the additional land (but excluding the access roadway which had been part

of the original site). I will call this area, in respect of which the respondent applied for a site licence, the application site.

5. The appellant informed the respondent that no planning permission for use as a caravan site existed in respect of the additional land. The appellant contended that this was a planning matter and that the areas of land outside the original site were in the green belt and required planning permission for any development. The appellant stated that if and when such planning permission was obtained due consideration could be given to increasing the home numbers and the licensed area could be amended accordingly. The appellant did not issue the licence sought by the respondent. The respondent pressed the appellant further about this in December 2017. The appellant responded pointing out that only part of the application site enjoyed planning permission for mobile homes and that in consequence: “The application cannot therefore be considered”

6. So far as concerns the enforcement notice (and stop notice) what had happened in summary is as follows. The appellant, which is both the local planning authority for the purpose of town and country planning legislation and the licensing authority for the purpose of the 1960 Act, perceived that there had been a breach of planning control on the enforcement notice site by reason of the creation of residential pitches and placement of mobile homes on this land. An enforcement notice was served requiring the remedy of the breach of planning control including the removing of hard standings et cetera and removal of all mobile homes and building materials from the enforcement notice site and the restoration of that site to its condition before the breach occurred. An appeal has been brought against that enforcement notice by the respondent’s landlord.

7. On 15 January 2018 the respondent applied to the FTT under regulation 6 of the Mobile Homes (Site Licensing) (England) Regulations 2014 purportedly by way of an appeal against a decision by the appellant not to issue a site licence for the application site.

8. The initial position of the appellant was to seek a stay of the proceedings before the FTT having regard to the absence of planning permission for parts of the application site and having regard to the outstanding appeal to the Secretary of State against the enforcement notice. The matter came before the FTT for a hearing on 9 March 2018. At that hearing the appellant (who was represented by Mr David Matthias QC) contended that the appellant had not made an appealable decision and that the proceedings before the FTT should be struck out on the grounds that the FTT lacked jurisdiction. The respondent (who was represented by Mr Jon Payne) resisted the application for a strike out and also resisted the application for a stay of the proceedings. The FTT gave directions regarding the making of any further submissions and indicated it would decide the matter subsequently upon the documents. This is what it did.

9. In its decision dated 20 April 2018 the FTT referred to section 3(3) of the 1960 Act, pointed out that a local authority may only grant a site licence in respect of land that has the benefit of planning permission for use as a caravan site, pointed out that as regards certain areas comprised within the application site (namely the additional land) there existed no such planning permission and continued as follows in paragraphs 8 to 12 its decision:

“ 8. The respondent asserts that there is no planning permission for the additional land and has in consequence issued stop and enforcement notices requiring a number of parties, including both the applicant and its landlord, to cease the asserted use of the additional land. The applicant’s landlord has appealed both notices on the ground that the additional land has the benefit of planning permission. In doing so the applicant’s landlord appears to rely on two conflated arguments: the first being that it is entitled to a certificate of lawfulness of existing use or development and the second being that the existing planning unit includes the whole of the land in the registered title, which includes the additional land. It is not clear if the applicant has joined in this appeal but it does in any event adopt the landlord’s arguments.

9. The appeal is to the Secretary of State and is currently before the Planning Inspectorate. Mr Matthias told me that a further appeal would lie to the High Court, presumably by way of judicial review.

10. If these proceedings are not stayed this tribunal will have to grapple with the issue that is now before the Secretary of State. In such circumstances I am satisfied that it is appropriate to stay these proceedings for each of the following two reasons:-

(a) The case before this tribunal will turn on a planning issue that is outwith its area of expertise. It is preferable that the planning issue should be first determined by the Secretary of State on the recommendation of a specialist planning inspector with a right of appeal to the High Court; and

(b) It is contrary to public policy to have the same issue determined in two different fora with the risk of conflicting decisions that would undermine confidence in the judicial process.

11. Mr Matthias invites me to strike out the proceedings on the ground that the respondent has not made a decision that is susceptible to appeal before this tribunal. On one level he is right. The decision against which the applicant appeals is contained in an email of 22 December 2017 in which the respondent states that *“because there is a lack of planning permission ... any application for such licence cannot therefore be considered.”*

12. Thus it could be said that the respondent has not refused to issue a licence: it has simply refused to consider the application. In the context of this case that seems to me to be a distinction without a difference. An unreasonable refusal to consider a licence application amounts to a refusal to grant a licence. If it transpires that the additional land does indeed have planning permission the refusal to consider the application is likely, with the benefit of hindsight, to have been unreasonable. In those circumstances I am satisfied that it is premature to strike out these proceedings.

The strike out request can more appropriately be considered when the planning issue has been resolved.”

10. Each party sought permission to appeal against this decision. The FTT refused permission to appeal pointing out that the FTT’s decision was essentially a case management decision and that the effect of the decision was to preserve the status quo whilst the essential planning issue was determined in a more appropriate forum. The parties applied to the Upper Tribunal for permission to appeal and this was granted, the order of the Deputy President being that the London Borough of Havering should be the appellant and Wyldecrest Parks (Management) Ltd should be the respondent and cross appellant. The appeal was ordered to be a review of the FTT’s decision.

11. At the hearing before me the appellant was once again represented by Mr David Matthias QC and the respondent by Mr Jon Payne.

### **The relevant legislation**

12. The Caravan Sites and Control of Development Act 1960 as amended provides so far is presently relevant as follows.

13. Section 1 provides:

“1(1) Subject to the provisions of this Part of this Act, no occupier of land shall after the commencement of this Act cause or permit any part of the land to be used as a caravan site unless he is the holder of a site licence (that is to say, a licence under this Part of this Act authorising the use of the land as a caravan site) for the time being in force as respects the land so used.

(1A) .....

(2) ...[creates an offence for contravention] ...

(3) ...[defines “occupier”] ...

(4) In this Part of this Act the expression “caravan site” means land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with the land on which a caravan is so stationed.”

14. Section 3 of the 1960 Act provides as follows:

#### **“3. – Issue of site licences by local authorities.**

(1) An application for the issue of a site licence in respect of any land may be made by the occupier thereof to the local authority in whose area the land is situated.

(2) An application under this section shall be in writing and shall specify the land in respect of which the application is made; and the applicant shall, either at the time of making the application or subsequently, give to the local authority such other information as they may reasonably require.

(2A) A local authority in England may require a relevant protected site application in respect of land in their area to be accompanied by a fee fixed by the authority.

(3) A local authority may on an application under this section issue a site licence in respect of the land if, and only if, the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site granted under Part III of the Act of 1947 otherwise than by a development order.

(4) If at the date when the applicant duly gives the information required by virtue of subsection (2) of this section he is entitled to the benefit of such a permission as aforesaid, the local authority may (where they are in England and are considering whether to grant a relevant protected site application) or shall (in any other case) issue a site licence in respect of the land within two months of that date or, if the applicant and the local authority agrees in writing that the local authority shall be afforded a longer period within which to grant a site licence within the period so agreed.

(5) If the applicant becomes entitled to the benefit of such a permission as aforesaid at some time after duly giving the information required by virtue of subsection (2) of this section, the local authority may (where they are in England and are considering whether to grant a relevant protected site application) or shall (in any other case) issue a site licence in respect of the land within six weeks of the date on which he becomes so entitled or, if the applicant and the local authority agree in writing that the local authority shall be afforded a longer period within which to grant a site licence, within the period so agreed.

(5A) The Secretary of State may by regulations require a local authority in England to have regard to the prescribed matters when deciding to issue a site licence under subsection (4) or (5) on a relevant protected site application in respect of land in their area.

(5B) The regulations may require a local authority in England, where they decide not to issue such a site licence under subsection (4) or (5), to notify the applicant of the reasons for the decision and of such right of appeal as may be conferred by virtue of subsection (5C).

(5C) The regulations may –

(a) confer on an applicant under this section a right of appeal to [the tribunal] against a decision of a local authority in England not to issue a site licence as mentioned in subsection (5B).

(b) provide that no compensation may be claimed for loss suffered in consequence of the decision pending the outcome of the appeal.

(5D) .....

(5E) .....

(5F) .....

(6) Notwithstanding anything in the foregoing provisions of this section, a local authority shall not at any time issue a site licence to a person who to their knowledge has held a site licence which has been revoked in pursuance of the provisions of this Part of this Act less than three years before that time.

(7) In this Part, “relevant protected site application” means, subject to subsection (8), an application for a site licence authorising the use of land as a caravan site other than an application for a licence –

(a) to be expressed to be granted for holiday use only, or

(b) to be otherwise so expressed or subject to such conditions that there will be times of the year when no caravan may be stationed on the land for human habitation;

whether or not because the relevant planning permission under Part 3 of the Town and Country Planning Act 1990 is so expressed or subject to such conditions.

(8) For the purpose of determining whether an application for a site licence is a relevant protected site application, any part of the application which is for the licence to permit the stationing of a caravan on the land for human habitation all year round is to be ignored if, were the application to be granted, the caravan would be so authorised to be occupied by –

(a) the occupier; or

(b) a person employed by the occupier but who does not occupy the caravan under an agreement to which the Mobile Homes Act 1983 applies (see section 1(1) of that Act).”

15. Section 5A makes provision regarding fees in respect of relevant protected sites. In subsection 5A(5) there is the following definition of a relevant protected site:

“(5) In this Part, “relevant protected site” means land in respect of which a site licence is required under this Part, other than land in respect of which the relevant planning permission under Part 3 of the Town and Country Planning Act 1990 or the site licence is, subject to subsection (6) –

(a) expressed to be granted for holiday use only, or

(b) otherwise so expressed or subject to such conditions that there are times of the year when no caravan may be stationed on the land for human habitation.”

16. The Mobile Homes (Site Licensing) (England) Regulations 2014 make the following provision in regulation 6 in respect of rights of appeal:



“(1) The applicant may appeal to the tribunal against a local authority’s decision not to issue, or consent to the transfer of, a site licence in respect of a relevant protected site within 28 days of receipt of notification of the decision by the local authority.

(2) The appeal shall be a re-hearing of the local authority’s decision and shall be determined having regard to –

(a) any undertaking given to the tribunal in relation to one or more of the matters set out in regulation 3 (4); and

(b) any other matters that the tribunal think are relevant (which may include matters of which the local authority was unaware).

(3) On determining an appeal, the tribunal may –

(a) confirm the local authority’s decision; or

(b) reverse the local authority’s decision, by ordering that the local authority issues a site licence, or consents to the transfer of the site licence, as applicable.”

17. The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 provide in rule 9 for striking out a party’s case in the following terms (so far is presently relevant):

“(2) The Tribunal must strike out the whole or part of the proceedings or case if the Tribunal –

(a) does not have jurisdiction in relation to the proceedings or case or that part of them; and

(b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.”

18. The Town and Country Planning Act 1990 provides in section 191 for the grant of a certificate of lawfulness of existing use or development in various circumstances including if a person wishes to ascertain whether any existing use of land is lawful. A person may make an application to the local planning authority specifying the land and describing the relevant use (or operations or other matter). If the local planning authority are provided with relevant information satisfying them of the lawfulness at the time of the application of the relevant use (or operations or other matter), the local planning authority are to issue a certificate to that effect. It is provided in subsection (7) as follows:

“(7) A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactments, as if it were a grant of planning permission –

(a) section 3(3) of the Caravan Sites and Control of Development Act 1960  
....”

## **The appellant's submissions**

19. On behalf of the appellant Mr Matthias advanced the following arguments.

20. In summary Mr Matthias contended that the FTT erred in law in refusing to strike out the proceedings as misconceived and outwith the terms of regulation 6 of the 2014 regulations. He submitted that as the proceedings were brought outwith the terms of regulation 6 the FTT lacked the jurisdiction to entertain the proceedings and was accordingly bound to strike out the whole of the proceedings pursuant to rule 9(2)(a) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013.

21. It was accepted on behalf of the appellant that a valid site licence existed in respect of the original site. It was true that no formal grant of planning permission had ever been issued in respect of the original site. However the provisions of sections 13 and following of the 1960 Act applied in relation to the original site because it had been in use prior to the relevant dates in 1960. The matter had been regularised appropriately by the application for and grant of site licences under the 1960 Act in respect of the original site.

22. The problem arose because the application site included the additional land in respect of which there existed no planning permission for use of this additional land as, or as part of, a caravan site.

23. It was notable that various attempts have been made in the past by the respondent or their predecessors (or the landowner) to obtain planning permission for use as or as part of a caravan site in respect of various areas lying outside the original site including parts of the additional land. However those attempts have been unsuccessful. The only land in respect of which it was recognised there existed planning permission for use as a caravan site was the original site.

24. As regards the additional land therefore the position was as follows:

(1) there existed no grant of planning permission for use of this land as, or as part of, a caravan site;

(2) there existed no grant of a certificate of lawfulness of existing use or development in relation to the additional land recognising that the additional land was used in the manner claimed by the respondent (namely as recreational land ancillary to the caravan site on the original site) and that this use was lawful; and

(3) the appellant disputed that there was any entitlement to any such certificate of lawfulness even if the respondent made any application for such a certificate (which the respondent had not done and had indicated no intention of doing).

25. Section 3(3) of the 1960 Act was of critical importance in the present case. This provides that when an application for a site licence is made to a local authority in respect of land the local authority may issue a site licence “if, and only if,” the applicant is, at the time when the licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site granted under the relevant statute (otherwise than by a development order).

26. During the course of argument the question was raised as to what was meant by the word “granted” in section 3(3). Mr Matthias submitted that the editors of the Encyclopaedia of Planning Law and Practice were correct in their commentary at paragraph 2-582:

“A formal grant of planning permission, or a certificate of lawful use or development, is a condition precedent to the issue of the site licence under this section. If there has been no formal grant of planning permission (i.e., a grant under Part III of the 1990 Act otherwise than under a development order ....), and there is no certificate (see the 1990 Act, s. 191 (7) (a)), .... then the application for a site licence must be refused.”

27. Mr Matthias accepted that if a relevant planning permission was in place in respect of the additional land then the present application for a site licence would be a relevant protected site application (as recognised in the statutory provisions, see paragraph 15 above) because there is on the original site permanent residential accommodation.

28. Against this background Mr Matthias advanced the following three grounds of argument:

(1) He submitted that the FTT was wrong in concluding that a refusal to issue a site licence and a refusal to consider an application for a site licence was a distinction without a difference in the context of this case.

(2) He submitted that the FTT was wrong in concluding that should it transpire “*that the additional land does indeed have planning permission, the refusal to consider the application is likely, with the benefit of hindsight, to have been unreasonable*”.

(3) He submitted that the decision to refuse to strike out the appeal was misconceived and outwith regulation 6 of the 2014 regulations.

29. Mr Matthias stressed the provisions of section 3(3) and pointed out that the appellant was not obliged to consider the merits of the application for a site licence (or the terms on which any such site licence should be granted if it were to be granted) because at all material times the circumstances were that the appellant could not issue a site licence – it was statutorily prevented from issuing a site licence because of the absence of a planning permission in respect of the additional land for use as a caravan site or as ancillary to a caravan site. In the circumstances of the present case the appellant did not consider the

respondent's application for a site licence at all, save only to examine whether the relevant grant of planning permission existed. It did not exist. The appellant therefore ceased consideration of the application. Section 3(5) recognises that an applicant for a site licence may become entitled to the benefit of a relevant planning permission at some time after making the application and giving the relevant information to the local authority – and in this case the local authority may issue the site licence within six weeks of the date on which the applicant becomes so entitled (unless a longer period is agreed). In the absence of the existence of a relevant planning permission the appellant was entitled to wait and to decide no more than that the necessary planning permission did not yet exist such that the appellant could not issue a site licence.

30. Mr Matthias submitted that in these circumstances the appellant's decision (namely that it could not issue a site licence and that therefore it should not consider further the application for a site licence) did not constitute within regulation 6 of the 2014 regulations a "decision not issue" a site licence. Also, bearing in mind the absence of any relevant planning permission for the additional land, there existed no decision by the appellant not to issue a site licence "in respect of a relevant protected site", because the definition of a relevant protected site in the statute and regulations meant a site in respect of which there existed a relevant planning permission. As a separate aspect of the same point Mr Matthias referred to regulation 2 of the 2014 regulations and to the definition of "applicant" which means (so far as presently relevant) a person making an application for the issue of a site licence in respect of a relevant protected site. As in the present case there was no "relevant protected site" (by reason of the lack of any relevant planning permission) the respondent could not constitute an "applicant" within the 2014 regulations.

31. Mr Matthias submitted that the remedy for the respondent, when faced with the appellant's refusal to consider further the application for the site licence (having noted that there was no relevant planning permission) was not to seek to appeal to the FTT but was instead to regularise the planning situation by obtaining planning permission or a certificate of lawfulness. Once the respondent had obtained planning permission or a certificate of lawfulness (if it was able to do so) the appellant would then be required to make a decision on the application for the site licence.

32. The appellant was the primary decision maker for the purpose of the issue of site licences. The merits of any application, including the question of what conditions should be attached to any site licence, was in the first instance for the appellant to decide. It was not open to the respondent, by means of this appeal to the FTT, to remove this primary decision making responsibility from the appellant and to place it in the hands of the FTT (to be exercised by the FTT if and when the lack of planning permission could be remedied).

33. In all these circumstances the FTT had no jurisdiction to entertain the application and the matter should be struck out.

34. It was noted by Mr Matthias that the respondent argued that no grant of planning permission was required for the purposes of section 3 (3) and that it was sufficient for the respondent to establish that it was entitled (supposing it were to make such an application) to the grant of a certificate of lawfulness in respect of the claimed established recreational use ancillary to the original site. Mr Matthias argued that this was an incorrect analysis, but supposing (against himself) that this was a correct analysis then in these circumstances the appellant in its role as licensing authority under the 1960 Act (which is its status in the present proceedings) must defer to the decision of the local planning authority (namely itself exercising the responsibilities under the planning legislation) and must proceed on the basis that no planning permission existed unless and until one is granted or a relevant certificate is issued. Further, it is not for the FTT to decide planning matters. It would be wrong for the FTT to proceed in the manner argued for by the respondent, namely that the FTT in these proceedings should examine the planning history and should come to a conclusion on the planning merits as to whether the respondent is entitled to a certificate of lawfulness for the claimed ancillary recreational use.

35. If the application for a strike out was to fail, then the FTT's decision to adjourn the proceedings (pending resolution of the planning dispute) should be upheld, rather than the FTT going on (as contended for by the respondent) to deal itself with the planning matters. However this was not proper result because it involved effectively parking the decision upon the issue of a site licence with the FTT (pending resolution of the planning position) in circumstances where the primary decision maker had not made any decision upon the merits. Such an approach would be contrary to the proper approach as shown in the Court of Appeal decision in *R (on the application of Hope and Glory Public House Ltd) v City of Westminster Magistrates and others* [2011] EWCA Civ 31 , see especially at paragraphs 34, 35, 46, 48 and 49.

### **The respondent's submissions**

36. On behalf of the respondent Mr Payne advanced the following submissions.

37. Mr Payne drew attention to section 3(5) which made clear that there was no "gateway" requirement preventing an applicant for a site licence from even making an application prior to the relevant planning permission for the application site being in place. This subsection expressly recognises that an application may be made and that the applicant may become entitled to the relevant permission at some time after giving the relevant information to the local authority – in this case the local authority may issue the site licence in respect of the land within six weeks of the date of the applicant becoming entitled to the relevant planning permission.

38. Accordingly the respondent was entitled to make the application it did for a site licence in respect of the application site.

39. As regards the provision in section 3(3) stating that a local authority is entitled to issue a site licence if and only if the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site “granted” under the relevant legislation, Mr Payne advanced the following submissions. It is not necessary for there to be in existence any formal document granting permission nor any formal certificate of lawfulness. What is necessary is that the circumstances should be such that there is a use which is immune from enforcement by reason of being an established use, for more than 10 years, such that a certificate of lawfulness of existing use would be granted if applied for.

40. In the present case the respondent submits there has for many years (and far more than 10 years) been use of the additional land as ancillary to the caravan site on the original site (the ancillary use being principally use as recreational land). Accordingly use of the additional land in this manner as ancillary to the caravan site is immune from enforcement.

41. In these circumstances the entire application site (not merely the original site) enjoys an established use as a caravan site. It may be that this established use does not entitle the stationing of caravans or the laying of concrete standings et cetera to take place on the additional land, but that does not alter the fact that there exists an established use for the additional land for recreational use ancillary to the original site. It may be noted that section 1(4) recognises that the expression “caravan site” means not only the land on which a caravan is stationed for the purposes of human habitation but also land which is used in conjunction with land on which a caravan is so station.

42. The FTT stayed the proceedings pending the resolution of the enforcement notice appeal. However the enforcement notice was directed towards the stationing of caravans and the carrying out of built development in the sense of laying concrete areas et cetera on the enforcement notice site. Mr Payne submitted that the enforcement notice matters were in effect a red herring in the present case. What was relevant for the present proceedings was the existence of the established use in respect of the whole of the application site for use as a caravan site with ancillary recreational use in respect of the additional land. This was not a matter raised in the enforcement notice proceedings. Mr Payne did not know the grounds of appeal which were being raised against the enforcement notice. In paragraph 26 of his skeleton argument he observed that the planning appeal will be unable to deal with the question of whether there is an established use (other than for the stationing of caravans) for the relevant pieces of land.

43. As regards the appellant’s argument that the application to the FTT should be struck out on the basis that the FTT had no jurisdiction in relation to the proceedings Mr Payne

submitted that the FTT must have such jurisdiction under rule 6 of the 2014 rules. In the absence of jurisdiction the respondent would have no way of challenging what had happened in the present case, namely the appellant deciding not to grant (or, put more broadly, failing to grant) a site licence as applied for by the respondent.

44. On the basis that the FTT had jurisdiction in relation to the proceedings brought before it by the respondent's application, Mr Payne argued that the FTT was wrong to stay the proceedings. It was of benefit to all parties, the appellant as local authority, the respondent as occupier and the residents of the units on the original site that a proper licence should exist over all of the land used for the purpose of the original site – if such a licence existed then proper conditions could apply to the additional land and could be enforced for the benefit of the residents.

45. It was contrary to the overriding objective that proceeding should be stayed. Mr Payne made reference in this regard to *Barnes v Black Horse Ltd and Others* [2012] EWHC 1950 at paragraph 19. The FTT should continue with the case and should decide all relevant matters.

46. If, as Mr Payne contended, a site licence could be granted even though there was no formal document in the nature of the grant of planning permission or the grant of a certificate of lawfulness of existing use, then the proper way forward for the FTT was to consider all the evidence and to decide whether (as contended by the respondent) there was a lawful established use for the additional land, namely use for ancillary recreational land, by reason of long user. If the FTT decided that such an established use did exist the FTT should then go on to decide whether and upon what terms a site licence should be granted and should issue that licence.

47. Mr Payne further contended that if, contrary to his primary submission, a site licence could not be issued unless and until there was in existence a formal document in the nature of a grant of planning permission or the grant of a certificate of lawfulness of existing use in respect of the additional land, then in those circumstances the FTT once again should not adjourn the proceedings (or strike them out) but should instead decide upon the merits whether a site licence should be granted and what should be the terms of the site licence if and when one was to be granted. The FTT only then should adjourn the matter pending the obtaining of the planning permission.

48. The *Hope and Glory* case referred to by Mr Matthias was of no assistance to the appellant. It may be that the statute envisaged that the appellant was the primary decision maker, but in the present case the appellant had had the opportunity of deciding the merits of the site licence application and had declined to do so.

## Discussion

49. I recognise that the decision appealed against was in effect a case management decision by the FTT and that the Upper Tribunal should only interfere with that decision if satisfied the decision was wrong.

50. In deference to the FTT I should record that the argument before the Upper Tribunal has proceeded in one important respect upon a different basis. It was argued before me (but was not argued before the FTT) that the provisions of section 3(3) require the actual grant of a planning permission (or the issue of a certificate of lawfulness of existing use) before the local authority has power to issue a site licence. The FTT was not referred to the commentary in the Encyclopaedia of Planning Law and Practice (see paragraph 26 above) or to any submissions upon those lines.

51. I recognise that, as pointed out by Mr Payne, the existence of a grant of planning permission for the application site is not a prerequisite to the making of an application for a site licence in respect of the application site – section 3(5) contemplates that the relevant grant of planning permission may occur after the application for the site licence has been made. Accordingly the respondent was entitled to make the present application for a site licence in respect of the application site.

52. However in my view the word “granted” in section 3(3) means that a local authority can issue a site licence if and only if the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site that has actually been granted under the 1947 or 1990 Act (or if there has been issued a certificate of lawfulness of existing use, which is to have effect for the purposes of section 3 (3) as if it were a grant of planning permission, see section 191 (7) of the 1990 Act). The opinions expressed by the editors of the Planning Encyclopaedia appear to me to be clearly correct.

53. The scheme of the 1990 Act is that the primary decision maker upon an application for a site licence is the local authority. If no planning permission exists when the application is made then the statute envisages that such planning permission may be granted after the application is made and that, after such grant of planning permission, the local authority is to have six weeks (or longer if agreed) to issue the site licence. The Act does not envisage the matter being put in the hands of the FTT, by way of appeal, before the local authority has had the opportunity of issuing a site licence, which it cannot do until after a planning permission has been granted.

54. However for the purpose of deciding whether the present application to the FTT should be struck out it is necessary to look at the details of the relevant legislation under which it is said such a strike out should be made, rather than merely to look at the general apparent scheme of the Act.



55. At all relevant times the appellant had no power to issue a site licence in respect of the application site. This is because the respondent was not at any relevant time entitled to the benefit of a planning permission for the use of the application site as a caravan site granted under the relevant legislation nor had there been issued any certificate of lawfulness of existing use.

56. A right of appeal is given to an applicant for a site licence. This right of appeal is conferred by regulation 6 of the 2014 regulations. It is a right to appeal to the FTT “against a local authority’s decision not to issue ... a site licence ...”

57. I accept Mr Matthias’ argument that in order for there to be a decision against which an appeal can be brought it must be possible to say that the local authority has decided not to issue a site licence. It is not sufficient for the local authority to have noted that it has no power to issue a site licence (assuming it is right in so noting) and to have informed the applicant of this fact. A decision not to issue a site licence involves the local authority having the power to issue a site licence and deciding not to do so. A mere correct recognition by the local authority that it has no power to issue a site licence is in my view not a “decision not to issue” a site licence and therefore does not permit the applicant to appeal under regulation 6 to the FTT. I am confirmed in this conclusion by the provisions of section 3(5B) which requires the local authority “where they decide not to issue such a site licence under subsection (4) or (5)” to notify the applicant of the reasons for the decision and of the right of appeal. What is contemplated is an appeal against a decision not to issue a site licence under subsections (4) or (5), but those subsections both contemplate that the local authority’s decision is made after the applicant is entitled to the benefit of a relevant planning permission. The statute does not contemplate an appeal being made before the applicant is entitled to the benefit of a relevant planning permission.

58. This being my conclusion upon Mr Matthias’ principal point it is not necessary for me to decide whether Mr Matthias is correct in his submission that in the present case there did not exist an “applicant” or an appeal in respect of “a relevant protected site”. However as at present advised I am not persuaded that a site cannot be “a relevant protected site” prior to the existence in respect of that site of a relevant planning permission. I hold this view having regard to the provisions of section 3(7) when read together with the recognition that an application for a site licence may be made to a local authority prior to the existence of a relevant planning permission for the site (as is recognised in section 3(5)).

59. Accordingly I conclude that the respondent’s application to the FTT must be struck out because it is an application that has not been made within the provisions which allow an appeal to the FTT – it is outwith the provisions of regulation 6 for the reasons mentioned in paragraph 57 above. The FTT only had jurisdiction in relation to the respondent’s application if the application constituted an appeal to the FTT made under regulation 6 of the 2014

regulations. The respondent's application to the FTT did not constitute such an appeal. Accordingly the FTT did not have jurisdiction in relation to the respondent's application.

60. It is true that, as noted above, an application may be made to a local authority for a site licence before a planning permission has been granted. There is, as Mr Payne submits, no gateway requirement of the existence of the planning permission prior to the making of an application. But the fact that the statute recognises in section 3 that there can be an application to the local authority for a site licence prior to the granting of the relevant planning permission does not carry with it in the indication that there can be an appeal to the FTT prior to the granting of the relevant planning permission. It is not permissible for the applicant for a site licence to bypass the primary decision maker by appealing to the FTT, prior to the grant of any relevant planning permission and therefore at a time when the local authority cannot issue a licence, and then asking the FTT to await the grant of any relevant planning permission before reaching its decision.

61. Still less is it permissible for an applicant who is not entitled to the benefit of a relevant grant of planning permission to appeal to the FTT against the fact that the local authority has not issued a site licence (which is something which the local authority had no power to do) and then to invite the FTT itself to make the decision on the planning merits as to whether the applicant would, if it applied for such, be entitled to the grant of a certificate of lawfulness of existing use.

62. Mr Matthias advanced the arguments on behalf of the appellant by reference to rule 9(2)(a) of the 2013 procedure rules. I have upheld his submission that the FTT did not have jurisdiction in relation to the application made by the respondent. In answer to a point raised by me as to whether, supposing the argument of lack of jurisdiction were wrong, any subsidiary argument was advanced that the application to the FTT should be struck out under rule 9(3)(e) on the grounds that there was no reasonable prospect of the respondent's appeal to the FTT succeeding Mr Matthias properly recognised that this had been no part of the appellant's case before the FTT. However he submitted that in these circumstances the respondent's appeal should be struck out under that provision on the grounds that it could not succeed – it could not succeed because as there does not exist any grant of planning permission in respect of the additional land the FTT cannot grant a site licence. Mr Payne submitted that the respondent's appeal should not be struck out because the FTT did have jurisdiction and because the FTT could properly decide upon whether a site licence should in principle be granted and what conditions should be imposed and could then properly await the eventual resolution of the grant of a planning permission.

63. This point does not in fact arise because I have concluded that the appeal brought by the respondent to the FTT must be struck out for want of jurisdiction. If however the point had arisen I would have concluded that there was no reasonable prospect of the respondent's appeal to the FTT succeeding and that the appeal should therefore be struck out under rule

9(3)(e). I so conclude because when the proceedings were brought before the FTT there was no power for the FTT to issue a site licence. The appeal was asking the FTT to do something it could not do.

### **Conclusion**

64. In the result therefore I allow the appellant's appeal and I dismiss the respondent's cross-appeal. I conclude that the respondent's application to the FTT must be struck out under rule 9(2)(a) of the 2013 rules because the FTT did not have jurisdiction in relation to the proceedings.

His Honour Judge Huskinson

A handwritten signature in black ink, appearing to read 'Nicholas Huskinson', with a long horizontal flourish extending to the right.

5 November 2018