Neutral Citation Number: [2024] UKUT 375 (LC)

Case No: LC-2024-524

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REFs: LON/OOAC/PH1/2023/0007, 9, 13, 29, 35, 38, 43, 47 and 53

22 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – PITCH FEE REVIEW – PROCEDURE – whether tribunal bound to allow CPI increase where no response has been made to a pitch fee review application – whether evidence received in one case may be taken into account by tribunal in another case heard at the same time – para.18, Ch.2, Pt.1, Sch.1, Mobile Homes Act 1983 – appeal dismissed

BETWEEN:

ARKLEY ESTATES LIMITED

Appellant

-and-

MS KATHLEEN MADIGAN (1)
MR R AND MRS S WEST (2)
MS SHIRLEY LEVENE (3)
MR TERRY STEWART (4)
MR RAYMOND BALDOCK (5)
MS GILLIAN GRIFFITHS (6)
MRS REEVE (7)
MR SEAN GALLAGHER (8)
MR MARIO MANCINI (9)

Respondents

Arkley Park,
Barnet EN5 3JQ

Martin Rodger KC, Deputy Chamber President

Determination on written representations

The following cases are referred to in this decision:

Fairman v Cinnamon (Plantation Wharf) Ltd. [2018] UKUT 421 (LC)

Peabody Trust v Miss Carole Welstead [2024] UKUT 41 (LC)

Re Sayer [2014] UKUT 283 (LC)

Telchadder v Wickland Holdings Ltd [2014] UKSC 57

Wyldecrest Parks (Management) Ltd v Whitley [2024] UKUT 55 (LC)

Introduction

1. This appeal raises the following two questions concerning pitch fee reviews under the Mobile Homes Act 1983:

    1. Where the occupier of a pitch does not respond to a pitch fee review notice given by a park owner, and does not participate in the tribunal proceedings to determine the appropriate pitch fee increase, is the tribunal obliged to award an increase equivalent to the increase in the relevant inflation index since the last review?

    2. Where pitch fee review applications in respect of a number of pitches on the same park are heard together by a tribunal, is it entitled to have regard to evidence and submissions presented by occupiers who have participated in the proceedings when it determines applications in respect of pitches whose occupiers have not participated in the proceedings?

2. The appeal arises out of a decision of the First-tier Tribunal, Property Chamber (the FTT) handed down (in its final form) on 9 July 2024 in which it determined pitch fees payable in respect of 40 pitches on a protected site at Arkley Park in Barnet with effect from 1 July 2023. The FTT determined that increases of 7.5% were appropriate for six of the pitches and 8.5% for the remainder. That increase was less than the increase in the retail prices index since the last review, which had been 11.4%.

3. The owner of the Park, Arkley Estates Ltd, was granted permission to appeal by the FTT and the appeal has been determined on the basis of written submissions. The appellant relies on submissions prepared by Mr Michael Mullin, who appeared on its behalf at the hearing before the FTT. Only one of the residents, Mr Sean Gallagher who occupies pitch 80, responded to the appeal. Mr Gallagher made short submissions explaining the basis of his continued objections to the proposed pitch fee increase.

The statutory scheme for pitch fee review

4. The occupation of pitches on a protected site is governed mainly by terms implied into agreements between occupiers and park owners by statute and found in Chapter 2 of Part 1 of Schedule 1 of the 1983 Act. The review of pitch fees is dealt with in paragraphs 16 to 20.

5. Paragraph 16 provides that the pitch fee may only be changed "(a) with the agreement of the occupier, or (b) if the appropriate judicial body, on the application of the owner or the occupier, considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee."

6. The procedure for increasing a pitch fee is specified in paragraph 17 which provides for annual reviews from a review date which will either be specified in the written statement of terms or will be the anniversary of the commencement of the agreement (paragraphs 17(1) and 29). The owner must give notice of its proposed increase using a prescribed form at least 28 days before it is due to take effect. By paragraph 17(3), if the occupier agrees to the proposed new pitch fee it becomes payable as from the review date. The implied terms do not say how an occupier's agreement is to be signified or recorded.

7. If the occupier does not agree to the proposed increase, either party may apply to the FTT for an order determining the amount of the new pitch fee.

8. Paragraphs 18, 19 and 20 provide instructions to the FTT on the factors which may be taken into account when conducting a review. The overarching consideration for the FTT is whether "it considers it reasonable for the pitch fee to be changed" (paragraph 16(b)). The factors to which it will have particular regard in determining the amount of the new pitch fee are set out in paragraph 18(1); these include changes in amenities or services which have not previously been taken into account.

9. Paragraph 20 introduces a presumption that the pitch fee will vary within a range set by the change in the retail prices index in the twelve months before the review date. In practice, especially in times of low inflation, the RPI increase has often been regarded as an entitlement, but the much higher price rises of recent years have highlighted the rebuttable nature of the presumption. The applicable index changed (in England) with effect from 2 July 2023, the day after the review date in these appeals, and is now the consumer prices index (CPI) . By paragraph 20(A1), the presumption of an index linked change applies "unless this would be unreasonable having regard to paragraph 18(1)".

10. The application of the statutory presumption and the factors in paragraph 18(1) have been considered by the Tribunal in many cases (for examples see *Re Sayer* [2014] UKUT 283 (LC) and *Wyldecrest Parks (Management) Ltd v Whitley* [2024] UKUT 55 (LC)) and it is not necessary to undertake that exercise again for the purpose of this appeal.

The proceedings before the FTT

11. The 2023 pitch fee review at the Park was commenced by notices given by the appellant to each occupier or resident on 25 May stating that from 1 July their own pitch fee would increase by 11.4%, in line with the increase in RPI since the pervious review. Each notice was accompanied by the information required by paragraph 25A of Chapter 2 of Schedule 1 to the 1983 Act which explains that if the increase is not agreed, the owner must apply to the relevant tribunal for the new pitch fee to be determined.

12. In England the relevant tribunal is the FTT and on 23 August 2023 the appellant filed applications seeking the FTT's determination in respect of 53 pitches where the resident had not yet expressly agreed to the proposed increase. By the time the applications came on for hearing the appellant had reached agreement with a number of these residents and the FTT was asked to consider the pitch fees for 40 pitches.

13. The FTT gave directions for the management of the proceedings which were delivered to every resident. These included a request that any resident who wished to oppose the application should complete a form of reply giving contact details and, if they wished, nominating a representative. Further directions were given after initial responses from residents had been received, but only to those who had already responded.

14. The applications were listed for hearing and the FTT conducted an inspection of the Park immediately before that hearing. A large group of residents nominated one of their number, Mr Clifton, as their representative. Nine residents had no representative and did

not attend the hearing. Those same nine residents had not responded to the FTT's initial directions. They are the respondents to this appeal.

15. At the hearing evidence was given by Mr Clifton on behalf of the residents whom he represented. No evidence was given on behalf of those who had not responded. In his response to the appeal, Mr Gallagher has explained that he had had not participated in the FTT proceedings due to ill health but that he had always objected to the proposed increase.

16. In its decision the FTT dealt with an argument presented by Mr Mullin on behalf of the appellant that, in the case of the applications to which no response had been received the FTT was obliged to approve the proposed RPI increase and was not permitted to take into account evidence which it had seen and heard from others who had participated or even matters which it had observed for itself on its site inspection. For it to do otherwise would be to take sides; it was for each resident to make a case for a departure from the presumption of an RPI increase and if they chose not to participate the Tribunal should not make a case for them.

17. The FTT rejected that suggestion, and gave the following reasons:

> "[W]here a park home owner has not agreed the pitch fee review, the site owner is required to make an application to the Tribunal. On such an application, the Tribunal must be satisfied that the proposed increase is reasonable. Its own observations might well displace the presumption. Its own observations might be informed by the evidence it has heard from other park home owners. The Tribunal is not a rubber-stamp; it has to be satisfied that the presumption should be given effect. We are satisfied that accords with Judge Rodger KC's observations in *Sayer*. We do not consider that is a question of 'descending into the arena', but rather a proper exercise of our jurisdiction as enacted."

The appeal

18. Mr Mullin made submissions in support of a single proposition that the FTT had not been entitled to determine the applications concerning the unrepresented residents on the basis of its own observations during the site inspection and the evidence adduced by the represented respondents.

19. Although Mr Mullin described the nine residents who are respondents to this appeal as "unrepresented", the fact that they were not represented at the hearing and did not attend is less significant than the fact that they did not respond to the applications at all. It is not at all uncommon for the FTT to have to determine pitch fee review applications to which there has been no response, and the proper approach to such applications raises an important point of principle about the nature of the proceedings. Was the FTT right to say that it was not a "rubber stamp" in those circumstances, or is the appellant right that it is for a resident who objects to a proposed increase to make a positive case sufficient to persuade the FTT that the statutory presumption of an RPI increase has been displaced?

20. Although the appellant's submissions were woven together under one heading it is more convenient to consider the point I have just identified as a discrete issue before addressing the more general point about the use which may be made by the FTT of evidence adduced in one application when it is determining another application heard concurrently.

Issue 1: Where a pitch fee review application is unopposed, is the FTT obliged to award an RPI/CPI increase?

21. Mr Mullin submitted that to displace the statutory presumption of an RPI increase introduced by paragraph 20(1A) a resident would have to make a positive case to that effect. They would have to identify factors falling within paragraph 18(1), or other sufficiently weighty matters, to justify a determination that the reasonable pitch fee was something other than the current fee uplifted by the relevant measure of inflation. In the case of the nine respondents they had not done so and had made no response to the application made against them. It was possible that they had not responded because they did not object to the proposed increase.

22. When granting permission to appeal, the FTT suggested that it might be appropriate to regard itself as exercising a jurisdiction akin to 'the rents jurisdiction'. By that I understand the FTT to have been referring to its jurisdiction to determine market rents for assured tenancies under section 14 of the Housing Act 1988. It is likely that it had in mind the recent decision of this Tribunal in *Peabody Trust v Miss Carole Welstead* [2024] UKUT 41 (LC) in which, at paragraphs [47]-[48], I said this:

> 47. The determination of a rent is not simply the resolution of a dispute between private individuals; it also touches on matters of public administration and the FTT's functions are, in part, concerned with the determination of entitlement to housing benefit and universal credit. A duty is imposed on the FTT by section 41A, Housing Act 1988 to assist in connection with housing benefit and universal credit by noting in every determination under section 14 the amount (if any) of the rent which, in its opinion, is fairly attributable to the provision of services. The Chamber President of the Property Chamber of the FTT is required by section 42A to make information publicly available with respect to rents determined by the FTT (including as to the amounts attributable to services).
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> 48. For these reasons it is probably unhelpful to think of rent determinations in terms appropriate to adversarial litigation or to import the principles and conventions of party and party dispute resolution, but if there is an "evidential burden" on either party in connection with a determination under section 14, it can only be on the landlord seeking an increase in rent. It might be preferable to see that as a matter of practicality rather than as a rule of evidence. But whatever material the parties put before it, the FTT is still obliged to determine the rent according to the statutory directions; it could not determine, for example, that since (as often happens) the landlord had not attended the hearing or provided any information the rent could not be increased at all.

23. Mr Mullin submitted that any analogy with the FTT's functions in relation to assured tenancies was misplaced. There are important differences between the two jurisdictions. The most significant, he suggested, being that the FTT is not under a statutory duty to

determine a 'fair' or 'market' pitch fee as it is in its rent jurisdictions under the1988 Act or the Rent Act 1977 rent. Under the Mobile Homes Act 1983 jurisdiction the 'market' or 'fair' level of pitch fee is irrelevant. The pitch fee is a result of the initial bargain between the site owner and the occupier, and the FTT is concerned only with the reasonableness of a change to that fee. Mr Mullin submitted that these were disputes between private individuals and lacked the public elements described in the *Peabody* case. He referred additionally to the fact that there is no equivalent in the 1983 Act of the FTT's express power to "make such inquiry, if any, as it thinks fit" (section 78(2), Rent Act 1977).

24. The points made by Mr Mullin have obvious force in distinguishing the regime for pitch fee review from the procedures under the 1977 or 1988 Acts. But the FTT was not suggesting an equivalence between the different statutes; it was instead hinting that the subject matter of a pitch fee review and the functions ascribed to the tribunal by the 1983 Act might distinguish cases such as this from the determination of ordinary party and party disputes. I think there is more in that suggestion than Mr Mullin allows.

25. It is well known that protected sites regulated by the 1983 Act are occupied disproportionately by residents who are elderly. In *Telchadder v Wickland Holdings Ltd* [2014] UKSC 57 the Supreme Court, when interpreting the termination provisions of the 1983 Act, took judicial notice of statistics showing that, of the 65,000 residents of more than 2,000 protected sites in 2002, about 68% were elderly (see Lord Wilson, at [13], and Lady Hale, at [39]). The residents of protected sites do not have conventional tenancies with conventional statutory protection; they usually own their own mobile homes, often having invested significant capital sums in acquiring them and have only a right to station the homes on the site. The demography of this sector of the housing market, and the absence of conventional security of tenure, no doubt explain the elaborate lengths to which Parliament has gone in the 1983 Act and its subordinate regulations to provide protection for park home residents.

26. One of the most important practical aspects of that protection is the pitch fee review regime. Increases are routinely restricted by reference to inflation and, in the absence of agreement, can only be achieved by the park owner obtaining a determination from the FTT. In my judgment it is significant that under paragraphs 16 to 20 of the implied terms the need to obtain an independent determination by an expert tribunal is triggered by an absence of agreement, rather than by any expression of disagreement by the park resident. Parliament has notably placed no onus on a resident to dispute a proposed increase if he or she wishes to have it scrutinised by the appropriate tribunal. That is in marked contrast to the scheme for increasing the rent payable under an assured tenancy covered by section 13, 1988 Act. An assured tenant who receives notice of a landlord's proposed increase has the opportunity to refer the notice to the FTT but under section 13(6) the rent proposed will become the rent payable unless the tenant makes that referral within a specified time.

27. Had it been intended by Parliament that a pitch fee increase equal to the increase in RPI would always be the outcome where a resident omitted to register an active objection to a park owner's proposal and failed to make an affirmative case before the appropriate tribunal for a lesser increase, it is difficult to see why park owners would have been put to the trouble, delay and expense of making an application to the tribunal under paragraph 17(8) of the implied terms in every case where the proposed increase has not been agreed. It is equally difficult to see why judicial resources would have been allocated to determining the amount of each unopposed increase if Parliament intended that the

presumption of an RPI increase would apply in the absence of an active objection. Had a default RPI increase been intended one would surely have expected the statute to provide for it to apply in every case where a resident had not served a counternotice signifying their disagreement or perhaps had not made an application of their own to the appropriate tribunal requiring it to determine the new pitch fee.

28. It is therefore possible to deduce from the structure of paragraphs 16 to 20 of the implied terms that Parliament must have envisaged a role for the relevant tribunal in every case where a resident does not positively agree to the park owner's proposed increase. The purpose of that role is obvious. It is likely that a significant proportion of residents who receive a notice proposing an increase will do nothing in response to it. The proportion of non-respondents is likely to be greater the older or more vulnerable they are. The statutory requirement for a reference to the tribunal in every case where an increase has not been agreed must therefore be intended as a safeguard or protection for park home residents, especially those who may be less able to protect their own interests.

29. In my judgment the FTT was correct when it said it was not a "rubber stamp" in cases where the park owner's proposal is not opposed. In such cases, as in cases where an increase is opposed, its role is to scrutinise the proposed increase and to determine whether it is reasonable for the pitch fee to increase and, if so, by how much. As the Tribunal has explained in cases such as *Wildcrest v Whitely*, at [24], the FTT's task is not closely defined in the implied terms but the object of its determination is clear:

> "The only standard which is mentioned in the implied terms, and which may be used as a guide by tribunals when they determine a new pitch fee, is what they consider to be reasonable. Paragraph 16 provides that, if the parties cannot agree, the pitch fee may only be changed by the FTT if it "considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee." The obvious inference from paragraph 16 is that the new pitch fee is to be the fee which the tribunal considers to be reasonable."

30. How the FTT is to respond to an individual pitch fee review application to which no response has been received is a different question from whether it is required in those circumstances to determine an increase equivalent to the change in RPI. The reasoning which has led me to the conclusion that the FTT is not a rubber stamp, and is not obliged to allow an RPI increase, would suggest that the tribunal is intended to apply its own judgment to the determination, but there may often be no material on which to base an assessment of the factors identified in paragraph 18(1) of the implied terms. On the other hand, in some areas the members of the panel may have become familiar with a particular site over many years and it may be obvious to them on an inspection that there has been a deterioration in the condition of the park, or a decrease in amenity. If adjoining land which previously provided an attractive outlook has been developed, or if a shop, social club or swimming pool has closed down, the FTT would be entitled to take account of those matters whether or not they were the subject of argument or evidence received from a witness. The important point at this stage is that these are matters for consideration by the FTT; they are not rendered irrelevant by the absence of a positive case by a resident, because the absence of a positive case does not lead to a predetermined outcome without an opportunity for the tribunal to apply its own judgment.

31. For these reasons I answer the first question in the negative. The FTT was not required to award an RPI rate of increase to those pitch fees where the resident had not responded to the application.

Issue 2: Was the FTT entitled to have regard to evidence and submissions presented by residents who had participated in the proceedings when it determined the respondent's applications concerning pitches whose occupiers have not participated in the proceedings?

32. I see this as a rather less complicated issue.

33. The starting point is the FTT's procedural rules, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 3 describes the FTT's overriding objective, which is to deal with cases fairly and justly. That includes dealing with a case in in a way which is proportionate to the importance of the case, the complexity of the issues, the anticipated costs, and the parties' resources (rule 3(2)(a)). It also includes avoiding unnecessary formality and seeking flexibility in the proceedings (rule 3(2)(b)).

34. The FTT has broad case management powers, which are described in detail in rule 6(3), but whose general effect is specified in rule 6(1), namely, that subject to the provisions of the Tribunals, Courts and Enforcement Act 2007, or any other enactment, the FTT may regulate its own procedure. In doing so it must give effect to the overriding objective.

35. Amongst the specific examples of case management powers listed in rule 6(3)(b) is the power to consolidate two or more sets of proceedings raising common issues or hear them together.

36. Also of relevance is rule 18, which is concerned with disclosure, evidence and submissions. In particular, the FTT may admit evidence whether or not it would be admissible in a civil trial (rule 18(6)(a)).

37. When it gave directions for the hearing of the 40 or more applications which had not been resolved by agreement, the FTT listed them all for hearing at the same time. It did not say so in terms, but it was obvious from the directions it gave that it intended to hear the applications together. Thus, it directed the preparation of a single bundle of documents for the use of the parties containing all of the applications and the documents filed in support, one copy of which was to be delivered to each resident. Without saying so, the FTT had used its power under rule 6(3)(b) to hear two or more sets of proceedings which raise the same issue together.

38. The appellant was not in any doubt that that was what the FTT had done. In correspondence before the hearing it had requested a direction that any resident who did not reply to the application would be deemed to agree to the proposed increase, but this was refused. Mr Mullin then made submissions to the FTT in writing that the applications were self-contained and related to individual contractual agreements between the park owner and individual residents. They must therefore each be determined based on the arguments and evidence put forward in the individual applications. He suggested that the FTT would be taking sides ('descending into the arena') if it took account of evidence in one case when it determined the outcome of a case where there had been no evidence.

39. It follows that the FTT's approach, taking account of the evidence and submissions of Mr Clifton presented on behalf of the residents whom he represented when it determined the applications made in respect of residents whom he did not represent, involved no unfairness to the appellant. Mr Mullin was able to ask any questions he wished of Mr Clifton, respond to his arguments and present his own arguments in support of the pitch fee applications. There is therefore considerable artificiality and technicality in the submissions on this appeal. The appellant's case is not based on alleged unfairness but on the suggestion that by taking account of the evidence it had heard the FTT was being partisan and adopting an impermissible inquisitorial approach.

40. In support of that submission Mr Mullin referred to a decision of this Tribunal (HHJ Gerald) in *Fairman v Cinnamon (Plantation Wharf) Ltd*. [2018] UKUT 421 (LC) which was concerned with a dispute over the apportionment of service charges. He plucked part of paragraph [63] of the Tribunal's decision, to the effect that the FTT "is not an inquisitorial tribunal but makes its decision based upon the issues, arguments and evidence before it." But he omitted the next sentence: "[I]t no doubt could of its own volition make inquiries and raise issues and call for evidence not ventilated by either party". What is important is that the parties hear the evidence on which the FTT bases its decision and have the opportunity to respond to it. In this case the appellant clearly had that opportunity.

41. In any event, the FTT did not adopt an inquisitorial approach, it made use of the evidence it heard, which dealt with matters of equal relevance to the pitch fees of participating residents and those of non-participants. For the FTT to have determined the applications in respect of pitches whose occupants had not responded to the applications as if it was ignorant of what it had heard during the hearing and seen on its inspection would not have been consistent with its overriding objective of dealing with cases fairly and justly. It would have been inflexible and unnecessarily formalistic. It would have prevented the panel from carrying out their function of determining whether it was reasonable for the pitch fees to be increased and by how much.

42. I should add, in response to one submission made by Mr Mullin that what the FTT observed during its inspection was itself evidence and required no elaboration or exposition by a witness. There is no logic or sense in the proposition that a description or photograph of the Park showing the A1 trunk road through the gap left where the appellant had chopped down boundary trees rather than have the expense of maintaining them, would have been admissible in evidence, but that the same view observed by the panel in person could not properly be taken into account. If there is some rule of civil litigation to that effect Mr Mullin did not refer to it; if such a rule exists, it does not apply in the FTT by reason of rule 18(6)(a) of the FTT's Rules.

43. For these reasons I answer the second question raised by the appeal in the affirmative. The FTT was entitled to take account of the evidence it heard and saw during the hearing when determining the pitch fees of residents who did not participate in the proceedings.

44. The appeal is therefore dismissed.

Martin Rodger KC,

Deputy Chamber President

22 November 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.