UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES - Pitch Fee Review - water - whether pitch fee included charge for the supply of water – whether annual RPI increase to apply to the whole pitch fee or only to that part not referable to the supply of water - Mobile Homes Act 1983 - Water Industry Act 1991, s.150 - Water Resale Order 2006 - appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

BY

MR JOHN SAYER **Appellant**

Re: 48 Woodland View,
Stratton Strawless,
Norwich
Norfolk NR10 5LT

A decision determined on written representations

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The following case is referred to in this decision:

Walker v Badcock [1997] 2 EGLR 163 (CA)

DECISION

Introduction

1. Stratton Strawless ("the Park") is a protected site within the meaning of the Mobile Homes Act 1983 providing permanent pitches for 129 mobile homes. One of those pitches, at 48 Woodland View, is the site of a mobile home belonging to the appellant, Mr Sayer. The Park is owned by PCSW Ltd, a company incorporated by and bearing the initials of Mr P C Waller, the original owner of the Park.

2. On 25 November 2012 PCSW gave notice to Mr Sayer (and I assume to the occupiers of other pitches on the Park) that with effect from 5 January 2013 it proposed an increase of 3.2% in the fees payable for the occupation of their pitches. That increase was in accordance with the increase in the retail prices index in the previous twelve months.

3. The proposed increase was objected to by Mr Sayer on two grounds, which were considered by a Residential Property Tribunal ("the RPT") at a hearing on 13 May 2013. The second of those grounds concerned the basis of payment for water supplied to the pitches. The RPT handed down a decision adverse to Mr Sayer on both grounds on 4 June 2013 and confirmed PCSW's entitlement to increase the pitch fee in proportion to the increase in the RPI since the last pitch fee review. On 29 July 2013 the RPT (which by then had become the First-tier Tribunal of the Property Chamber) granted permission to appeal its decision on one of the two issues.

4. Although PCSW participated fully in the hearing before the RPT, it has chosen not to respond to the appeal. At Mr Sayer's request the appeal has been dealt with on the basis of his written representations.

The Issue

5. Mr Sayer contends that:

(a) the pitch fee includes a charge for the supply of water; and

(b) the RPI increase to which the site owner is otherwise entitled cannot lawfully be applied to that part of the pitch fee referable to the supply of water because the Water Resale Order 2006 prohibits the making of a profit by a re-seller of water; and

(c) the Park owner should provide information to enable the charge for water comprised in the pitch fee to be identified leaving the balance of the pitch fee alone to be the subject of the RPI increase.

6. The sole issue in this appeal is whether Mr Sayer is correct in these contentions.

7. The sums in issue in this appeal are very small and the RPT granted permission to appeal (rightly in my view) on the basis that the issue was of some general significance. Mr Sayer's real concern in seeking to exclude water charges from the RPI increase is to achieve transparency in relation to those charges which, he says, he has consistently been denied by PCSW.

The facts

8. From the facts found by the RPT and the documents submitted by Mr Sayer in support of the appeal, I take the following facts as the basis of my decision.

9. Stratton Strawless was described by the RPT as a well-presented residential park homes site comprising 129 units. It is located in the grounds of Stratton Strawless Hall, Norwich.

10. Water is supplied to the Park through a single metered pipe which also supplies a tap in the car park, a number of flats at Stratton Strawless Hall, and two dwellings occupied by Mrs Waller-Barrett and her father, who manage the Park.

11. In January 1984 the pitch known as 48 Woodland View was the subject of an agreement between Mr Waller as site owner and a Mr Beresford who thereafter was entitled to site a mobile home on the pitch. The benefit of that agreement was assigned to Mr Sayer on 4 December 2003.

12. The agreement is in writing and includes two covenants by the occupier of the pitch which are relevant to this appeal. By clause 3 of Part 4 of the agreement the occupier undertook:

> "(a) to pay to the owner an annual pitch fee of £7.50 per week subject to review as hereinafter provided by equal weekly payments in advance on the Saturday of each week
>
> (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 charges in respect of electricity, gas, water, telephone and other services."

13. Although clause 3(b) of the agreement obliged the occupier of the pitch to pay charges in respect of water, the RPT found that no such charges had ever been levied. At paragraph 21 of its decision the RPT said this:

> "However, what is clear in this case is that no separate charge has ever been made for what would historically have been very low water costs. Instead, each year the pitch fee has increased by small steps assessed by the site owner initially, and then by applying the RPI measure of inflation. Water has never been charged for separately but it could be, just like electricity and gas."

14. Although water has never been charged for separately, it has been acknowledged by PCSW that the cost of water is reflected in the pitch fee. In support of his appeal Mr Sayer produced a

notice he had received in 2003 informing him of the Park owner's proposed increase in pitch fees which took effect on 9 January 2004. The increase for a single unit was to be from £80.81 to £84.05 per calendar month of which it was said that "15p of this increase is for water rates and electricity maintenance/lighting etc." Although this document appears not to have been provided to the RPT, it is not inconsistent with the evidence given by Mrs Waller-Barrett, the daughter of Mr Waller, (the original site owner) that "historically her father used to charge just 60p-70p per week for water." In his statement of case, Mr Sayer refers to this evidence in support of his assertion that a "discrete element" of the pitch fee was attributable to the supply of water. As the RPT found however, the 60p-70p referred to was not charged separately from the pitch fee, but as is clear from the notice relied on by Mr Sayer and from the evidence of Mrs Waller-Barrett it was recognised that the pitch fee included payment for the supply of water.

15. In April 2013 charges incurred by PCSW in procuring the supply of water to the Park increased by 17%. PCSW made no attempt to pass the full amount of that increase on to the occupiers because, notwithstanding the terms of the agreement, it regards the water charge as part of the pitch fee which may not increase by more than the annual increase in RPI since the last pitch fee review.

The relevant statutory provisions

16. The Mobile Homes Act 1983 applies to any agreement under which a person is entitled to station a mobile home on land forming part of a protected site and to occupy that home as his or her only or main residence.

17. Section 2(1) of the 1983 Act is designed to secure consistency in the terms on which pitches on protected sites are occupied; it achieves this by implying certain terms into agreements to which the Act applies. In this case the implied terms are those set out in Chapter 2 of Part 1 of Schedule 1 to the Act (as amended). Paragraphs 16 to 20 concern the pitch fee, an expression defined in paragraph 29 of Part 1 of Schedule 1 as meaning:

> "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, sewerage or other services, unless the agreement expressly provides that the pitch fee includes such amounts."

18. Paragraph 16 of Part 1 of Schedule 1 provides that the pitch fee can only be changed in accordance with paragraph 17, either with the agreement of the occupier, or if the "appropriate judicial body [in this case the RPT] considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee."

19. Paragraph 17(1) provides that the pitch fee shall be reviewed annually as at the review date, which is a date specified in the written agreement under which the pitch is occupied or, if no date is specified, is the anniversary of the date the agreement commenced.

20. If a review of the pitch fee is not agreed, and it is therefore necessary for it to be referred to the RPT for determination, the approach to be applied to determining the new fee is described in paragraphs 18, 19 and 20 of Part 1 of Schedule 1.

21. These paragraphs do not provide a comprehensive code for the determination of the pitch fee. Instead, paragraph 18(1) identifies certain specific matters (concerning expenditure on improvements by the owner, the amenity of the site, and statutory changes since the last review date) and directs that "particular regard shall be had" to them. Paragraph 19 identifies one further factor which is not to be taken into account (costs incurred by the owner in expanding the site). Paragraph 20(1) then introduces a presumption which is to operate in the determination of the new pitch fee, namely:

> "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."

22. The effect of these provisions as a whole is that, unless a change in the pitch fee is agreed between the owner of the site and the occupier, the pitch fee will remain at the same level unless the RPT considers it reasonable for the fee to be changed. If the RPT decides that it is reasonable for the fee to be changed, then the amount of the change is in its discretion, provided that it must have "particular regard" to the factors in paragraph 18(1), and that it must not take into account of the costs referred to in paragraph 19 incurred by the owner in connection with expanding the site. It must also apply the presumption in paragraph 20(1) that there shall be an increase (or decrease) no greater than the percentage change in the RPI since the last review date unless that would be unreasonable having regard to the factors in paragraph 18(1). In practice that presumption usually means that annual RPI increases are treated as a right of the owner.

23. Although annual RPI increases are usually uncontroversial, it should be noted that the effect of paragraph 20(1) is to create a limit, by reference to RPI, on the increase or decrease in the pitch fee. There is no invariable entitlement to such an increase, even where none of the factors referred to in paragraph 18(1) is present to render such an increase unreasonable. The overarching consideration is whether the RPT considers it reasonable for the pitch fee to be changed; it is that condition, specified in paragraph 16(b), which must be satisfied before any increase may be made (other than one which is agreed). It follows that if there are weighty factors not referred to in paragraph 18(1) which nonetheless cause the RPT 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 review date may be displaced.

24. The supply of water, gas and electricity is regulated by statutory regulators. OFWAT, the water regulator (described in its own literature as a "non-ministerial government department") has power under section 150 of the Water Industry Act 1991 to fix maximum charges which may be made by a re-seller of water to a customer.

25. The Water Resale Order 2006 came into effect on 31 March 2006 and revoked a previous order in similar terms, the Water Resale Order 2001. The general effect of the Orders is to require

that anybody re-selling water or sewerage services may charge no more than the amount they are charged by their own water company, plus a reasonable administration charge. If the re-seller charges more than the average household bill for the region, he or she must be able to justify the higher amount according to rules contained in the Order. The 2006 Order obliges a re-seller to provide specified information about how the charge which a purchaser is asked to pay has been calculated or estimated. If such information is not provided on request the charge recoverable by the re-seller from the purchaser is limited to half of the average household bill for the region.

26. Paragraph 6 of the 2006 Order imposes maximum charges which a "re-seller" may recover from a "purchaser" for metered or un-metered water supplies. The expression "purchaser" is defined in paragraph 5 of the Order as "a person who occupies any dwelling and who buys from a re-seller any water or sewerage services". A "re-seller" is also defined and includes any person who is not a statutory water undertaker who provides a supply of piped water to any purchaser.

The RPT's decision

27. The RPT referred to the 2006 Order before reaching its conclusion (recited in paragraph 13 above) that no separate charge had ever been made for water at the Park. In light of that conclusion the RPT went on, at paragraph 22 of its decision, to say this:

> "The Tribunal is satisfied that the site owner is not re-selling water at a profit and has not identified any specific element of the pitch fee attributable to that as opposed to any other service provided by it. The site owner is therefore entitled to increase the pitch fee only by inflation and this means the whole of the pitch fee."

28. In paragraph 24 of its decision the RPT provided an alternative justification for its conclusion that the RPI increase was applicable to the whole of the pitch fee:

> "If the Tribunal is wrong in its principal finding that the site owner has not been re-selling water as part of the pitch fee then it rejects Mr Sayer's suggestion that an RPI increase cannot apply to this discrete element as well. If the site owner can demonstrate that the true cost equalled or exceeded that element and has increased in the relevant period by at least the increase in the RPI then it will not have profited from re-selling the water."

The appeal

29. In his statement of case Mr Sayer challenged the RPT's conclusion that the site owner was not a re-seller of water subject to the restrictions imposed by the 2006 Order. He contended that there was a discrete element of the pitch fee attributable to the supply of water and referred to the 2004 notice of increase which attributed 15p of that year's increase to "water rates and electricity maintenance/lighting etc". The site owner was in a position to provide information which would identify how much of the pitch fee was attributable to the supply of water but refused to do so even when directed by the RPT to identify in its statement of case the amount of any charge for water supply included in the pitch fee.

30. Mr Sayer also pointed to the fact that the site owner's application to the RPT for the 2013 pitch fee review provided an affirmative answer to the question: Does the pitch fee include payment for water?

31. Mr Sayer also referred to the 2006 Order and to a statement on the OFFWAT website that:

> "If you pay for your water as part of your rent or pitch fee, your re-seller should show you how much your water charges are so that you know how much you are paying."

32. Mr Sayer next relied on the owner's obligation under paragraph 22 of Part 1 of Schedule 1 to the 1983 Act to provide (free of charge) if requested by the occupier documentary evidence and an explanation in support of any charges for gas, electricity, water, sewerage or other services payable by the occupier to the owner under the agreement.

33. Mr Sayer commented on a suggestion by the RPT that, for the sake of both transparency and full recovery of the true cost of water, the site owner should implement the term of the agreement (clause 3(b) of Part 4) which obliges the occupier to pay charges in respect of water in addition to the pitch fee. Mr Sayer suggested that if water charges were in future to be levied separately then the pitch fee which currently contains payment for water, should be reduced by a corresponding amount. It would, he contended "be clearly incorrect" for the site owner to charge separately for water in addition to the current pitch fee.

Discussion

34. The written agreement between the parties provides expressly for the payment of water charges in addition to the payment of a pitch fee. The written agreement was clearly based on the statutory implied terms and, had it been implemented, there would have been no doubt that the pitch fee itself did not include any payment for the supply of water. If the Park owner had chosen to levy water charges then there would equally have been no doubt that, under the terms of the 2001 and 2006 Orders, Mr Sayer would have been a "purchaser" and the Park owner would have been a "re-seller". Mr Sayer would have been entitled to call for the information concerning the manner in which the charge had been calculated provided for by the 2006 Order and, in default of such a request being satisfied, he would have benefited from a reduced charge.

35. However, as the RPT found, the terms of the agreement were not implemented and no separate charge for water has ever been levied in addition to the pitch fee. The explanation for this may be, as the RPT suggested in paragraph 21 of its decision, that historically water costs were very low. Water costs are no longer insignificant and in recent years have risen faster than the RPI Index.

36. There is no evidence of any express agreement between Mr Sayer and the Park owner, or between any other occupier and the Park owner, that the contractual entitlement to levy a separate water charge should be varied and replaced by the treatment of water as part of the total consideration for which the pitch fee was payable, but in practice that is the system which operated by

the time Mr Sayer acquired his pitch. In the absence of any express agreement to the contrary, and given the informality of the arrangement, it would in my judgment be open to either Mr Sayer or PCSW to require that the original contractual bargain be implemented thereby allowing charges for water to be collected in addition to the pitch fee. I agree with the RPT that no variation of the agreement would be required to achieve that result, since it is what the parties originally agreed. As the pitch fee has already been reviewed on the assumption that it provides consideration for both the pitch itself and the water supplied to it as well as any other services and amenities, it would be necessary for the party wishing to revert to the strict contractual position to give notice of that requirement so that the pitch fee could be adjusted appropriately at the next review date, with the introduction of water charges taking effect at the same time.

37. In my judgment it is not possible to identify a separate element of the pitch fee which represents the consideration for the supply of water. As matters have evolved over time a single fee has become payable for all of the benefits received by the occupier under the agreement. The only additional charges which have been referred to are those for gas and electricity. The whole pitch fee has come to be paid for the totality of the rights, benefits and services received under the agreement and it would not be legitimate to attempt to isolate a charge for a particular element of that total consideration. In particular I do not think it would be legitimate to assume, as Mr Sayer does, that the water component of the pitch fee can be ascertained simply by apportioning the water bill paid by the Park owner amongst all those who receive their water from the same metered supply. As the RPT recorded, the water bill has increased at a faster rate than RPI with the result that the water bill has consumed a greater proportion of the pitch fees collected by the site owner over the years. Mr Sayer himself recognised this in his submissions to the RPT. He is recorded as submitting that no increase at all was allowable in the element of the pitch fee referable to water charges "so that in time it might come to consume entirely the whole pitch fee and destroy the profitability of the site owner's business".

38. In my judgment the RPT was correct to approach the effect of the 2006 Order on the basis that water was not charged for separately. On that basis I do not consider that the 2006 Order applies to the supply of water by the site owner to Mr Sayer. Mr Sayer is not a "purchaser" within the definition in paragraph 5 of the 2006 Order because he does not buy water from the site owner in the manner contemplated by the Order. Mr Sayer receives water in return for payment, but he does so only as part of a wider bargain which includes the right to station his mobile home on the pitch (together with any other rights and services conferred by the agreement) in return for which he pays a single undifferentiated and indivisible pitch fee. It is impossible to apply the maximum charge provisions of paragraph 6 of the Order to such an arrangement.

39. I do not consider that the statement on the OFFWAT website, on which Mr Sayer relied, is a comprehensive statement of the law (which it does not purport to be) rather than a statement of good practice, and I do not consider that it applies to arrangements in which water is received as part of the services for which the pitch fee is payable without any separate amount being attributed to it.

40. Although the implied term imported into the agreement by paragraph 22 of Schedule 1 to the 1983 Act requires the owner to provide documentary evidence and an explanation of any charges for water or other services payable by the occupier to the owner under the agreement, I am satisfied that

in this case there are no such charges. The only charge is the single pitch fee for the totality of the services provided. It is a misconception to equate the costs incurred by the site owner with a charge to the occupier.

41. For so long as water charges continue to be subsumed into the pitch fee the effect is that the Park owner is restricted to the RPI increase in the pitch fee irrespective of the increase in the cost to it of supplying water to the Park. Correspondingly, the owner is not required to provide the information which would be required by the 2006 Order if a separate charge was levied.

42. As I have already suggested, it seems to me likely that either party could inform the other that, with effect from the next review date, they wished to revert to the strict terms of the agreement, with a separate charge being made for water in addition to the pitch fee. If that course is taken by either party, it is to be hoped that they will reach agreement on an appropriate adjustment of the pitch fee to reflect the new separate charging arrangement. If agreement cannot be reached it is likely that the First-tier Tribunal would have to consider whether the change in the basis on which water was supplied (albeit that it was a return to the basis originally intended) was sufficient in itself to make it reasonable for the pitch fee to be changed from the next review date.

43. For the reasons I have tried to explain at paragraph 23 above it does not seem to me that such a change need necessarily be constrained by the change in RPI since the last review date. Indeed, even if the RPI increased during the year the ceiling which the rate of increase represents is unlikely to be relevant to determining the adjustment in the pitch fee appropriate to reflect a significant change in the way in which water charges are dealt with in practice. Such a change would transfer both the cost of water and the risk of above-RPI increases in future from the Park owner to the individual occupier; that is likely to represent a benefit to the Park owner which it would be necessary for the tribunal to take into account in considering whether any increase or reduction in the pitch fee was reasonable.

44. Equally, however, it cannot be assumed that the appropriate adjustment would be as simple as Mr Sayer suggested (i.e. that an apportioned part of the total water bill for the year should be deducted in full from the current level of pitch fee). It would be for the First-tier Tribunal to consider in the light of the previous levels of pitch fee, and the cost incurred by the site owner for the supply of water at that time and subsequently, what adjustment was appropriate. The task would not necessarily be a straightforward one but its potential uncertainty derives from the omission of the 1983 Act to identify any clear valuation principle by which pitch fees are to be adjusted; as the Court of Appeal noted in *Walker v Badcock* [1997] 2 EGLR 163: "There are no precise rules laid down. It is left to the arbitrator or judge to decide." The task now falls to the Property Chamber of the First-tier Tribunal.

45. It follows that I am satisfied the RPT came to the correct conclusion in this case. The RPI increase which it otherwise considered to be appropriate was properly applied to the whole of the pitch fee fixed by agreement in the previous year and I therefore dismiss the appeal.

Martin Rodger QC

Deputy President

24 June 2014