UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – administration charges – entitlement of park owner to recoup costs of electricity, LPG and sewerage services – Mobile Homes Act 1983 – appeal and cross-appeal both allowed in part

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

BETWEEN:

P R HARDMAN & PARTNERS

Appellants

and

(1) BRENDA GREENWOOD
(2) MARILYN FOX

Respondents

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

Before: Martin Rodger QC, Deputy President

Sitting at: Lincoln County Court
on
22 September 2015

Miss Helen Gardner instructed by Tinn Criddle Hall, Solicitors, for the appellant
Mr Alan Savory of the Independent Park Homes Advisory Service for the respondents

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The following cases are referred to in this decision:

Britaniacrest Limited [2013] UKUT 0521 (LC)

Warfield Park Homes Ltd v Warfield Park Residents Association [2006] EWCA Civ 283

Introduction

1. This appeal raises once again the issue of whether the terms implied into pitch agreements by the Mobile Homes Act 1983 (as amended) oblige the occupiers of mobile homes on protected sites to contribute towards costs incurred by park owners in the provision, administration and maintenance of electricity, gas and sewerage services as well as paying for the cost of the gas, electricity or sewage disposal itself.

2. In *Britaniacrest Limited* [2013] UKUT 0521 (LC) the Tribunal determined that in the absence of an express provision in the pitch agreement a park owner was not entitled to levy separate charges to cover the cost of reading gas, electricity and water meters or of carrying out administrative tasks in connection with the supply of utilities to the pitches. In this case the First-Tier Tribunal (Property Chamber) ("the F-tT") applied *Britaniacrest* and ruled that the park owner had not been entitled to add a surcharge or service charge to the price it paid to third party utility providers for electricity, LPG (liquefied petroleum gas) and sewerage services when billing occupiers for those services. The park owners now challenge that decision in an appeal for which permission was granted by the F-tT.

3. The F-tT also directed that over-payments of charges relating to the supply of electricity, LPG and sewerage services should be repaid by the appellants to the respondents by way of set-off against sums (including pitch fees) falling due over the next three years, with any balance not repaid in full by the end of that period then to become payable as a lump sum. There was no challenge by the appellants to that aspect of the decision.

The facts

4. From the decision of the F-tT and from the appeal documents I take the following facts as the basis of my consideration of this appeal.

5. Shortferry Caravan Park at Fiskerton in Lincolnshire is a protected site for the purpose of the Mobile Homes Act 1983 and has been operated by the appellants (a family partnership) since 1981. As found by the F-tT the Park is a mixed use site licensed for 100 touring caravans or tents, 337 holiday homes and for an additional 67 mobile homes used as permanent residences, 5 of which are occupied by the appellants' family and staff. The appellants also own and operate an adjoining public house, The Tyrwhitt Arms which both the permanent residents of the Park and short term visitors are able to enjoy. The other facilities of the Park include a series of fishing lakes, a swimming pool, a laundry, a shower block and several public toilets. The common areas and roads running through the Park are provided with street lights, and the Park has its own private sewerage system.

6. The respondents, Mrs Greenwood and Mrs Fox, are the occupiers of two of the permanent pitches on the Park, on which they station their mobile homes.

7. Each pitch is provided with a supply of LPG piped from a bulk tank. The tank is filled by an independent supplier whose charges are met by the appellants; those charges include the cost of renting the LPG tank itself. The supply to the permanent pitches is individually metered and the appellants pass on the cost of the LPG consumed to the occupiers of those pitches by quarterly billing. The unit rate which the appellants charge to the occupiers for the gas supplied to them has been set by the appellants at a level intended to include a contribution towards the cost of providing gas to the communal areas, and to the costs incurred by the appellants in reading meters, tank rental, maintenance of the tank compound and underground pipes, an interest charge (as the appellants must pay for the LPG when it is supplied but are reimbursed quarterly), and a further administration fee.

8. As a proportion of the cost of the gas these surcharges are significant. Since May 2008 the cost to the appellants of LPG delivered to the Park has varied between 34p per litre and 47p per litre. The charge to pitch occupiers has varied during the same period between 49p per litre and 71p per litre. The last figures I was shown suggest that in February 2014 the appellants were paying 44p per litre for LPG and selling it on the occupiers of the permanent pitches at 68p per litre. Until the F-tT directed disclosure of the invoices which the appellants receive from their own suppliers, the scale of these surcharges was not apparent. Even now the charges themselves have not been itemised as part of the "price structure" supplied by the appellants to the respondents which gives only the cost of supply, the charge to occupiers and a list of the matters covered by the margin between those figures (which the appellants refer to as the "service charge element").

9. Electricity is supplied to the Park through a single mains supply which is then sub-divided to serve both the pitches and the communal facilities, including the laundry room and swimming pool, and to operate the sewage system and street lighting. The permanent pitches each have a separate meter. The meters do not distinguish between day and night supplies of electricity although the tariff negotiated by the appellants with their supplier charges these at different rates.

10. The cost of electricity purchased by the appellants varied between 2008 and February 2013 from 9p per unit to 11p per unit. From May 2013 a differential day and night rate was negotiated which varied from 9.3p to 15p per unit at the day rate and from 5.9p to 9.3p per unit for the night rate. The appellant charged the pitch occupiers for electricity at rates varying between 12p per unit and 28p per unit between 2008 and 2014. The appellants regarded the difference between the price they paid and the rate they charged as a "service charge element" intended to recoup the cost of electricity supplied to the communal areas, reading meters, standing charges and meter fees as well as an administration fee, the cost of calling out electricians to resolve any problems and the cost of maintaining a computer programme to assist with billing. Once again, at the time they were levied, the extent of these charges was not apparent from the invoices delivered to the occupiers.

11. With effect from 1 January 2003 the maximum price at which electricity may be resold has been set by the energy regulator, Ofgem, and is the same price as that paid by the person re-selling it, including any standing charges.

12. Having obtained advice the appellants acknowledged to the F-tT that the prices which they had charged to the respondents exceeded what was permissible at all time with which this appeal was concerned. Mrs Bosworth, one of the partners, told the F-tT that they had misunderstood the maximum resale price regime and that if the appellants had appreciated that the restriction applied they would have recovered the same amount through a separate service charge. She felt that the residents had only been charged as much as the appellants would have been entitled to recover by that alternative method and explained that if the appellants were required to repay the sums which the Park residents claimed to have been overcharged without any way of adjusting the billing so as to recover the "service charge" element by other means, "that would result in a huge loss to the [appellants] and would, in all the circumstances be unfair".

13. The sewerage system operating at the Park is a private system which dates from 1998 but was extended in 2008 when new sewage tanks were installed. There are now three sewage treatment plants with six tanks; one of these tanks serves 39 of the permanent pitches while the other permanent pitches are served by tanks which also serve the holiday pitches. The costs incurred by the appellants in connection with sewerage include the cost of a permit from the Environment Agency, charges levied by a contractor for emptying the tanks, charges by a second contractor for servicing the tanks every quarter and the cost of electricity required to operate the system. The appellant sets its own quarterly sewerage charges to the occupiers with a view to recouping a contribution towards these expenses. In addition it is a condition of the Environment Agency permit that each tank is monitored twice daily, a task which is undertaken by the appellants' own employees. The monitoring requires about two hours per day of employees' time although Mrs Bosworth explained in her witness statement that this cost is not passed on to the occupiers.

14. The annual charges to the occupiers of permanent pitches for sewerage services has varied from £88 per year in 2008 rising to £198 per year in 2014.

The application to the First-tier Tribunal

15. In May 2013 the respondents asked the appellants for details of the gas, electricity and sewerage charges which they were being asked to pay. They eventually received a breakdown of the costs incurred by the appellants. Having taken advice the respondents considered that the sums which they had been paying since 2008 included charges for services which ought under the terms of their written statements to have been the responsibility of the appellants.

16. Section 4 of the 1983 Act (as amended) confers jurisdiction on the F-tT:

> "In relation to a protected site …
>
> (a) to determine any question arising under this Act or any agreement to which it applies; and
>
> (b) to entertain any proceedings brought under this Act or any such agreement."

17. On 24 June 2014 the respondents applied to the F-tT under section 4 for a determination of the following questions:

(a) whether the costs charged for electricity, sewage and LPG were the responsibility of the residents; and

(b) whether the residents were entitled "to recompense for site owners overcharging".

The written statement

18. The terms of occupation of protected sites are regulated in part by agreement between the parties and in part by the 1983 Act. The Act provides a minimum set of terms which are implied into every agreement for the occupation of a pitch (section 2 and Schedule 1, 1983 Act). To the extent that there is any inconsistency between express terms agreed between the parties and the terms implied by statute, the implied terms prevail. As a result, a high degree of standardisation is found in the terms used on protected sites.

19. The Secretary of State is given power by section 2A, 1983 Act, to amend the implied terms contained in Schedule 1. When those terms are amended, as they have been from time to time including by the Mobile Homes Act 1983 (Amendment of Schedule 1)(England) Orders of 2006 and 2011, the amendments apply in relation to agreements made both before and after the date of commencement of the Order (see article 1(3) of the 2006 and 2011 Orders).

20. Pitch agreements are usually referred to as a "written statement"; the written statements used by the appellants at the Park are in a common form recommended by British Holidays & Home Parks Association whose logo appears on the document.

21. The sample written statement included in the appeal bundle relates to the pitch at 13 Lakeside View occupied by Mrs Fox, the second respondent. It was entered into on 12 December 2001 between the appellants and a Mr and Mrs Hayes who subsequently sold the caravan on the pitch to Mrs Fox and her husband on 4 April 2011, together with the benefit of the written statement.

22. The statement is in four parts. Part I identifies the parties, the date of commencement and the pitch; Part II provides information explaining the operation of the 1983 Act; Part III is titled "Implied Terms" and lists the terms which, at the date the written statement was drafted, were implied by the 1983 Act; Part IV of the written statement is titled "Express Terms of the Agreement" and comprises further terms said to have been "settled between you and the site owner in addition to the implied terms". In reality the express terms are in the standard form so it is seems improbable that they were "settled" by any form of individual negotiation.

23. The express terms in Part IV of the written statement confer the right on the occupier to station a mobile home on the pitch and "the right to use such communal and

recreational facilities as may be provided upon the Park" (paragraph 1). Paragraph 3 comprises agreements by the occupier with the owner which include the following:

> "(a) to pay to the owner an annual pitch fee of [left blank] subject to review …
>
> (b) to pay and discharge all general and/or water rates which may from time to time be assessed charged or payable in respect of the mobile home or the pitch (and/or a proportionate part thereof where the same are assessed in respect of the residential part of the park) and charges in respect of electricity gas water telephone and other services
>
> (d) to keep the mobile home in a sound state of repair and condition …
>
> (f) to keep the pitch and all fences, sheds, outbuildings and gardens thereon in a neat and tidy condition …
>
> (m) to permit the owner, his servants and agents with or without workmen at all reasonable hours to enter upon the pitch for the purpose of:
>
> (i) inspecting and maintaining the services provided at the park …"

24. Paragraph 4 of the express terms comprises agreements by the owner with the occupier, including the following:

> "(a) to keep and maintain those parts of the park which are not the responsibility of the occupier hereunder or of other occupiers of other pitches on the park in a good state of repair and condition.
>
> (c) at all times during the currency of the agreement to use his best endeavours to provide and maintain the facilities and services available to the pitch at the date hereof or such further services as may from time to time be provided to keep the same in proper working order …"

25. Provisions for the review of the pitch fee were contained in paragraph 7 of Part IV. These allow for annual review and state that in determining the amount of the reviewed pitch fee regard shall be had, amongst other matters, to the effect of legislation applicable to the operation of the park. More complex provisions for the review of pitch fees are now implied into the agreement by paragraphs 16 to 20 of Chapter 2 of Schedule 1 to the 1983 Act, and these take precedence over the express terms to the extent that there is an inconsistency between them.

26. It is also relevant to mention further terms which have been implied into agreements for the occupation of protected sites by Chapter 2 of Schedule 1 to the 1983 Act (as amended in this respect by the 2006 Order). These include paragraph 21 which is headed "Occupier's obligations" and, as relevant, provides that:

> "The occupier shall –
>
> (a) pay the pitch fee to the owner;

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

The implied terms also impose relevant obligations on the site owner, including by paragraph 22, as follows:

> "The owner shall –
>
> (a) …
>
> (b) if requested by the occupier, provide (free of charge) documentary evidence in support and explanation of –
>
> (i) …
>
> (ii) any charges for gas, electricity, water, sewerage or other services payable by the occupier to the owner under the agreement;
>
> (c) be responsible for repairing the base on which the mobile home is stationed and for maintaining any gas, electricity, water, sewerage or other services supplied by the owner to the pitch or to the mobile home; …"

The First-tier Tribunal's Decision

27. As subsequently corrected when granting permission to appeal the F-tT's decision of 9 February 2015 concluded that the respondents' obligation to pay for electricity, LPG and sewerage services was limited to the following:

(a) the standing charge and the price of electricity delivered to their pitches at the rate paid by the appellants to their supplier;

(b) a proportionate contribution to the price of electricity supplied to the swimming pool, the sewerage system, the public toilets, laundry room, shower block and the street lights; and

(c) the cost of LPG delivered to their pitches at the price paid by the appellants to their LPG supplier.

In each case VAT was to be added to those sums at the appropriate statutory rates.

28. The F-tT arrived at its conclusion after referring to paragraphs 57-61 and 70-71 of the Tribunal's decision in *Britaniacrest* which it considered to be binding and determinative of the issues it had to consider. At paragraph 17 of its decision it considered the submission of Miss Gardiner on behalf of the appellants and said this:

> "Miss Gardiner argued that the *Britaniacrest* case only renders irrecoverable (without an express agreement) the administrative cost of reading meters and

invoicing. The Tribunal reads the Upper Tribunal's decision as applying to all costs which can properly be described as overheads or expenses other than the direct cost of supply, and finds that all the additional sums charged by the respondents in relation to the supply of electricity, LPG and sewerage services are irrecoverable, save for the unit cost of supplying electricity to the communal facilities…. Mrs Bosworth stated "*the pitch fee covers only accommodation, and always has*". This may have been the intention of the respondents but the Tribunal finds that, as argued by Mr Savory and determined in the *Britaniacrest* decision, the pitch fee in fact includes the cost to the respondent of supplying the applicants with the services to which they are entitled."

29. In paragraph 20 of its decision the F-tT recorded that there had been argument over how the residents were to be reimbursed for sums which had been overcharged. The appellants favoured a set-off against future liabilities while the respondents sought an order for repayment as a lump sum. The Tribunal's decision was something of a compromise as it directed that overpayments of charges relating to the supply of electricity, LPG and sewage services should be repaid to the respondents by way of set-off against sums otherwise due from them (including pitch fees), but if they had not been repaid in full by 9 February 2018 any was to be repaid in a lump sum on that date. The F-tT does not appear to have been asked to quantify the amount of the overpayments nor was it provided with the information which would have been to enable it to do so.

30. The F-tT subsequently gave permission to appeal on two issues, namely:

(a) whether the appellants' overheads, direct cost of supplying services and/or site administration charges are payable by the park home owners by virtue of paragraph 3 of Part IV (express terms) of the respondent's written statements;

(b) would either or both of (1) "historic practice at Shortferry Caravan Park", (2) "commercial necessity" (if established) have a bearing on the answer to (a) above?

Britaniacrest

31. Before considering the arguments on the appeal I should refer to the Tribunal's decision in *Britaniacrest.*

32. *Britaniacrest* concerned a written statement in identical terms to that used by the appellants at the Park. The issue in the appeal was whether the occupiers of pitches were liable to pay the owner separate charges to cover the cost of reading gas, electricity and water meters and carrying out other administrative tasks in connection with the supply of utilities to the pitches. It had been the practice of the owner to add a service charge of £15 plus VAT to each of the quarterly bills for gas, electricity and water supplied to the occupiers. In contrast to the present appeal these charges appeared as a separate item on the invoices received by the occupiers. The first-tier tribunal ruled that the written statement did not entitle the owner to levy these administration charges so they were not payable by the occupiers.

33. On appeal to the Tribunal the owner argued that it was an express term of the agreement that administration charges were payable in respect of gas, electricity and water or alternatively that a term ought to be implied obliging the occupiers to pay a sum reflecting not only the cost of utilities supplied to the park from time to time, but also covering the reasonable cost to the owner "of the labour and expertise of administering and maintaining the said utility provision."

34. The Tribunal considered whether there was an express term authorising the administration charges in paragraphs 49 to 63 of the decision. The express term relied on by the owner was paragraph 3(b) of Part IV of the written statement (which was in the same form as is recited in paragraph 22 above). The relevant obligation was "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".

35. The Tribunal decided that paragraph 3(b) did not create an obligation to pay a charge to cover the administrative costs incurred by the owner in connection with the supply of utilities. The part of the decision relied on by the F-tT and quoted in its own decision included the following, from paragraphs 57 to 61:

> 57. As a matter of immediate impression, even without regard to the marginal note, paragraph 3(b) seems to me to be concerned with the payment of charges levied by a third party, rather than charges levied by the owner of the site. There is an obvious difference in language between paragraphs 3(a) and 3(b), the first of which requires the occupier to "*pay to the owner*", while the second does not identify the person who is to be paid. That contrast does not exclude the possibility that charges within paragraph 3(b) may also have to be paid to the owner, but it is consistent with the sums within paragraph 3(a) being paid for the benefit of the owner, while those in paragraph 3(b) are to discharge liabilities owed to others, even if those liabilities are met in the first instance by the owner before being reimbursed by the occupier. That sort of division is also suggested by the nature and description of the charges themselves.
>
> 58. The first types of charge identified in paragraph 3(b) are general and/or water rates. Where these are charged to individual pitches, the obligation entails that the occupiers will pay the local authority any sums separately assessed for their own pitches. Where the park as a whole is rated only a proportionate part is payable by each occupier, and practicality is likely to dictate that the owner will discharge the liability to the charging authority before seeking reimbursement from occupiers of their proportionate part of the bill. If the owner incurs a cost in making that apportionment and collecting the contributions of individual occupiers, it is not a cost which could be recovered under the first part of paragraph 3(b) which requires payment only of the relevant rates themselves.
>
> 59. No indication is given in the second part of paragraph 3(b), which refers to "*charges in respect of electricity, gas, water, telephone and other services*", that any different approach is contemplated. The expression "*charges in respect of*" seems to me to refer to charges levied by the suppliers of the various services, and not to charges made in connection with those services by the park owner.

> 60. … I also consider that (subject to the possibility of there being a relevant implied term, to which I will come next) the RPT was correct in its conclusion … that the cost to the Park owner of administering the utilities was included in the pitch fee. In the absence of a right for the Park owner to charge a separate fee for the provision of some service which the agreement obliges the owner to provide, the pitch fee payable by the occupier is consideration for the performance of all such obligations of the owner and is in return for all of the benefits received by the occupier under the agreement.
>
> 61. There is no restriction on the rights conferred on the occupier which may be taken to be included in the pitch fee. In this case, for example, in addition to the right to occupy the pitch the occupier receives in return for the pitch fee the benefit of obligations by the owner to keep the common parts of the Park in a good state of repair, to provide and maintain the facilities and services available to the pitch from time to time (which include the utilities themselves and the conduits and meters through which they are supplied), and to insure the common parts. Each of these is an example of a service which can only be provided at a cost to the owner, yet for which there is no separate entitlement to charge; each must therefore be taken to be included in the pitch fee. The same is true, in my judgment, of the service provided by the owner in reading meters and calculating and administering bills for each of the utilities.

36. In a further passage not relied on by the F-tT, but relevant to the argument presented by Miss Gardiner on behalf of the appellants, the Tribunal went on to consider the definition of "pitch fee" in paragraph 29 of the implied terms provided for by Chapter 2 of Schedule 1 to the 1983 Act. The definition provides as follows:

> "In this Chapter—
>
> "pitch fee" means 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"

The Tribunal concluded that this definition did not assist the owner, for the following reasons:

> 62. … The purpose of the definition, and the exclusion from it of "*amounts due in respect of gas, electricity, water and sewerage or other services*", is to make it clear what charges are governed by the restrictive provision for reviewing the pitch fee in paragraphs 16 to 20. If separate amounts are payable "*in respect of*" the various utilities, those amounts are not subject to the annual indexation by reference to RPI which is the normal limit of permitted increases in pitch fees. The definition does not require that the administration necessary to deliver the utilities cannot be covered by the pitch fee, nor does it make the imposition of an administration charge permissible.

That explanation omitted to point out that the definition of "pitch fee" is introduced by the words "in this Chapter" i.e. in Chapter 2 of Schedule 1 to the 1983 Act (as amended) and was not explicitly intended to be of wider application. Chapter 2 includes paragraphs 16 to 20 which deal with the review of pitch fees.

37. The Tribunal also considered whether a term could be implied into the written statement entitling the owner to charge an administration fee in addition to the cost of utilities supplied. In rejecting that suggestion the Tribunal explained that, as there was no express provision for a service charge to cover repairs or insurance of common parts or the conduits through which the services are provided, the parties must be taken to have agreed a pitch fee at the commencement of the arrangement which took those matters into account as part of the benefits received by the occupier and the costs and risks assumed by the owner. In exactly the same way, in the absence of a service charge covering the cost of reading meters and administering the utilities, the parties must have regarded those matters as part of the benefits covered by the pitch fee. No term of the written statement obliged the occupier to make an additional payment, or said how much that additional payment should be, and Britaniacrest's suggestion that it could charge any sum it chose provided it was reasonable was not obvious and was so different from the tightly controlled regime for increasing pitch fees that it could not be implied.

The appeal

38. For the appellants Miss Gardiner made submissions in relation to LPG charges, sewerage charges and administration charges generally. There was no appeal against the F-tT's decision on electricity charges which implemented the Ofgem directive.

LPG

39. The effect of the F-tT's decision had been to exclude the addition of any service element to the cost of LPG delivered to the pitches, and to restrict the appellants to recovering the price which they paid to their LPG supplier. This was, Miss Gardiner submitted, the introduction of an "MRP" (maximum resale price) for a commodity which fell outside the scope of the Ofgem MRP directive. It was common ground that Ofgem had authority to regulate the terms of supply of gas purchased from authorised suppliers only; LPG is not purchased from suppliers regulated by Ofgem and is not within the scope of the rule restricting the MRP to the price paid by the reseller, as Ofgem itself confirms in its own publications.

40. As for *Britaniacrest* Miss Gardiner submitted that it was concerned only with the entitlement of a park owner to levy a separate administration charge. It was worthy of note, she suggested, that in *Britaniacrest* the Tribunal had been considering the supply of mains gas, rather than LPG; mains gas is governed by Ofgem's MRP directive. Alternatively the Tribunal's decision in *Britaniacrest* was wrong and ought not to be followed. Paragraph 3(b) of Part IV of the written statement ought not to be narrowly construed and the distinction made between making a payment to the owner, and making a payment to meet a charge payable to a third party was, Miss Gardiner submitted, an artificial one.

Sewerage

41. Miss Gardiner submitted that paragraph 3(b) also provided expressly for the occupier to pay charges in respect of "other services" which obviously included sewerage services. The obligation should be interpreted as requiring the respondents to pay the costs incurred by the appellants relating to the Park's private sewerage system. It would be perverse if the fact that the Park was not connected to a mains sewerage network maintained by a local water authority meant that the service received by occupiers could not be the subject of a charge.

42. The sums which the appellants had recouped through the quarterly sewerage charge included costs incurred in engaging third party contractors to empty and service the sewerage system. These were charges "in respect of" the sewerage service and ought to be recoverable on the plain meaning of paragraph 3(b). Moreover, there is no MRP regime for sewerage services and no reason why the appellants should be restricted by paragraph 3(b) to recovering the costs incurred without any additional element to reflect the costs they incur in administering the service.

Administration charges

43. Miss Gardiner submitted that the practice of adding a charge for the administration of the supply of utilities was permitted by paragraph 3(b). Such sums were "assessed charged and payable" and were charges "in respect of" the relevant services.

44. If the Tribunal was not with the appellants on the meaning of the written statement Miss Gardiner submitted that the acquiescence of the occupiers by making payment of the charges over many years should have the effect that they were now estopped from disputing that these supplemental sums were payable. When it was pointed out by the respondents that they had not been aware that the unit price of utilities was being increased to cover the appellants own expenses until 2013, Miss Gardiner agreed that knowledge of the surcharges by the respondents would be essential before any case of acquiescence or estoppel could be developed against them. She therefore decided not to pursue that argument.

The respondents' case

45. For the respondents Mr Savory invited the Tribunal to follow its decision in *Britaniacrest* and to confirm that the appellants had no entitlement to add a charge for administration to the cost of utilities. In the case of electricity (which was not the subject of the appeal) the Ofgem MPG applied; in the case of LPG the written statement did not include any express or implied term requiring that the occupier pay more than the cost of the gas itself, and the mere fact that the supply was not regulated by Ofgem did not sanction the imposition of a surcharge.

46. As far as sewerage was concerned Mr Savory said that the respondents regarded themselves as being obliged to reimburse the charges incurred by the appellants in paying third party contractors to licence, service and empty the system. The respondents

did not agree that the cost of electricity required to run the system should be passed on to them, nor should administration costs incurred by the appellants themselves.

Discussion and conclusions

47. The starting point for considering the submissions received is the express terms of the written statement, as supplemented by the statutory implied terms. The first and most obvious point to make is that neither of these sources of obligation includes anything which looks like a service charge. Since at least the 1970s variable service charges have been a common feature of long leases of flats and, in modern times, comprehensive and often complex service charge provisions are invariably included in such leases. Statutory regulation of residential service charges originated in the Housing Finance Act 1972 and has developed by leaps and bounds. This statutory regulation does not apply to mobile homes, nor are modern forms of leasehold service charge covenants drafted with agreements for the occupation of mobile home pitches in mind. The point remains that if either the parties to individual agreements, the draftsmen of standard forms of agreement, or the Secretary of State exercising the power to introduce new implied terms wished to impose an obligation on the occupier to pay a separate charge for services provided by the park owner, there is both conventional language and well tried models which could be adapted to that purpose. If a form of service charge had been intended one would therefore expect it to have been made absolutely clear what the charge was to be for, when it was to be paid, how it was to be ascertained and whether it was to be open to any external scrutiny or certification. Nothing of that sort is found in the common form of written statement or in the statutory implied terms.

48. Despite Miss Gardiner's measured and courteous efforts to persuade me of my error, I adhere to the view expressed in *Britaniacrest* that paragraph 3(b) of the express terms of the written statement is not apt to impose a general service charge obligation on the occupiers, but is concerned solely with the reimbursement of specific outgoings incurred by the owner in meeting liabilities to third party service providers.

49. Paragraph 3(b) begins with general and water rates in respect of the mobile home and the pitch (whether they are assessed individually or in respect of the residential parts of the park collectively). It is in the nature of such charges that they are levied by a third party billing authority, and by describing them as "assessed charged or payable" the draftsman appropriately adopts the language of external imposition. A charge cannot be described as "payable" unless an obligation to pay already exists. In the case of general and water rates the occupier's primary obligation is to pay directly to the billing authority but it is implicit in the context, as reflected in the practice of the parties in this case, that there is a secondary obligation to reimburse the owner a proportionate part of any sum the owner itself has paid to discharge the occupier's primary liability.

50. The same paragraph also extends to charges "in respect of electricity gas water telephone and other services". As a category the list is limited to rates and utilities supplied to individual pitches. The reference to "other services" obviously includes sewerage, but it is not capable of being extended to insurance, security, repairs of the common parts of the park or any other sort of "service" which is not analogous to the other types of service already listed. "Services" is here used in the specific sense of utilities, rather than in the more general sense of any service rendered by the owner to

the occupier. The other common characteristic of the list of services is that each service is generally supplied by a third party and, like water rates and general rates, the charge for that service will be quantified by a third party. For the reasons I gave in *Britaniacrest* I consider that paragraph 3(b) is concerned only with the payment, or reimbursement, of outgoings, i.e. the charges of third party suppliers or service providers, and does not impose a more general obligation to make payments for administrative tasks performed by the owner in connection with the supply or service.

51. I do not think Miss Gardiner is right in her submission that *Britaniacrest* was concerned only with the entitlement of a park owner to levy a separate administration charge (as the owner had done, quite transparently, in that case). The Tribunal's decision was concerned with the nature of the charges covered by paragraph 3(b) and not with whether they were open or concealed, as they have been in this case until recently.

52. The language of paragraphs 21 and 22 of the implied terms (which have become terms of the agreement since the written statement before me was entered into) does not assist the appellants. On the contrary it supports the view I take, in that the language reflects the understanding of the draftsman that the parties are free to provide expressly for separate charges to be payable in addition to the pitch fee.

53. The occupier's obligation under paragraph 21(a) of the implied terms mirrors paragraphs 3(a) of the express terms and is concerned with the pitch fee payable to the owner. Paragraph 21(b) once again, and explicitly, obliges the occupier to make a payment to the owner, namely a payment of "all sums due under the agreement in respect of gas, electricity … [etc] supplied by the owner". An obligation to pay "sums due under the agreement" presupposes that there is to be found elsewhere in the agreement a provision which renders such sums due. Such an obligation is different from a simple obligation to pay for all gas, electricity etc supplied by the owner, or an obligation to reimburse the costs incurred by the owner in arranging and administering the supply of utilities by others. Paragraph 21(b) therefore has effect where the parties have agreed that utilities or other services will be provided by the owner and will be paid for by the occupier (with or without an element to cover the owner's costs of admiistration). Such an agreement may be oral, it may be implicit in the practice adopted at the site, or it may be expressly provided for in writing, but I do not think it is provided by paragraph 3(b) itself.

54. The agreement between the parties is not silent about the supply of utilities. The owner is under an express obligation by paragraph 4(c) of Part IV to provide and maintain the facilities and services available at the pitch at the date of the written statement. The implied terms include paragraph 22(c) which imposes a similar obligation to maintain services supplied by the owner. It follows from the presence of a positive requirement for the owner to maintain the services and the absence of an express or implied term for the payment of a charge to cover costs of the owner in performing that obligation that the pitch fee must be seen as providing the only financial consideration for that performance. In other words the owner is entitled to the pitch fee and to reimbursement of sums it has paid to third party suppliers of utilities but is not entitled to a service charge, or surcharge, on top of those sums.

55. Nor do I think Miss Gardiner is correct in likening the situation to the imposition of a maximum resale price for utilities. The inability of the appellants to add a surcharge to the unit costs or to levy a separate service charge is not the result of external regulation, but is the consequence of the parties' own agreement, and in particular of paragraph 3(b).

56. The effect of paragraph 3(b) is therefore to limit the charge which the appellants may make in respect of LPG to a unit charge equal to the cost they themselves have incurred for the LPG supplied to them. Costs incurred by the appellants in reading meters, in the provision and maintenance of the infrastructure, including the tanks themselves, the tank compound and the underground pipes, the interest charge and the administration fee are not payable by the respondents. The occupiers are entitled to be provided with documentary evidence in support of those charges on request to the appellants and free of charge in accordance with paragraph 22(b)(ii) of the statutory implied terms.

57. The private sewerage system operated at the Park is conceded by the respondents as being in a different category and they did not seek to uphold the F-tT's decision that the appellants were not entitled to pass on any of the costs incurred in connection with the system. The charges for emptying and regularly servicing the tanks are agreed to be charges falling within paragraph 3(b), as is the fee payable for the Environment Agency licence. That concession is made on the basis that those services are provided by third party contractors rather than by the appellants themselves. The concession does not extend to the capital cost of installing the new tanks which appeared on the 2009 breakdown of costs incurred by the appellants in connection with sewage disposal (the appellants do not appear ever to have sought to recover this capital cost from the occupiers, but its appearance on the breakdown might give that misleading impression). The method adopted by the appellants for apportioning the costs of sewerage services seems to me to have been reasonable. Once again the occupiers are entitled to call for documentary evidence in support of those charges.

58. There was no formal cross appeal by the respondents against the F-tT's decision that the price of electricity supplied to the swimming pool, the sewerage system, the public toilets, laundry room, shower block and the street lights at the Park was recoverable under paragraph 3(b). Nevertheless, in their statement of case for the appeal, which was provided well in advance of the hearing, the respondents disputed their liability to contribute towards these costs and Mr Savory made submissions to the same effect. The appellants were on notice of the issue and I permitted those submissions by way of cross appeal.

59. It is clear from paragraph 3(b) that the only contribution towards general and water rates which the occupiers are required to make is towards such rates as are assessed "in respect of the mobile home and the pitch". Where rates are levied in respect of the residential part of the Park as a whole the occupiers are required to pay a proportionate part; but in my judgment that does not convert the obligation to pay rates levied in respect of the pitch into a more extensive obligation but rather is simply a method of quantifying those rates where individual pitches are not separately assessed. I read the remainder of paragraph 3(b) as being restricted in the same way to costs of utilities provided to the pitch. No more extensive liability is expressly provided for and the

natural sense of the language is that the electricity, gas and water charges which the occupier is to pay are those incurred in the supply of services to the pitch alone. They do not extend to the cost of operating the communal facilities of the Park (especially those, like the shower block and laundry, provided principally for the users of the temporary pitches and holiday caravans).

60. I therefore consider that the F-tT was wrong to determine that paragraph 3(b) obliges the occupiers to contribute towards the cost of electricity consumed in the provision of communal facilities and in particular the swimming pool, the public toilets, the laundry room, the shower block and the street lights. I make a distinction in respect of the electricity required to run the sewerage system, which I regard as part of the cost of providing the sewerage service itself; as the running costs of the sewerage system are recoverable under paragraph 3(b), at least to the extent that they are incurred in reimbursing charges by third party suppliers, the cost of providing the electricity to run the system, without which individual pitches could not be served, ought also to be included.

61. These conclusions are not affected by what the F-tT referred to as "historic practice" at the Park. I take it that was a reference to the appellants' argument that, because there had been a surcharge on the cost of utilities for many years, without protest by the occupiers, they were now estopped from disputing that historic practice. That argument was advanced to me only on the basis of estoppel, but as I have recorded, Miss Gardiner did not feel able to develop that argument because it was clear that the respondents had had no knowledge of the basis of charging until 2013. There was no evidence to support an argument that there was an express contractual arrangement, contrary to paragraph 3(b), that occupiers would pay a supplement to cover the incidental cost to the appellant of providing utilities. Had that been made clear to occupiers when they took their pitches there might have been mileage in an argument based on historic practice, but in this case neither the practice nor the charges were transparent.

Disposal

62. I therefore allow the appeal and the cross appeal and substitute the following in place of the F-tT's determination in paragraph 1 of its decision:

> The liability of the respondents to pay for electricity, LPG and sewerage services is limited to their respective proportions of:
>
> (a) the standing charge and the unit price of electricity delivered to their pitches at the rate paid by the appellants to their supplier;
>
> (b) the unit price of electricity required to operate the sewerage system at the rate paid by the appellants to their supplier;
>
> (c) the cost of LPG delivered to their pitches at the unit price paid by the appellants to their LPG supplier;

(d) the charges of third party contractors engaged by the appellants to empty and service the sewerage system and fee paid to the Environment Agency in respect of the system.

63. If the parties are unable to agree the accounting consequences of these determinations it will be necessary for them to refer the quantification of the overpayments back to the F-tT for further determination. As I have previously indicated, there was no challenge to the F-tT's direction in paragraph 2 of the decision that sums found to have been overpaid ought to be reimbursed by the appellants to the respondents by means of a set off against future liabilities (with any balance unpaid by 9 February 2018 to be repaid in a lump sum).

64. Finally, I was asked by Miss Gardiner to provide guidance to the parties on the manner in which the appellants could, as she put it, amend their charging structure to enable them to recoup costs formerly covered by the surcharge on the cost of utilities. There would seem to be two routes which the parties could consider. The first would be the introduction of a variable service charge under which the appellants could recover some of the costs which have been in issue in this appeal; there is currently no service charge in the written statements in use at the Park and the introduction of such a change could not be imposed (except on new lettings) but would require the agreement of each current occupier. The second would involve a negotiated adjustment to the pitch fee, either in addition to the introduction of a variable service charge or instead of it, which once again would require agreement. If there is a willingness amongst the parties to explore either of these routes to a permanent readjustment of the charging structures at the Park they may find it beneficial to engage a mediator to assist in their discussions.

65. Whether, in the absence of agreement, the First-tier Tribunal had the power to adjust a pitch fee under the statutory implied terms to reflect the inability of a park owner to continue to collect a surcharge which, before *Britaniacrest*, it had assumed it was entitle to, is the subject of a separate appeal for which permission has recently been given by the Tribunal and which I cannot prejudge. Some limited guidance may be derived from the decision of the Court of Appeal in *Warfield Park Homes Ltd v Warfield Park Residents Association* [2006] EWCA Civ 283 in which it was not disputed that changes in the regulatory regime for the supply of water, gas and electricity could in principle be taken into account when reviewing pitch fees under the 1983 Act (before the more recent amendments).

Martin Rodger QC

Deputy President

27 October 2015