TC02575

Appeal number: LON/2009/0793

VAT – exempt supplies – pitches for mobile homes – voluntary disclosure for periods 04/89 to 12/96 – claim to repayment of output tax – Group 1 Schedule 6 VAT Act 1983 – seasonal pitches – supplies properly standard rated – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TALLINGTON LAKES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN
GEORGE BARDWELL CBE

Sitting in public at the Royal Courts of Justice on 11 and 12 October 2012

Mr Neil Morgan, director appeared for the Appellant

Mr Brendan McGurk of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The appellant is the proprietor and operator of Tallington Lakes which is a substantial holiday park and water sports complex near Stamford in Lincolnshire. The site includes a large number of static caravans which for present purposes we will describe as "mobile homes". The appellant's income includes pitch fees from the owners of mobile homes on the site.

2. This appeal concerns the refusal of a voluntary disclosure for VAT purposes made by the appellant on 17 December 2008. The net sum claimed in the voluntary disclosure was £508,238. It covered the VAT periods 04/89 to 12/03 and included a claim for repayment of output tax in the sum of £531,698 which the appellant had accounted for in those periods. The claim was made on the basis that the underlying supplies of pitches were in fact exempt supplies. It was rejected by HMRC in a letter dated 25 February 2009 on the basis that it was partly capped and in any event the supplies made by the appellant were all taxable at the standard rate and output tax had been properly accounted for by the appellant.

3. This is not the first such claim made by the appellant. On 9 January 2007 the VAT & Duties Tribunal, allowed an appeal against HMRC's refusal of a similar claim for periods 03/01 to 12/03 – see *Tallington Lakes Ltd v HMRC [2007] UKVAT Decision 19972*. That decision was subsequently reversed on an appeal by HMRC to the High Court – see *HMRC v Tallington Lakes Ltd [2007] EWHC 1955 (Ch)*. We describe these proceedings ("the 2007 Proceedings") in more detail below.

4. Subsequent to the 2007 Proceedings the House of Lords delivered judgment in the case of *Fleming (t/a Bodycraft) v HM Revenue & Customs [2008]UKHL 2*. It was this decision which effectively opened the door to certain repayment claims going beyond the 3 year capping which was introduced in 1996. This prompted the appellant to make the present voluntary disclosure going back to April 1989.

5. Mr Neil Morgan is a director of the appellant and represented the appellant before us. He also gave evidence on behalf of the appellant. In the course of correspondence in 2011 Mr Morgan accepted that the appellant could not maintain any claim to repayment arising after 4 December 1996. We are therefore concerned with the appellant's claim for repayment of output tax in the period 1 April 1989 to 4 December 1996.

6. The essence of the dispute between the parties is whether or not mobile homes on the site were subject to an occupancy restriction in the period 1 April 1989 to 4 December 1996. In particular a restriction preventing owners from occupying in the month of February in each year. If there was such a restriction in place the pitch fees charged by the appellant would be standard rated. If there was no such restriction the pitch fees would be exempt from VAT.

7. An issue also arises as to the extent to which the appellant is bound by certain findings in the 2007 Proceedings. In our view and in the circumstances set out below the findings of fact in the 2007 Proceedings could only apply in relation to the period from 1991 to 1996. That period does not cover the whole period of the voluntary disclosure and on that basis we will deal with our findings of fact before considering the effect of the 2007 Proceedings on the present appeal. We shall deal with the issues before us in the following order:

(1) The legal framework

(2) Facts not in dispute

(3) The evidence

(4) The parties' submissions on the evidence

(5) Findings of fact

(6) The 2007 proceedings

(7) Decision

The Legal Framework

8. We are concerned in this appeal with the VAT position in relation to caravan pitches from April 1989 onwards. However it is necessary for us to consider the position prior to April 1989 in order to understand the evidence as to how the appellant came to account for output tax on supplies of pitches after that date.

9. The supply by way of sale of a caravan or mobile home has always been zero rated for VAT purposes. We are not directly concerned with such supplies but we mention it because some of the evidence refers to zero rated supplies made by the appellant.

10. Prior to April 1989 *Group 1 Schedule 6 VAT Act 1983* exempted the grant of a licence to occupy land save in relation to a number of exceptions which included:

> "*(a) the provision of accommodation in a hotel, inn, boarding house or similar establishment or of holiday accommodation in a house, flat, caravan or houseboat;*
>
> *(b) the granting of facilities for camping in tents or caravans*"

11. This was the position until April 1989. The Finance Act 1989 introduced wholesale amendments to *Group 1 Schedule 6*. The corresponding exclusion from exemption was by reference to supplies of "seasonal pitches" for caravans. For these purposes seasonal pitches were defined as follows:

"*A seasonal pitch is a pitch –*

(a) which is provided for a period of less than a year; or

(b) which is provided for a year or a period longer than a year but which the person to whom it is provided is prevented by the terms of any covenant, statutory planning consent or similar permission from occupying by living in a caravan at all times throughout the period for which the pitch is provided."

12. We understand that the amendment by reference to seasonal pitches was intended to reverse or at least clarify the decision of the VAT Tribunal in *Warner v Commissioners of Customs & Excise MAN/86/385* which was released on 23 June 1987. In that case the Tribunal was concerned with both "short stay" and "long stay" caravans. Long stay caravans on the site could not be occupied in the period November to February in any year. The Tribunal held that the supply of a pitch for camping in a caravan was excluded from exemption and that in practice camping would generally involve a stay on the site of up to 4 weeks. It appears from that decision that HM Customs & Excise (as it then was) considered, at least until 1984, that the right to place a caravan on a site for longer than a temporary stay was exempt. In VAT leaflet 701/20/84 they appear to have adopted a different approach as follows:

"*A supply is regarded as the provision of facilities for camping if the pitch is let for a period of less than a year. A supply may be treated as exempt under the Group if the terms of any written agreement, or the invoices issued pursuant to the agreement, make it clear that an annual agreement is intended.*"

13. The Tribunal in *Warner* did not agree that this approach reflected the law as set out in *VAT Act 1983*. The term "camping" was much more restrictive and therefore the long stay caravans were exempt. It can be seen that the amendments introduced in 1989 gave more certainty to the scope of the exemption in relation to caravans, including mobile homes. It also closely reflected the approach in leaflet 701/20/84.

14. Apart from the VAT position, we were also referred to various provisions in relation to the regulation of caravan sites. In particular Mr McGurk, who appears on behalf of the respondents, referred us to the *Caravan Sites and Control of Development Act 1960* ("the 1960 Act").

15. Section 1 of the 1960 Act provides that no occupier of land shall permit it to be used as a caravan site unless he is the holder of a site licence. Breach of the provision is a criminal offence. Schedule 1 of the 1960 Act sets out those situations where a site licence is not required. None of those situations arise on the facts of the present appeal.

16. Importantly, section 3(3) provides that the local authority can only issue a site licence if the applicant is entitled to the benefit of planning permission to use the land as a caravan site.

Facts Not in Dispute

17. This section deals with our findings of fact in relation to various background matters not in dispute.

18. The appellant was registered for VAT on 1 January 1982. The site which it owns and operates comprises various lakes which were originally gravel pits and which have been developed for leisure use since at least 1982. There is a water-ski lake, a windsurfing and sailing lake, a jet ski centre and a coarse fishing lake. There are also bar, catering and entertainment facilities.

19. Surrounding the lakes there are a large number of mobile homes together with areas for touring caravans. They are pitched on a number of separately identified areas of the site. There are also a small number of woodland lodges. Almost all the mobile homes are owned by individuals who pay pitch fees to the appellant. The woodland lodges are held by individuals on long leases from the appellant.

20. The shares in the appellant were originally held by a consortium of 9 shareholders. In 1989 the business was run by a general manager who was an accountant called Mr R Robinson. Mr Morgan, who was not a member of the consortium, purchased all the shares in the appellant in 2004. However he had been present at the site since the summer of 2003 whilst the transaction was going through. He has a background in business and had previously owned and run property businesses and a small manufacturing business.

21. Both parties accept that there were 240 mobile homes at Tallington Lakes in 1993.

The Evidence

22. The evidence before us as to the position in the period 1 April 1989 to 4 December 1996 comprised witness statements and documentary evidence produced by the appellant and documentary evidence produced by the respondents.

23. The witness evidence relied on by the appellant included two witness statements from Mr Morgan upon which he was cross-examined. We also had a witness statement from Ms Valerie Green which she had made in connection with the 2007 Proceedings. During the course of the hearing Mr Morgan also sought permission to adduce a witness statement from Ms Janet Jones and a further witness statement from Valerie Green. We granted permission for those witness statements to be adduced. Neither Valerie Green nor Janet Jones was tendered for cross-examination and we refer to their evidence in more detail below.

24. In order to put Mr Morgan's evidence into context it is relevant to note that he purchased shares in the appellant in 2004. He had some involvement and direct knowledge of the appellant's activities during 2003 but his knowledge of the position prior to that date was second hand, derived either from persons who might have been expected to have first hand knowledge such as employees and mobile home owners or from the documents themselves.

(a) Appellant's Historical Dealings with HMRC

25. We deal firstly with evidence as to the appellant's historical dealings with HMRC. The documentary evidence included a "*Summary of Trading Activities and Records*". This is a "rolling record" maintained by HMRC on a printed form containing details in relation to the appellant. Entries were made in manuscript and it was periodically updated. It shows the main business activity as a leisure park with subsidiary activities described as "*caravan park: zero rated residential caravans bought and sold. site rentals received sale of Kawasaki jet skis.*".

26. Significantly in a section headed "*Principal Outputs Exempt*" the document has a manuscript entry which reads "*site rentals – standard rated w.e.f. 1.4.89*".

27. On the second page there is a heading "*Special and unusual features …*". This includes the following manuscript entry:

> "*Potential for complex liability problems and partial exemption. – position simplified from 1.4.89 with standard rating of caravan pitch rentals and Trader opting to tax residue of the various businesses operating at the lakes WEF 1/1/90*"

28. Various dates are identified and initialled on the document to show when it had been completed and when it had been reviewed and if necessary amended. These show that it was initially completed on 22 February 1988 and thereafter reviewed on 17 October 1989, 12 December 1991, 18 January 1993, 20 July 1995 and 5 September 1996.

29. On 3 April 1989 HMRC wrote to Mr Robinson of Tallington Lakes. We set out the content of this letter in detail:

> "*With regard to the question of caravan rent … I can now provide you with an answer, having regard to the new regulations:-*
>
> *a) If the company lets holiday accommodation in a caravan, that supply is standard rated.*
>
> *b) If the company provides pitches for siting permanent residential caravans (ie those which can be legally occupied throughout the whole of the year) the supply is exempt. Accommodation rented in such caravans is also exempt.*
>
> *What the change in the law and consequently the regulations made under it, has done is to standard rate the letting of all pitches at caravan parks, except where used for permanent residential caravan accommodation (which remains exempt from VAT). Thus, nightly, weekly yearly or any other agreement for the siting of caravans are to be standard rated if the caravan so sited cannot be lawfully occupied at all times throughout the year…*"

The Notice from which these facts have been taken is No 742 'Land and Property', to be published on 1 April 1989. "

30. It is not clear who signed this letter on behalf of HMRC. We also had what appears to be an extract from an HMRC visit report of an officer called R J Revell. It is undated but it is clear from its face that this was made following a visit in 1989 and states in manuscript:

"*Mr Robinson aware of the significant liability changes from 1.4.89 and is taxing at the standard rate (a) All caravan pitch rentals on the basis that none can be legally occupied throughout the year, and (b) the sale of woodland lodges as these also are not legally available for year round occupation.*"

(b) The Planning Position

31. We were provided with a schedule of planning applications for Tallington Lakes ("the Planning Schedule"). The Planning Schedule appears to have been produced in connection with Mr Morgan's purchase of the appellant's shares. It was faxed by the vendors' solicitor in February 2004 to Mr Morgan's solicitor. It is a one page document and briefly describes 40 planning applications dating back to 1951, including the outcome of each application and some very brief remarks which are reproduced below where relevant. It refers to the following planning permissions in particular which we summarise from planning permissions available in the documentary evidence:

Date Planning Permission granted	**Description**	**Reference**	**Restriction (if any)**	**Remarks**
01.09.84	Residential Caravans Plots 21 and 22	953/84; 954/84	Use by employees until 31.12.89	"Expires 31.12.89"
09.06.87	6 Residential Chalets	274/87		
08.03.88	34 Static Caravans for "Leisure Homes"	1668/87		"No Conditions"
16.02.93	2 Caravans	1329/92; 1330/92	Use by employees until 16.02.98	"Renewed 953/84 [and 954/84 – 16.02.98"
26.10.93	Use of land for caravan park	92/1328	February Restriction	"Authorised 853/84 – Refd"

26.10.93	Continuation of use of building as Clubhouse and use of land for caravan park	93/0189	February Restriction	
26.10.93	Use of land and lake for leisure and siting of caravans	93/0007	February Restriction	"Thurlby" land – Condns"
04.01.94	Use of land for caravan park	93/1200		"Extended 'island' site"
11.07.00	Use of land for caravan park	00/0407	February Restriction	[plots 1-52 "South Bank"]

32. A letter dated 8 February 2011 from Valerie Green to South Kesteven District Council requested full copies of all planning permissions in the period 1951 to 1996 enclosing a document based on the Planning Schedule. The letter states "*We have records of some of the planning permissions in this period as per the attached schedule. However we do know that this schedule is incomplete and that several permissions are missing from the list, particularly in the period 1965 through to 1990*".

33. Mr Morgan's evidence as to the planning history was that at the time of the 2007 Proceedings he had been under the impression that there were many historical planning permissions for mobile homes at Tallington Lakes going back to the 1970s and 1980s. He said that he believed this because he knew there had been caravans on the site since the mid-1970s and because there was a long schedule of historical planning permissions from which he inferred permissions had been granted. Mr Morgan did not say and was not asked whether this was the Planning Schedule referred to above. If it was, there was nothing in that schedule from which permission for the siting of caravans or mobile homes could be inferred until the permission granted on 1 September 1984. Even then, the permissions granted at that time were for employee occupation only.

34. Mr Morgan went on to say that following the 2007 Proceedings he came to realise that his understanding was incorrect. He believed that there were no planning permissions for mobile homes until the permission granted on 8 March 1988. He said that this planning permission "*almost certainly … related to a new area of development*".

35. In order to establish that mobile homes were on the site prior to 1988 Mr Morgan relied on what he had been told by ex-employees and other persons. He also relied on the fact that VAT on pitch rentals was accounted for in the sum of £24,062 in the period 1 April 1989 to 31 March 1990. Mr Morgan stated that the average pitch fee in 1989 was £750 and VAT was then charged at the rate of 15%. Based on these figures

Mr Morgan inferred that there were approximately 210 mobile homes on the site in 1989. He also inferred on the basis of 10 pitches being developed each year that by 1993 there were approximately 240 mobile homes at Tallington Lakes. HMRC did not dispute these calculations or inferences.

36. HMRC's rolling record includes some information on turnover, split between taxable (including zero rated), zero rated and exempt. Under the date 12/87 the exempt turnover is stated to be £60,000. Under the date 6/89 the exempt turnover is apparently nil. It is not clear to us and it was not canvassed in evidence whether this is annual turnover or whether the dates refer to VAT periods. There is a reference elsewhere in the evidence to the appellant preparing annual accounts to 31 March in each year.

37. Annex A (a document we refer to in more detail below) identifies that two planning permissions granted on 26 October 1993 (92/1328 and 93/0189) relate to 206 pitches on various parts of the site. This was not disputed between the parties. Mr Morgan's evidence was that these were new areas to be developed. Of these, he said that 27 pitches on Centre Bank had not been developed to this day.

38. It was common ground that the existing mobile homes on site at the time of these permissions totalled 240. Mr Morgan inferred that these were present without any planning permission and therefore without any occupancy restriction.

39. The Planning Schedule includes the remark "*Authorised 853/94 – Ref'd* " for planning permission 1328/92 granted on 26 October 1993. The entry 853/84 refers to a proposed use of "Continue use of Leisure Park and buildings". The decision appears to be that this application was refused on 2 April 1985. It is not clear from the Planning Schedule how these two planning applications relate to one another, or whether application 853/84 related to the siting of mobile homes.

40. Mr Morgan's evidence was that planning permission SK/93/0007 granted on 26 October 1993 related to touring caravans which was not disputed. Annex A also identifies that the planning permission granted on 4 January 1994 (93/1200) relates to 30 pitches on Island Bank.

41. Mr Morgan suggested that in March 1988 there were 210 mobile homes on Tallington Lakes. The planning permission granted on 8 March 1988 provided for a further 34 mobile homes. By December 1993 there were approximately 240 mobile homes on the site of which only 34 had planning permission. Following the planning permissions granted in October 1993 mobile homes were added at the rate of about 14 pitches per year.

(c) Site Licences

42. The evidence before us included site licences issued by South Kesteven District Council pursuant to the 1960 Act as follows, together with our observations:

Date of Licence	Terms	Observation
22.05.93	1 residential caravan	Plot 21 for employee occupancy
22.05.93	1 residential caravan	Plot 22 for employee occupancy
01.02.94	Not to exceed 241 static caravans	
18.08.03	Not to exceed 322 static caravans	
11.09.03	Not to exceed 385 static caravans	
29.03.04	Not to exceed 51 touring caravans	
26.11.04	1 residential caravan	Renewal re plot 21
26.11.04	1 residential caravan	Renewal re plot 22

43. The only site licences which had an expiry date were those issued on 22 May 1993 which were expressed to expire on 16 February 1998. This appears to have been because the planning permissions were also limited in time.

44. The site licence dated 1 February 1994 contained the following conditions:

> "*1. The number of static holiday caravans on site shall not exceed 241.*
>
> *2. This licence is issued subject to the 1989 Model Standards for Holiday Caravan Sites.*"

45. The evidence did not include the 1989 Model Standards. However we understand that these are standards set by the Secretary of State pursuant to section 5(6) of the 1960 Act. As such they are a form of regulation and we understand that they deal with practical and safety issues regarding the siting of caravans.

46. This site licence also recorded the planning permissions to which the appellant was entitled. These were 92/1328, 93/0006; 93/0007 and 93/0189. We did not have a copy of 93/0006. 93/0007 related to an unspecified number of touring caravans not relevant for the purposes of this appeal. 92/1328 and 93/0189 related to 206 pitches as noted above.

47. There was no evidence of any correspondence relating to the site licence issued in February 1994. There was documentary evidence that in 1999 and 2000 there were various visits from South Kesteven District Council in connection with site licences under the 1960 Act following the granting of planning permissions. These related to the two residential caravans used for employees and the permission for 52 holiday caravans granted on 11 July 2000.

48. In 2001 and 2002 there were further site visits and correspondence from which it is clear that the District Council was seeking to ensure that there were planning permissions in place for all pitches so that a single site licence could be granted. On

23 October 2002 the appellant applied for a site licence covering 358 static caravans described on the application as "*Seasonal between … March 1st – January 31st*". As a result of that application a site licence was issued on 18 August 2003, although it only covered 322 pitches.

49. The site licence issued on 11 September 2003 contained a condition that "*static holiday caravans shall be sited in accordance with Annex A which forms part of this licence*". It appears that this licence was granted immediately following the previous licence on the basis that the appellant had provided details of further planning permissions. Annex A was attached to the licence setting out details of planning permissions covering 385 pitches. We had copies of some but not all of the planning permissions referred to on Annex A. This is the Annex A we have previously referred to and we reproduce it as a schedule to this decision.

50. Mr Morgan contended that the figure of 385 pitches referred to in this site licence supported his calculation that by September 2003 there were 389 mobile homes on the site. The latter figure was calculated on the basis that there were 240 pitches by October 1993 without any form of planning permission. The 1993 and 1994 planning permissions provided for a further 236 pitches although 27 of those were not developed and 12 were not developed until 2011. He said that there had been scope to develop about 14 pitches a year for 10 years giving a total of 380.

51. Annex A was before the VAT Tribunal and the High Court in the 2007 Proceedings. It describes 12 areas of the site with the number of mobile homes on each area cross-referenced to the planning permission relevant to that area. In fact the parties were agreed that not all these areas had been developed at the date of the licence. There was some dispute as to when certain areas were developed, however it is not necessary for us to resolve that issue.

52. At one stage in his evidence Mr Morgan stated in relation to the position prior to the 1993 site licence "*I don't know if a site licence existed or not*". His evidence in this regard reflects the fact that he has no direct knowledge of the operation of Tallington Lakes in the relevant period other than that which he has gleaned from the documents and from discussions with persons who were employed by the appellant at that time. When asked whether his position was that since the late 1970's it was more probable than not that Tallington Lakes had operated without a site licence he replied "*no, I don't know if there was a site licence. I don't know if one was required*".

(d) Terms and Conditions

53. The evidence before us also included various sets of terms and conditions for pitch licences granted by the appellant to owners of mobile homes. Mr Morgan stated that terms and conditions would be updated annually, however we do not have terms and conditions covering the whole period of the claim. The dates of some of the documents were hotly disputed. We can summarise the relevant documents and the position of both parties as follows.

54. The appellant produced a document which Mr Morgan contended was the terms and conditions in 1991 ("the 1991 Terms and Conditions"). We adopt that description for ease of reference although the respondents do not accept that these terms and conditions were in place in 1991. We describe later terms and conditions in a similar way without prejudging the date on which they were introduced.

55. The 1991 Terms and Conditions comprised a 3 page document containing "General Park Rules" and "Caravan Pitch Licence Rules". There is no date on the document, but Mr Morgan said that it had been located by his staff in an old storage location and he had been told by his staff that it dated from 1991 or 1992. The staff members concerned were Valerie Green, Janet Jones and Mike Smith. There was no evidence from any of these employees as to the circumstances in which the document was found or their recollection that it in fact applied in 1991 or 1992. Mr Morgan himself had no direct knowledge of the 1991 Terms and Conditions.

56. We note that clause 12 of the licence rules states that "*From 1993 the caravan owner will be required to pay a reservation fee … to reserve his pitch for the following season*". No reference was made to this clause during the evidence or in submissions but it does at least support Mr Morgan's assertion that the document pre-dates 1993.

57. The 1991 Terms and Conditions contained no occupancy restriction other than at clause 4 where there was a restriction in the following terms:

> "*The caravan owner and all persons occupying the caravan shall occupy the caravan for residential purposes only and no trade or business shall be carried out in or from it.*"

58. The respondents produced a document headed "*Terms and Conditions for Caravan Ownership and Annual Plot License*". They contended these were the terms and conditions in 1995 ("the 1995 Terms and Conditions"). Mr Morgan contends that they date from some time between 1999 and 2004. They included an occupancy restriction as follows:

> " *The licensee and all persons occupying the caravan shall occupy the caravan for holiday purposes only and no trade or business of any description shall be carried out in or from it. The site licence rules state that no caravan/tent shall be used for the purposes of human habitation during the month of February, nor for more than 28 days in any period of six consecutive weeks.*"

59. We note clause 10 of the 1995 Terms and Conditions:

> "*The Licensee and all persons occupying the caravan shall conform to and observe the condition of the Site License granted to the Company by the Local Council under the [1960 Act]…*"

60. This set of terms and conditions had the following receipt stamp on it:

"*RECEIVED 08 SEP 1995 ENV. HEALTH SERVICES*"

61. We should say that it is the Environmental Health Services department of South Kesteven District Council which deals with the issue of site licences under the 1960 Act. The document also had a fax header which showed that it was faxed between unknown parties on 15 January 2000.

62. There was considerable disagreement between the parties as to the date on which the 1995 Terms and Conditions were effective and the significance of the receipt stamp. Mr Morgan gave evidence that the computers and software used by the appellant in 1995 could not have produced these terms and conditions. He said that terms and conditions were always produced in house. However Mr Morgan himself had no direct knowledge of these matters.

63. The appellant produced a document which Mr Morgan contended was the terms and conditions in 1999 ("the 1999 Terms and Conditions"). This had the same heading as the 1995 Terms and Conditions. There did not appear to be any significant dispute as to the date of this document. The document had a reference V5 29.03.99 and contained an occupancy restriction as follows:

> "*The Licensee and all persons occupying the caravan shall occupy the caravan for residential purposes only and no trade or business of any description shall be carried out in or from it. In accordance with the planning permission any caravan which is not permanently sited and connected to site drainage shall not be used for overnight occupation during the month of February. Any caravan may be used as a principle (sic) private residence throughout the year provided it is permanently sited and connected to site drainage.*"

64. Mr Morgan contended that a document produced by the appellant in the 2007 Proceedings was introduced with effect from April 2004 ("the 2004 Terms and Conditions"). He refers to a reference on the document in the form "V5.2 07.04.04" and said that he drafted the document. The respondents contend that the appellant is estopped by reference to findings in the 2007 Proceedings from asserting that these terms and conditions were introduced in 2004.

65. The 2004 Terms and Conditions contained a February occupancy restriction at clause 7 in the following terms:

> "*The Licensee and all persons occupying the mobile home shall occupy the home for private residential purposes only and no trade or business of any description shall be carried out in or from it. In accordance with the planning permission no mobile home shall be occupied during the month of February. The mobile home may be used as a principal private residence. "*

66. Apart from this documentation and Mr Morgan's evidence the only direct evidence as to what terms and conditions were in effect came in the form of a witness statement from Valerie Green made on 28 November 2005 in connection with the

2007 Proceedings. This was supplemented by her witness statement made on 11 October 2012, and the witness statement of Janet Jones also made on 11 October 2012.

67. In her first statement Valerie Green said that she had worked as the general manager of Tallington Lakes since 1991. She had owned a caravan at Tallington Lakes since 1986. The thrust of her first witness statement was that "*the previous plot licence conditions contained a mistake in that they required caravan owners not to occupy during the month of February … This condition has never been enforced … We always thought that this situation, with apparently some of the residents able to occupy during the day in February but not stay overnight, whilst the remainder of the residents were able to occupy and stay overnight in February, as exceptionally silly. Hence we ignored it and so did all of the residents*".

68. In her second witness statement, made overnight during the course of the hearing, Valerie Green states that there was no restriction on occupancy until late 1997 or early 1998. That restriction was subsequently removed then later reintroduced and then again removed. Mr Morgan reinstated it after his purchase in 2004. Janet Jones' witness statement supports this evidence. She was connected with Tallington Lakes from 1993 onwards and became general manager in 1995.

69. In January 2005 Valerie Green wrote to residents in connection with the VAT status of pitch fees and said:

> "*I am pleased to inform you that following a review, you may use your caravan pitch throughout the entire year without restriction in February.*"

70. Mr Morgan gave evidence that when he took over in April 2004 he had re-imposed the occupancy restriction. He did this in the 2004 Terms and Conditions.

71. The evidence included a sales brochure produced by Humberts Leisure Chartered Surveyors at the time the business was being marketed for sale in 2004. This was subject to the usual disclaimers concerning reliance generally contained in such documents. It refers to 233 existing mobile home pitches with planning consent for a further 150 pitches and a site licence for 385 pitches "*all for 11 Month occupancy from the 1st March to 31st January*". It also refers to 3 additional lodges being held on long leases. In relation to the lodges the brochure states:

> "*The three 'A frame' lodges are each held on similar individual 99 year, repairing leases from 1st June 1998 … The use is restricted to a holiday home which may not be occupied in February …*"

72. Mr Morgan maintained that the sales particulars were wrong in their description of the lodges and the restriction on 385 pitches. He said that the lodges were held on 999 year leases without restriction. He did not produce copies of the relevant leases. He referred us to the planning permission dated 9 June 1987 for 6 residential chalets said to refer to the lodges and correctly pointed out that there was no residential occupancy condition.

73. The witness statements of Valerie Green and Janet Jones also stated that the woodland lodges were sold on 999 year leases.

Outline of Parties Submissions on the Evidence

74. Mr Morgan contends that in 1988 when permission was granted for 34 static caravans there were already 210 caravans on the site for which there was no planning permission. He submitted that the planning permissions granted in 1993 and 1994 were indicative of the District Council trying to do something about the previously established use as a caravan park which had occurred without planning permission and therefore without any restrictions. He accepted that the 1993 permissions did impose an occupancy restriction although they affected only the discrete areas of land identified in Annex A. He submitted they were for the development of 167 new mobile home pitches in addition to the 240 pitches which already existed without any occupancy restriction at that time.

75. The heart of Mr Morgan's submissions was that prior to October 1993 there was no document which placed any restriction on the occupation of mobile homes. Further there was no planning permission in place for use of the land as a caravan park until 1988 and the permission granted in 1988 contained no restriction. If the planning permission contained no occupancy restriction it was extraordinarily unlikely that any site licence, even if one existed, would contain such a restriction. He relied upon the position in law that a site licence could not be granted by the District Council unless there was a planning permission in place.

76. Mr Morgan maintained that at the time the first planning permission for mobile homes was granted in 1988 the site had been operating for some 15 years. When the 1993 permissions were granted it was a case of the District Council acting retrospectively to regularise the position.

77. For the period after October 1993 Mr Morgan did not accept that the existing 240 mobile homes were subject to any occupancy restriction. Whilst the planning permissions contained an occupancy restriction, he did not accept that the mobile homes were occupied subject to that restriction. However he said that he was prepared to accept for the sake of argument that a proportion of pitches developed between 1993 and 1996 should be treated as being subject to an occupancy restriction.

78. Following some adjustments, Mr Morgan produced a schedule calculating that proportion as follows. There were 280 pitches for which planning permission was granted in the period 1988 to 1996. Of these, 145 were developed and were subject to an occupancy restriction and 64 were developed without any occupancy restriction. The remaining pitches for which planning permission was granted were not developed in that period. Hence he said that 70% of those developed had an occupancy restriction and 30% had no occupancy restriction.

79. Mr Morgan's explanation for the change in VAT treatment in 1989 was what he described as "*pressure*" placed on Mr Robinson by HMRC such that Mr Robinson wrongly agreed to treat the pitch rentals as standard rated. Mr Robinson had told him

as much. He did not accept that Mr Robinson had made any enquiry as to the effect of the change in the law in 1989. He did not accept the accuracy of officer Revell's visit report in 1989, suggesting that what was recorded there was wrong. For example, he said that the woodland lodges were sold on 999 year leases and not 99 year leases and that there was no occupancy restriction in the leases or in the planning permissions. They were completely residential. If Mr Robinson told HMRC this then he was wrong.

80. The appellant's position was that the decision in 1989 to treat the pitch fees as standard rated was simply wrong and that we should find that there was no restriction on occupancy between 1989 and 1996. Mr Morgan also relied on a reference in the HMRC rolling report to the effect that the caravan park was zero rated and if that was the case then it would have been exempt following the 1989 changes to the legislation.

81. Mr Morgan did not accept that the 1960 Act applied to Tallington Lakes, although he did not refer us to any reason why that might be the case other than to say "*maybe this Act didn't apply because this was a residential park home site*".

82. In relation to the 1995 Terms and Conditions Mr Morgan was adamant that they were not in effect in 1995. He submitted that the first terms and conditions to include an occupancy restriction were introduced in 1997/98. They were amended in 1999, subsequently tightened up by the document incorrectly stamped 1995, later removed, reimposed by Mr Morgan in July 2004 and finally removed in January 2005.

83. Mr Morgan sought to support this sequence of events by reference to a term in the 1995 Terms and Conditions which prevented caravans manufactured more than 12 years prior to the date of commencement of the licence to be kept on the pitch. It is not disputed that the 1999 Terms and Conditions contained a similar provision but by reference to caravans manufactured more than 14 years prior to the commencement of the licence. Nor is it disputed that the 2004 terms and Conditions contained a similar provision but with reference to 12 years. Mr Morgan submitted that this provision would not have been altered in this way. It was more likely that the relevant age was originally 14 years in 1999 and was then subsequently reduced to 12 years some time between 1999 and 2004 from which it could be inferred that the 1995 Terms and Conditions were actually introduced sometime after 1999.

84. Mr McGurk submitted that if the repeated insertion and removal of an occupancy restriction really occurred as Mr Morgan suggested then Valerie Green would undoubtedly have said so in her 2005 witness statement. She would have been able to say that for long periods, including all periods prior to 1997/98, residents were not restricted from occupying caravans for the whole year. In this regard her first witness statement was inconsistent with the case now put forward by the appellant.

85. Mr Morgan maintained that there was no inconsistency between Valerie Green's witness statements. He did at least accept that her first witness statement might have been clearer.

86. Based on the evidence Mr Morgan invited us to find that in the late 1980s the shareholders in the appellant wished to prepare the company for sale. There were more than 200 mobile homes on Tallington Lakes without planning permission, and mobile home owners did not move out during February. The local council would only grant planning permission with an occupancy condition and that is what they did in 1993. However that condition only applied to new areas at the site to be developed rather than existing mobile homes. To impose such a condition on the existing occupiers would have caused uproar. Attempts were made to do so by the appellant in late 1997 or early 1998 but the adverse reaction of owners led to it being removed, re-introduced and then removed again.

87. It followed, so said Mr Morgan, that because there was no planning permission for more than 200 pitches, there could be no site licence. It was only once the planning permissions had been granted in October 1993 that the council could grant a site licence which it did in February 1994.

88. Mr McGurk submitted that it was inconceivable that 240 mobile homes could have been on site in 1993 without planning permission or a site licence. That would have been a criminal offence under the 1960 Act. He invited us to infer that there must have been a site licence and planning permission in place prior to 1993. Further that it was a reasonable inference that the planning permission imposed an occupancy restriction on mobile homes which it covered.

89. In support of the respondents' positive case that there were such restrictions Mr McGurk relied heavily on the correspondence between Mr Robinson and HMRC in 1989 and the HMRC rolling record of visits since 1988. There was, he said, no evidence of any pressure placed on Mr Robinson by HMRC, as alleged by Mr Morgan. This evidence supported the existence of a restriction in the planning permission. We note that Mr McGurk did not suggest that it was likely an occupancy restriction would have been imposed in the absence of a planning restriction.

90. In the alternative Mr McGurk pointed to the absence of documentary evidence as to the terms of the planning permission and site licence. If we were satisfied that there was a planning permission in force, Mr McGurk said that the appellant could not satisfy the burden on it of establishing that there were no occupancy restrictions prior to 1993.

91. Mr McGurk also relied on the description "leisure homes" in the 1988 planning permission which he said implicitly restricted use to holiday accommodation for less than a year. Mr Morgan's response was that this was not the test. The test was whether there was a restriction in occupancy.

92. Mr McGurk submitted that the Planning Schedule was not reliable as a comprehensive planning history of the site. Whilst it appeared to have been produced for the purposes of Mr Morgan's purchase of shares in the appellant there is no evidence as to the circumstances in which it was produced, whether it was subject to any reservations or indeed whether it was a draft or final version.

93. In relation to the evidence as to the terms and conditions pursuant to which owners occupied mobile homes, Mr McGurk submitted that this supported the existence of an occupancy restriction going back to at least 1995. Valerie Green's evidence in her 2005 witness statement clearly supported the existence of an occupancy restriction going back to 1986. She speaks of a "*mistake*" in the "*previous*" terms and conditions. Her reference to previous terms and conditions must have referred to those pre-dating the 2004 Terms and Conditions which were in evidence in the 2007 Proceedings. At the date of this witness statement everyone including Mr Morgan accepted that the 2004 Terms and Conditions in fact went back to 1991. If there was a significant period of time during which the terms and conditions did not contain a restriction she would have said so. Her evidence was also consistent with the 1995 Terms and Conditions.

94. Mr Morgan's evidence in relation to the 1995 Terms and Conditions was, said Mr McGurk, pure speculation and not reliable. There was no reason not to take the document at face value and accept it as a record of the terms and conditions in place in 1995. The occupancy restriction contained in those terms and conditions was then repeated in the 1999 terms and conditions.

95. Similarly, Mr McGurk submitted that the witness statement of Janet Jones and the second witness statement of Valerie Green, both dated 11 October 2012, should carry no weight. They were inconsistent with other documentation, in particular the 1995 Terms and Conditions, and inconsistent with Valerie Green's first witness statement. Neither had been made available for cross examination. Their evidence and Mr Morgan's submissions were inherently implausible because they gave rise to the following sequence of events:

(1) Terms and conditions introduced in late 1997/early 1998 which we have not seen imposing a general occupancy restriction.

(2) The restriction was amended in the 1999 Terms and Conditions.

(3) The restriction was subsequently "tightened up" in the 1995 Terms and Conditions.

(4) The restriction was removed prior to Mr Morgan's purchase of the shares in 2004.

(5) The restriction was re-introduced by Mr Morgan in July 2004.

(6) The restriction was removed by Mr Morgan in January 2005

96. There was no evidence at all before the tribunal to support the alleged changes at (1) and (4). Mr McGurk also submitted that it was implausible that a mobile home owner occupying a site subject to the October 1993 planning restriction would not also be subject to terms and conditions similarly restricting occupation. Otherwise the appellant would have been exposed to being in breach of the terms of the planning restriction. We note that it has never been suggested by the appellant that some owners were subject to terms and conditions containing an occupancy restriction whilst others were not.

Findings of Fact

97. The issues which we have to resolve on this appeal arise against the background of the planning permissions, site licences and terms and conditions in force at various times. The burden is on the appellant to satisfy us on the balance of probabilities that there was no occupancy restriction affecting mobile homes at Tallington Lakes in the period 1 April 1989 to 4 December 1996.

98. The documentary evidence which we have described above was not in issue, in the sense that the documents were all accepted as genuine documents. The dates and the truth of the content of a number of documents was hotly disputed, in particular the 1995 Terms and Conditions, the HMRC rolling record and the visit report. In general however the real dispute between the parties was as to the inferences which could properly be drawn from the documentation.

99. We deal with our findings of fact by reference to the same headings under which we have described the evidence. In making our findings of fact we have taken into account the totality of the evidence and the submissions of Mr Morgan and Mr McGurk.

(a) The Appellant's Historical Dealings with HMRC

100. The dealings between Mr Robinson and HMRC in 1989 were in part evidenced by the letter from HMRC to Mr Robinson dated 3 April 1989. There was also the rolling record which evidences contact in 1988 and 1989 and a visit record also from 1989.

101. We regard these documents as cogent and contemporaneous evidence as to the correct VAT position with effect from 1 April 1989.

102. Reference in the rolling record to "*caravan park: zero rated*" refers to the sale of mobile homes. It establishes to our satisfaction that there were mobile homes on Tallington Lakes in 1989. We consider it unlikely that there would have been any business selling mobile homes which was not connected with the rental of pitches to the purchasers. The HMRC rolling record describes the caravan park as being a "*subsidiary business activity*" to the main activity of the leisure park.

103. Mr Morgan's evidence was that there were 210 mobile homes on the site in 1989 without planning permission. The number of mobile homes on site at this time was not challenged by HMRC. It is not entirely clear to us how this reconciles with some of the documentation. For example the site licence granted in September 2003 was for up to 385 mobile homes for which there was planning permission. That would suggest a total of 595 mobile homes either on the site or for which there was planning permission. However the sales particulars from 2004 indicate that at that time there were 233 existing pitches with planning permission for a further 150 pitches. Notwithstanding this apparent inconsistency we do not intend to go behind the agreed basis on which the parties have dealt with the evidence. We approach our task on the basis that there were 210 mobile homes on the site in 1989 and make a finding of fact to that effect.

104. The letter from HMRC dated 3 April 1989 indicates that there had been some prior discussion between Mr Robinson and HMRC as to the VAT treatment of mobile home pitch rentals. It clearly summarises the prospective 1989 legislation in relation to pitch rentals. We do know that the appellant was treating pitch rentals as exempt. That must have been on the basis that owners of mobile homes were not "*camping*", in other words that their stays on the site were not temporary. What was regarded as temporary at that time was a matter of some uncertainty as appears from the Tribunal decision in *Warner*.

105. It is clear that Mr Robinson and an officer of HMRC were both addressing their minds to the issues arising in relation to the 1989 changes and how the appellant should treat pitch rentals in the future. From 1 April 1989 the appellant standard rated the pitch fees.

106. The visit report from officer Revell some time later in 1989 records in terms the basis on which the appellant was standard rating the pitch fees. It was expressly on the basis that mobile homes could not be legally occupied throughout the year. The same treatment is recorded in relation to woodland lodges.

107. We do not accept Mr Morgan's submissions that Mr Robinson was pressured into conceding that the pitch fees were standard rated. There is simply no evidential basis for that submission. Given the significance of the change introduced with effect from 1 April 1989 we consider it unlikely Mr Robinson would have agreed to that treatment without at least some discussion with the directors of the appellant. Indeed Mr Morgan gave evidence and we accept that caravan parks such as Tallington Lakes are intensely competitive in terms of pitch fees. Against that background we are not satisfied that Mr Robinson was in any way pressured into agreeing that pitch fees were properly standard rated with effect from 1 April 1989.

108. We acknowledge that we have not heard evidence from the officers who dealt with the appellant in 1989. Nor indeed have we received any evidence from Mr Robinson. In those circumstances, and without more, there is no reason not to accept the contents of those documents at face value. They are prima facie evidence that there were occupancy restrictions on all mobile homes at Tallington Lakes in 1989.

109. It does remain a possibility that Mr Robinson was mistaken as to the occupancy conditions attaching to the mobile homes. We must therefore consider whether there is any evidence to support such a finding and whether it is sufficiently cogent, in the absence of evidence from Mr Robinson, for us to conclude on the balance of probabilities that there were no occupancy restrictions.

(b) The Planning Position

110. The planning history of the site was fairly described by Mr Morgan as "*a patchwork quilt*". He also fairly described the documentation covering both planning and site licensing as "*inconsistent and erratic*". Both parties have attempted to obtain as much information as possible about the planning history of Tallington Lakes with varying degrees of success. At no stage does South Kesteven District Council confirm

that the planning history as set out in the Schedule is complete. What is at least clear is that we do not have a complete picture and we must do the best we can with the material we have.

111. We accept Mr McGurk's reservations about the reliability of the Planning Schedule. We cannot be satisfied that it is a reliable and comprehensive schedule of the planning history of Tallington Lakes. We would have expected planning to have been a significant issue in the negotiations for purchasing the site and that there would have been much more by way of documentation and correspondence addressing the issue than a single page schedule. We have seen no such documentation.

112. It is clear to us from the planning permissions which we do have that when permission was granted in terms for "*use of land as caravan site*" such permissions did not extend to the whole of the Tallington Lakes site. The permissions were granted in relation to specific areas of the site. Without reference to the planning applications themselves, which were not in evidence, it is impossible to be sure which planning permissions relate to which areas. However both parties were content to rely on the accuracy of Annex A which identified to some extent the various areas to which some of the planning permissions related.

113. We acknowledge Mr Morgan's submission that the first relevant permission on the Planning Schedule which relates to mobile homes is dated 8 March 1988. We accept that it did not contain any occupancy restriction as such, although it is arguable, as Mr McGurk submits, that the description of "*leisure homes*" suggests that occupation for less than a year is permitted. In the light of our findings of fact generally it is not necessary for us to determine that issue, but we accept that it does at least imply some restriction on occupation.

114. There was no evidence to support Mr Morgan's assertion that in the late 1980s and early 1990s the previous shareholders and the District Council were seeking to regularise the planning position. Nor was there any evidence that the previous shareholders were looking to sell the business at that time.

115. Considering the planning evidence in isolation we accept that it does at least support Mr Morgan's submission that there were no planning restrictions prior to 1993. However we are not satisfied that the evidence shows the complete picture and in any event we must consider all the evidence before us in reaching our findings on the issue.

(c) Site Licences

116. The site licences themselves contained no restrictions on the period of occupation, although they do refer to "*holiday caravans*". It is not suggested that the conditions on which the site licences were issued would themselves have contained such restrictions.

117. It is clear from the site licence application in 2002 that the appellant was treating all mobile homes on the site, apart from the employee caravans, as subject to

an occupancy restriction. That evidence is inconsistent with Mr Morgan's assertion that at least 210 mobile homes on the site had no such restriction.

118. We are left with Mr McGurk's submission that as a matter of law Tallington Lakes required a site licence. A site licence could only be granted if there was planning permission in place. It does seem to us unlikely that Tallington Lakes would have been operated in such substantial breach of the 1960 Act without any planning permission or site licence covering any mobile homes on the site prior to 1993. The appellant's contention that in 2003 when Mr Morgan was negotiating the share purchase more than half the mobile homes on the site were not covered by the site licence seems equally unlikely. As does the suggestion that the solicitors acting for Mr Morgan in the purchase would not have addressed the issue with him directly if there had been any cause for concern. The absence of a site licence and planning permission would undoubtedly have been a cause for concern.

119. Mr Morgan's evidence in relation to site licences was less than satisfactory. It was part of the appellant's case that a site licence could not be issued unless a planning permission was in place. It is also clear that site licences were issued as identified above, including site licences after Mr Morgan had purchased the shares in the appellant. However he professed not to know whether it was necessary for Tallington Lakes to have a site licence in order to comply with the 1960 Act. He could point to no exemption applicable to Tallington Lakes. He had apparently taken no steps to satisfy himself as to the need for a site licence.

120. We found Mr Morgan's lack of knowledge as to the regulatory requirements for Tallington Lakes surprising to say the least. Whilst he is not a lawyer, he is an intelligent businessman running a substantial holiday park. We have no reason to doubt Mr McGurk's analysis of the requirements of the 1960 Act and their application to Tallington Lakes.

121. Putting that to one side, Mr Morgan's evidence was that he did not know if there was a site licence prior to 1993. It does appear to us that the Environmental Health Department of South Kesteven District Council was seeking to ensure compliance with the 1960 Act in the period 2001 to 2003. There was some correspondence in this period which refers to site visits but it does not identify any substantial number of mobile homes for which there was either no planning permission or no site licence. In the light of that correspondence and the evidence as a whole it seems unlikely to us that there would have been a substantial number of mobile homes at Tallington Lakes at that time without planning permission or without a site licence.

(d) Terms and Conditions

122. It was not suggested to us that there would be any reason for the terms and conditions on which owners rented pitches to contain an occupancy restriction if there was no such restriction in the planning permissions. Equally, if planning permissions in place did contain an occupancy restriction we think it likely that a similar

restriction would have been included in the terms and conditions for pitches. Otherwise the appellant risked a significant breach of the planning condition.

123. We do not consider that much if any weight can be attached to the 1991 Terms and Conditions. We had no reliable evidence as to the provenance of the document or indeed reliable evidence that those terms were ever in force. It may have been a final document, it may have been a draft. In the absence of any reliable corroboration we simply cannot make any findings in relation to this document.

124. We cannot accept Mr Morgan's evidence in relation to the production of the 1995 Terms and Conditions. He was not connected with the appellant in 1995 and we have no direct evidence in relation to the date of this document save the document itself. We were told by Mr McGurk on instructions that Mr Gray, an officer of HMRC, had obtained the document but it was not clear where he had obtained it from or in what circumstances.

125. We do not consider that the reference in the 1995 Terms and Conditions to the restriction in relation to caravans manufactured more than 12 years prior to the commencement of a licence supports Mr Morgan's submission that it post-dated 1999. In this context Mr Morgan did not refer to the 1991 Terms and Conditions which also contained a similar provision with a reference to 12 years. We are not satisfied that the 1991 Terms and Conditions were ever in force, but in any event we do not consider that we can read anything into any pattern in the references to the age of caravans.

126. It is notable that the 2004 Terms and Conditions are in a very similar format to the 1999 Terms and Conditions. The 1995 Terms and Conditions, which Mr Morgan submits were dated between the two, are in a quite different format.

127. Whilst the evidence as to the provenance of the 1995 Terms and Conditions is incomplete, we find that the document was received by the Environmental Health Services department of the District Council and stamped by them on receipt in 1995. It contains the terms and conditions for pitch licences from at least 1995 onwards.

128. It is notable that the occupancy restriction in the 1995 Terms and Conditions refers to the "*site licence rules*". The site licences which we have seen include a site licence dated 1 February 1994. This licence does not expressly include the occupancy conditions referred to in the 1995 Terms and Conditions. It does refer to the licence being issued subject to certain 1989 model conditions. However there is no evidence that this site licence imposed an occupancy condition. Indeed none of the site licences referred to above contain any occupancy restriction. Mr McGurk did not suggest that site licences would normally contain such restrictions.

129. We infer that the most likely explanation is that the reference to "site licence rules" is to a separate set of rules and refers to the licences granted by Tallington Lakes to the owners rather than to site licences granted by the District Council. We note that there is a reference in clause 9 of the 1995 Terms and Conditions to

"*Membership and park rules*". There is no evidence before us as to the content of those rules.

130. It is also notable that the occupancy restriction in the 1995 Terms and Conditions goes beyond the conditions imposed by the 1993 planning permissions. The terms restrict occupancy not just in the month of February but also occupation for more than 28 days in any 6 week period. It is not clear to us why that should do so and the most likely explanation is that they reflected a restriction to be found elsewhere.

131. It was common ground that the 1999 Terms and Conditions contained an occupancy restriction. It is notable that they do so by reference to planning permission, although again it uses different terminology for some reason arguably imposing a lesser restriction than that contained in the 1993 planning permissions.

132. Subject to any estoppel arising out of the 2007 Proceedings we would accept Mr Morgan's evidence that he drafted the 2004 Terms and Conditions after he purchased Tallington Lakes. The 2004 Terms and Conditions impose an occupancy restriction in line with the 1993 planning permissions. That is consistent with his evidence that he was not aware of any other planning restrictions although it does not shed any light on whether other planning restrictions existed.

133. For the reasons given above we do not consider that we have a complete picture of the planning history of Tallington Lakes. Against that background, it is difficult to assess the significance of language used in the various terms and conditions. We do however find that the 1995 Terms and Conditions were in place in 1995 and no terms and conditions prior to these have been produced. The language used in the 1995 Terms and Conditions and the 1999 Terms and Conditions supports the existence of a planning restriction in addition to that imposed in 1993.

134. We are unable to accept the evidence of Valerie Green and Janet Jones that the terms and conditions contained no occupancy restriction until 1997 or 1998. Their evidence has not been tested by cross-examination and is inconsistent with the 1995 Terms and Conditions. We accept Mr McGurk's submission that Valerie Green would have made a very different witness statement in the 2007 Proceedings to the one she made in November 2005 if the first occupancy restriction was introduced in 1997 or 1998 and subsequently removed and re-instated. If there had been a long period of time prior to 1997 when the terms and conditions permitted owners to live in mobile homes without restriction she would no doubt have said so.

135. We agree with Mr Morgan's submission that to impose an occupancy restriction on existing occupiers would have caused uproar. We do not accept that such a restriction would have been imposed unilaterally some time after 1993 when there were more than 240 mobile homes on the site. If that were the case we are sure that Valerie Green or Janet Jones would have remembered and would have said so in their witness statements.

136. Subject to any impairment of memory due to the passage of time, one might expect Valerie Green to be able to provide direct evidence as to the terms of occupation going back to 1986. Unfortunately she was not called to give oral evidence and HMRC have not been able to cross-examine her on her witness statements. Similarly in relation to Janet Jones. The absence of such evidence does not assist the appellant in discharging the burden of establishing that there was no restriction prior to 1993.

(e) Generally

137. The evidence contained in the sales particulars in 2004 supports the respondent's case. It expressly states that all existing mobile homes on the site were subject to an occupancy restriction. It also states that 3 woodland lodges on 99 year leases from 1 June 1998 have a similar restriction.

138. We are not satisfied that the reliability of the sales particulars is brought into question because they refer to 99 year leases rather than 999 year leases. Mr Morgan adduced no direct evidence as to the length of the leases. For the reasons give above we cannot accept the evidence of Valerie Green and Janet Jones on this issue. Mr Morgan referred us to the planning permission for 6 residential chalets (274/87) which he said were the woodland lodges and contained no occupancy restriction. It was not clear to us whether this planning permission related to the woodland lodges. We do note however that the sales particulars are consistent with Officer Revell's visit report from 1989.

139. Taking all the evidence and submissions into account we find as a fact that Mr Robinson treated pitch fees as standard rated from 1 April 1989 because at that time there was a planning restriction on occupation throughout the year. We are not satisfied that he was mistaken to do so.

140. We do not accept Mr Morgan's submission that Tallington Lakes operated without any planning permissions or site licences for 210 mobile homes in the period up to 1989. Indeed, the implication of Mr Morgan's submissions is that Tallington Lakes continues to this day to operate without planning permission or a site licence for a substantial number of mobile homes. We appreciate that there is some evidence which supports Mr Morgan's submission but, on the balance of probabilities, we are satisfied that there were occupancy restrictions in 1989.

T*he 2007 Proceedings*

141. In the light of our findings above it is not necessary for our decision to address the respondents submission that the appellant is seeking to re-litigate issues which were determined against the appellant in the 2007 Proceedings. We shall therefore deal with Mr McGurk's submissions on this issue relatively briefly.

142. Mr McGurk made two principal submissions:

(1) That the issue of whether the supply of pitches by the appellant was exempt or standard rated was determined in favour of the respondents in the

2007 Proceedings and the appellant is barred from re-litigating it by cause of action estoppel.

(2) The 2007 Proceedings involved certain fundamental findings of fact and law and the appellant is barred from re-litigating those matters by issue estoppel.

143. The 2007 Proceedings, and the judgment of Richards J in particular, determined the nature of the appellant's supplies of pitches in the period 1 January 2001 to 31 December 2003 ("the relevant period"). It was held that the supplies were standard rated rather than exempt during this period because there was a restriction on occupation during February of each year. Richards J stated at [31]:

> *"I conclude therefore that the Tribunal's decision cannot stand and that HMRC's appeal should be allowed. Both the contractual and planning restrictions on occupation during February applied during the relevant period, with the result that the company was providing "seasonal pitches". VAT was therefore chargeable on the grant of the pitch licences."*

144. In reaching that conclusion the learned judge considered the findings of fact of the Tribunal including those findings in relation to the 2004 Terms and Conditions we have considered in this decision and the planning history of the site. Following the judgment Mr Morgan applied to have the appeal remitted to the VAT Tribunal for it to make further findings of fact as to the terms and conditions applicable in the relevant period and the planning history of the site. He sought to persuade the judge that he should be permitted to re-open the position in relation to these matters. The application was refused on the basis that the material was all available at the time of the tribunal hearing and could have been put before the tribunal.

145. Mr Morgan has adduced all the relevant evidence in the present appeal. Mr McGurk objects to that course on the basis of issue estoppel.

146. Both the VAT Tribunal and Richards J were concerned with the 2004 Terms and Conditions which, on the basis of Valerie Green's evidence, they appear to have accepted covered the position going back to 1991. They were also concerned with the planning permissions granted on 26 October 1993 and 4 January 1994 (SK92/1328 and SK93/0189 respectively). They were not concerned with any other planning permissions or terms and conditions. In particular it does not appear that the 2007 Proceedings considered the position prior to 1991.

147. On that basis Mr McGurk accepted that in making his findings, Richards J considered the position from 1991 onwards in relation to the terms and conditions and from 1993 onwards in relation to the planning permissions in force.

148. Mr McGurk raised cogent arguments that both for the period from 1989 to 1991 and for the period from 1991 to 1996 the appellant is barred by a cause of action estoppel and/or issue estoppel from asserting that the supplies of pitches are exempt. Our impression is that those arguments are stronger in relation to the later period than in relation to the earlier period. However with respect to Mr McGurk's submissions

we do not propose to decide those issues. Firstly because it is necessary for us to make appropriate findings of fact even if Mr McGurk were right in his submissions. Having made those findings of fact we have decided to dismiss the appeal in any event. Secondly because Mr Morgan, who is not a lawyer, was not in a position to offer any contrary legal argument.

149. We also note, for the sake of completeness, that Mr Morgan told us that he has referred the decision of Richards J to the European Court of Human Rights. We were provided with no documentation to substantiate that the reference had been accepted or was still outstanding but in any event both parties agreed that it should not affect our decision.

Decision

150. We have found that in the period 1 April 1989 to 4 December 1996 there was a restriction on owners occupying mobile homes at Tallington Lakes throughout the year.

151. In the light of that finding of fact we are bound to find that supplies of pitches by the appellant in that period were properly standard rated. In the circumstances we must dismiss the appeal.

152. In the light of our decision an issue of unjust enrichment relied on by the respondents does not arise. In any event we would not propose to finally determine that issue before the decision of the Upper Tribunal in *Reed Employment v HM Revenue & Customs FTC/39/2011* which we are told is due to consider that issue. For the sake of completeness we record that Mr Morgan's evidence relevant to the issue of unjust enrichment was not challenged by HMRC. Consequently we find as a fact that caravan parks such as Tallington Lakes are intensely competitive in terms of pitch fees. By way of illustration the appellant has not been able to increase pitch fees over the last 7 years. The burden of accounting for output tax on pitch fees over the period in question led to a lack of maintenance and investment at the site.

153. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 28 February 2013

SCHEDULE

ANNEX A

TALLINGTON LAKES, BARHOLM ROAD, TALLINGTON

This forms part of Site Licence number 84/2

Area	No of Static Holiday Caravans	Planning Reference
East Bank	**34**	**SK75/1668/87/2895**
Windsurf Bank	**48**	**SK93/0189/75/8**
Windsurf Bank	**10**	**S02/1640/75**
Windsurf Bank (old touring area)	**12**	**SK93/0189/75/8**
Main Bank	**56**	**SK93/0189/75/8**
The Island	**26**	**SK92/1328/75/52**
Island Bank	**30**	**SK93/1200/75/47**
Lagoon Bank	**37**	**SK92/1328/75/52**
Centre Bank	**27**	**SK92/1328/75/52**
Centre Bank / Lagoon Bank	**47**	**S02/1032/75**
South Bank	**52**	**S00/0407/75**
Lake View	**6**	**S02/1640/75**
TOTAL	**385**	