UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – WATER CHARGES – whether first-tier tribunal has jurisdiction to determine breach of Water Resale Order 2006 – estimated charges based on previous year resulting in overpayment recouped in subsequent year – whether in breach of Order – whether repayment to be ordered – appeal allowed

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

BETWEEN:

WYLDECREST PARKS (MANAGEMENT) LTD

Appellant

and

MR GORDON SANTER and others

(Members of the Beechwood Park Residents Association)

Respondents

Re: Beechwood Park, Beacon Way,
Dawlish Warren,
Devon
EX7 OSP

Martin Rodger QC, Deputy Chamber President

The Court House, Exeter

16 January 2018

Mr David Sunderland for the appellant.
Mr Gordon Santer and *Mr Stephen Hassall* for the respondents

The following cases are referred to in this decision:

Duke and others v Wyldecrest Parks (Management) Ltd, Re: Scatterdells Park, unreported, 25 April 2013, residential property tribunal

Telchadder v Wickland Holdings Ltd [2014] UKSC 57

Introduction

1. Beechwood Park ("the Park") is a protected site under the Mobile Homes Act 1983 which provides permanent pitches for 92 mobile homes. This appeal arises out of an application made to the First-tier Tribunal (Property Chamber) ("the FTT") on 20 October 2016 by the owners of 63 homes on the Park all of whom are members of the Beechwood Park Residents Association. By their application the residents sought a determination that in the period from 15 May 2015 to 31 March 2016 the Park owner, Wyldecrest Parks (Management) Limited, had overcharged for water supplied to them.

2. Wyldecrest applied to the FTT to dismiss the application on the grounds that it had no jurisdiction to determine whether overcharging had occurred. It says that a claim of overcharging for water in breach of article 6 of the Water Resale Order 2006 ("the 2006 Order") must be determined in the County Court. The FTT disagreed and refused to strike out the residents' application, declining to follow an earlier decision of a residential property tribunal on which Wyldecrest had relied.

3. On 4 January 2017 I granted permission to appeal on the basis that there were now conflicting decisions at first instance concerning the FTT's jurisdiction to determine claims arising out of alleged overcharging for utilities. I directed that the FTT should decide the substantive issues in the application before the appeal on the issue of its jurisdiction was considered so that any appeal arising out of its resolution of those issues could be determined at the same time.

4. On 11 April 2017 the FTT issued its decision on the substantive application. It found that between 15 May 2015 and 31 March 2016 Wyldecrest had charged each resident £148.75 more than it had itself paid for the water it supplied to them. This was said by the FTT to be a breach of article 6 of the 2006 Order and it directed that the amount overcharged should either be credited to the residents' accounts or refunded to them within 28 days. Despite finding that an overpayment had occurred, the FTT considered that the approach used by the appellant to estimate the charges for water, which involved basing charges for the current year on cost incurred in the preceding year, was a reasonable one.

5. On 31 May 2017 the FTT granted permission to appeal its substantive decision.

6. The appeal raises three issues. The first is an issue of general importance to park owners and residents, namely whether the FTT has jurisdiction to determine disputes about overcharging for the supply of water. The second is whether the FTT was correct to find that the appellant was in breach of article 6 of the 2006 Order because its system of estimating water charges resulted, in the event, in a greater sum being recovered from residents in a particular period of 10 months than the appellant itself had incurred from its own water supplier in that period. The third issue is whether the FTT was correct to direct repayment of the sum overcharged when, as is now agreed, by the time it made that direction, the overpayment had been recouped by

residents as a result of lower monthly charges set by Wyldecrest for the year beginning 1 April 2016.

7. At the hearing of the appeal Wyldecrest was represented by Mr David Sunderland, its Estates Director, and the residents were represented by Mr Gordon Santer (who until recently was chairman of the Residents Association) and Mr Stephen Hassall of the Independent Park Homes Advisory Service. More than forty of the residents attended the hearing, and a small number of them made additional points or provided information during the course of the proceedings. I am grateful to all who attended for their assistance.

The facts

8. Wyldecrest is the owner of more than 50 mobile home parks. At 28 of those parks it is a water "re-seller". As defined by article 5 of the 2006 Order a water re-seller is any person who is not a water undertaker but who provides, from water supplied to it by a water undertaker, a supply of piped water to the resident of a dwelling. In its own guide to water resale OFWAT, the water regulator, describes a "re-seller" as someone who charges domestic tenants or others for water which they receive from a water company.

9. The effect of article 6 of the 2006 Order is that a water re-seller may not charge more for the water it supplies to domestic purchasers than the amount it is charged for that water by its own supplier (plus a small administration charge of about £5 a year). There is therefore no profit to be made by Wyldecrest from re-selling water to the residents of the Park.

10. The Park is an estate of 92 pitches which was acquired by Wyldecrest on 15 May 2015. Each pitch is occupied under the terms of an agreement between T.S. Martin Ltd, Wyldecrest's predecessor as Park owner, and the resident of the mobile home stationed on the pitch. In the course of the hearing I was shown the agreement under which Mr Santer and his wife occupy their pitch. I assume the agreements under which the other residents occupy pitches are on materially the same terms.

11. Mr and Mrs Santer's agreement includes an express undertaking by the resident, at paragraph 5.2 of Part 4, "to pay the park owner promptly all charges for electricity, gas, water, refuse removal and any other services supplied to the park home or pitch." The agreement says nothing about the frequency or quantification of these charges, (in contrast to paragraph 5.1, which requires payment of the pitch fee by monthly instalments). It is Wyldecrest's case that it is entitled to adopt any reasonable scheme of charging for water which it chooses, including charging monthly in advance based on an estimate of consumption, or six monthly in arrears when it receives its own water bill.

12. The terms implied by Chapter 2 of Part 1 of Schedule 1 to the Mobile Homes Act 1983 (as amended) ("the 1983 Act") also apply to the agreement. In the case of

charges for utilities the implied terms neither contradict nor supplement the express term, and provide only that the occupier must:

> "Pay to the owner all sums due under the agreement in respect of gas, electricity, water, sewerage or other services supplied by the owner."

By paragraph 22(b) of the implied terms the owner of a park is required, if requested by the occupier, to provide (free of charge) an explanation of any charges for water or other utilities or services payable by the occupier under the agreement together with documentary evidence in support.

13. When Wyldecrest took over management of the Park it continued to charge for water supplied to the residents at the same monthly rate of £58.62 as had been charged by its predecessor. Wyldecrest did not know the basis of that charge but assumed that its predecessor's practice, which was also Wyldecrest's own practice, was to estimate water charges for the forthcoming year in February and to notify any change in the amount of the monthly charges so that they took effect from 1 April in each year, that being the date on which changes in the pitch fees payable by residents also take effect. Since an owner cannot know in advance exactly how much water will be consumed in the forthcoming year, or by precisely how much prices may increase, the charge is an estimate based on the quantity and cost of water consumed on the Park in the previous year. It is also Wyldecrest's practice across all of the sites at which it is a water re-seller, that any over-payment made by residents as a result of this process of estimation, or any under-payment, is credited or recouped through the monthly bills paid in the next year. In practice, adjustments in either direction were said by Mr Sunderland hardly ever to be necessary, but if any were required they would be spread over the whole year so that the amount payable each month would remain the same.

14. Shortly after the appellant acquired the Park Mr Santer wrote to Mr Sunderland welcoming the change of ownership and identifying a number of issues which the residents had had with the previous owners. One of those issues concerned water charging. Historically water had been supplied to the Park and an adjoining holiday park through a single common meter, with the aggregate costs for the two sites being apportioned and the Park's contribution then being sub-divided equally between the 92 individual pitches. This, Mr Santer pointed out, had resulted in over-charging to the residents of the Park. The overcharging was continuing (at that time) because the monthly charge set in February 2015 by Wyldecrest's predecessor on the basis of the inaccurate apportionment between the two sites had been taken over by Wyldecrest. In subsequent correspondence Wyldecrest said that any necessary adjustment would be made when the water charges were reviewed and set for the next year.

15. The first water bill which Wyldecrest received in its own right was on 6 January 2016, after the installation of a new water meter; before that date two bills were received from the owner of the adjoining site through whose meter water to the Park was supplied. It was apparent by that time that the monthly sum being collected from each pitch more than covered the cost incurred by Wyldecrest.

16. On 25 February 2016 Wyldecrest notified residents that the water charge for the year commencing 1 April would be reduced to £44.26 per month. Following a request from Mr Santer a calculation showing how this charge was made up was provided. The calculation was based on the three bills for water which had been received by Wyldecrest between 15 May 2015 and 6 January 2016, a period of 236 days. From those three bills (copies of which were supplied to Mr Santer) Wyldecrest had calculated a daily cost for water consumed on the Park which it then converted into an annualised cost before apportioning it equally between the 92 homes on the Park and expressing the result in equal monthly instalments. The effect was that the charge for 2016-17 was based on the cost incurred by Wyldecrest in the first eight months of its ownership of the Park, rather than on a full year's figures. Mr Hassall confirmed that the residents did not question that approach.

17. In response to Wyldecrest's explanation of the proposed charge for 2016-17, Mr Santer pointed out that the three invoices suggested that in 2015-16 the residents had paid £14.36 per month more per pitch than the appellant had paid to its own supplier for the same water, yet nothing was proposed to be done to reimburse that sum. Mr Santer emphasised that he did not expect the appellant to re-pay sums which had been overcharged by its predecessor, but only expected it to reimburse overpayments which it had received.

18. No satisfactory resolution was offered by Wyldecrest and on 19 October 2016 the residents issued their application to the FTT seeking reimbursement.

19. By the time the application was finally determined by the FTT in April 2017 a further year's water charges had been paid by Wyldecrest to its supplier; Wyldecrest had charged residents for that water at the monthly rate of £44.26 per pitch which it had notified in February 2016. By February 2017, when Wyldecrest received its last bill before the FTT hearing, the effect of an increase in the charges it had paid to its own supplier was that the residents had underpaid for the period since 1 April 2016 by a cumulative total which exceeded the overpayment for the preceding year.

20. The parties now agree that by the time of the FTT hearing they were more or less even for the whole period from 15 May 2015 when Wyldecrest had taken over the Park until February 2017; the exact amount of the small underpayment by the residents depends on the assumption made about the first month (when the water charge had been paid to Wyldecrest's predecessor, which had not accounted for it to Wyldecrest).

The FTT's jurisdiction decision

21. In its decision of 15 November 2016 the FTT dismissed Wyldecrest's request that the residents' application be struck out for want of jurisdiction. The appellant's submission was that the enforcement of the 2006 Order was a matter exclusively within the jurisdiction of the County Court. In support of that submission reliance was placed by Wyldecrest on a decision of a residential property tribunal, (the predecessor of the FTT) on 25 April 2013 concerning a dispute between Wyldecrest

and the residents of Scatterdells Park, a protected site in Hertfordshire. Amongst other issues, the residents of that park had sought a determination of the sums which they could lawfully be required to pay for electricity. That depended on whether Wyldecrest was bound by the maximum resale price for electricity set by OFGEM, the electricity regulator. The tribunal considered that only the County Court could determine whether the maximum re-sale price provisions applied to the arrangements at Scatterdells Park and therefore decided that it did not have jurisdiction to determine the amount to be paid for electricity under the residents' pitch agreements.

22. Wyldecrest asked the FTT to follow the Scatterdells Park decision and to decline to determine whether there had been overcharging for water, in breach of the 2006 Order.

23. In its decision of 15 November 2016 the FTT referred to section 4 of the 1983 Act which (in England) confers jurisdiction on it to determine any question arising under the Act or any agreement to which it applies. The FTT was satisfied that the price which the residents ought to have been charged for the water supplied to them at the Park was a question arising under the residents' pitch agreements, to which the 1983 Act related. It therefore ruled that it had jurisdiction to entertain the residents' application notwithstanding the apparently contrary view expressed by the tribunal in the Scatterdells case.

The FTT's substantive decision

24. In its substantive decision of 11 April 2017 the FTT recorded that the residents did not dispute the calculation of the monthly charge levied from April 2016 (although the FTT did not say so, I take this to be a reference to the charge of £44.26 notified to all residents on 25 February 2016). What the residents wanted was an adjustment to be made to reflect the fact that for the period from 15 May 2015 to 31 March 2016 they had paid more for their water than it had cost Wyldecrest. The appellant's case was that any overcharge would be dealt with by adjusting the water charges for the year beginning 1 April 2016.

25. After the hearing before the FTT, but before its decision, Wyldecrest provided further invoices and calculations, including the calculation which, it is now agreed, shows that by the date of the hearing the account between the parties was more or less even, with no cumulative overpayment. It appears that the additional invoices had previously been supplied to the residents but had not been referred to at the hearing. The new information included an invoice covering the period after 6 January 2016 until 31 March 2016. This enabled the FTT to determine that the total cost to the appellant for water supplied to it during the period it had been asked to examine, from 15 May 2015 to 31 March 2016, had been £43,052.62. The FTT apportioned that sum equally between all of the residents of the Park and concluded that for the period covered by the residents' application each pitch had overpaid by £148.75.

26. The FTT was not critical of the principle on which Wyldecrest determined the water charges, but it considered that there were flaws in the detailed application of its approach. The FTT said this:

> "In making this determination the Tribunal accepts that it is reasonable for the Respondent to estimate annual water charges based on the actual consumption of the previous 12 months but in making this calculation the respondent must be consistent in annualising the invoices relied upon, and not include an overlap period in the estimate for successive years.
>
> Whilst going forward the adjustment of water charges on an annual basis does not contravene the 2006 Order such adjustment cannot be used to ignore the over payment for the disputed period. Simply basing the estimate for the following year on the actual cost for the previous year does nothing to refund any over payment during the preceding year, as the OFWAT regulations require. If, for example, the estimated cost turns out to be more or less correct, the residents remain "out of pocket" in respect of the over-payment for the previous year. If water prices in the subsequent year increase to a figure greater than the amount estimated any overpayment would be eroded in part, but it is inevitable that the cost in the subsequent year will be greater than the estimate, so there will need to be a reckoning at regular intervals. The Tribunal considers that an annual balancing exercise, once the actual costs are known, would be a reasonable way to proceed for the benefit of both mobile home owners and the Park owner."

27. In paragraph 45 of its decision the FTT made a number of determinations. These referred to a schedule showing how it calculated the overpayment of £148.75. None of those determinations was that the appellant was in breach of the requirements of the 2006 Order. Nevertheless, in summarising its decision in paragraph 1 the FTT had already expressed its conclusion as follows:

> "(a) The [residents] have paid [Wyldecrest] more than the water which it supplied to the [residents] costs [Wyldecrest] during the period between 15 May 2015 and 31 March 2016. This is in breach of clause 6 of the Water Re-sale Order 2006 ("the 2006 Order") made under section 150 of the Water Industry Act 1991.
>
> (b) The method used by [Wyldecrest] estimates the monthly payments for water for the year commencing 1 April in each year by basing this on the actual cost of the water for the preceding year and is reasonable.
>
> (c) Where, once the actual cost of the water for the year is known and there has been an overpayment by a mobile home owner for that period in breach of the OFWAT regulations, [Wyldecrest] is liable to refund the overpayment to the mobile home owner straight away or credit it against the next instalment of monthly water charges until the overpayment has been used up. Conversely, if there has been an underpayment a balancing charge will be due to be paid by the mobile home owner to [Wyldecrest].

(d) That being the case, the Tribunal has calculated the situation as at 31 March 2016 and finds that each mobile home owner at Beechwood Park, as at 31 March 2016 overpaid the [Wyldecrest] the sum of £148.75 which amount should either be credited to their accounts or refunded to them and the Tribunal orders this to be done by the respondent within 28 days."

It appears that the FTT did not appreciate when it made this order that, as is now agreed, the effect of using the previous year's bills to set the charge for 2016-17 combined with increases in the cost of water to Wyldecrest was that the overpayment of £148.75 had already effectively been reimbursed when the order for repayment was made.

The appeal on jurisdiction

28. Mr Sunderland first submitted that the residential property tribunal in the Scatterdells Park case had been correct to find that it did not have jurisdiction to determine the amount of an over payment said to have been made for utilities. There was no difference between the jurisdiction of that tribunal and of the FTT, nor any relevant distinction between the 2006 Order and the maximum pricing provisions applicable to the supply of electricity. Whether overcharging for water had taken place depended on the terms of the 2006 Order rather than on any provision of the agreement under which a pitch was occupied. Section 4 of the 1983 Act gave the FTT jurisdiction to determine any dispute under such agreements or under the Act itself, but not any other dispute.

29. In support of his submission Mr Sunderland referred to the Housing (Scotland) Act 2017 which had introduced a "fit and proper person" condition for the grant of licences to operate mobile home sites in Scotland. Section 32(O)(2) of the Act requires that certain matters be taken into account in the application of that condition and refers separately to breaches of the law relating to caravans and contraventions of a charges scheme made under the Water Industry (Scotland) Act 2014. This suggested to Mr Sunderland that parliamentary draftsmen did not treat water charging as part of the law relating to caravans. However, the 2014 Act is an Act of the Scottish Parliament which is not contemporary with either the 1983 Act or the 2006 Order, and it is therefore unlikely to shed useful light on the intentions of the United Kingdom Parliament in enacting the legislation applicable in England with which this appeal is concerned. In any event I did not find it of assistance.

30. Mr Hassall explained that the residents had consulted LEASE, the government funded leaseholder advisory service, before bringing their application for reimbursement in the FTT. According to LEASE, the FTT was the appropriate place for all disputes under the terms of agreements under the 1983 Act to be resolved.

31. I am satisfied that the FTT came to the correct conclusion on the issue of jurisdiction.

32. By section 4(1) of the 1983 Act the FTT has jurisdiction, in England, to determine "any question arising under this Act or any agreement" to which the Act applies and to "entertain any proceedings brought under this Act or any such agreement." The pitch agreements at the Park are, it is agreed, agreements to which the 1983 Act applies.

33. The obligation to pay for water consumed on the pitch is imposed by paragraph 5.2 of Part 4 of the pitch agreement, and not by the 2006 Order. In ordinary language the question of how much an occupier is obliged to pay for water under paragraph 5.2 is an issue which "arises under" the agreement, and the proceedings commenced by the residents in the FTT were "brought under" their agreements, because the obligation to pay the charge was imposed by the agreement. Once the water had been paid for the question whether more had been paid than was properly due also arose under the agreement, and proceedings for its recovery were brought under the agreements for the same reason.

34. The effect of paragraph 6(2) of the 2006 Order is to place a limit on the sum which may be charged by a re-seller for water it supplies to domestic customers. When determining whether such customers have been charged too much for their water it is obviously necessary to take the provisions of the 2006 Order into account, but that does not prevent the determination of the water charges properly payable by the residents in this case from being a question arising under their individual agreements.

35. The 2006 Order does not stipulate that issues relating to overcharging or reimbursement must be determined in any particular forum. In contrast, section 4 of the 1983 Act gives effect to a clear policy that disputes concerning the rights and obligations of the occupiers of mobile homes (except those relating to the termination of agreements, which are allocated to the County Court by section 4(3) of the 1983 Act) should be determined in tribunals rather than in courts.

36. The law relating to mobile homes is complex and inaccessible. A substantial proportion of the residents of mobile homes are elderly (68% in 2002 and probably more today: see *Telchadder v Wickland Holdings Ltd* [2014] UKSC 57, at paragraph [13]). Most live on modest fixed incomes.

37. These characteristics of the residents of mobile home parks, and the legislation which governs their rights, may explain why Parliament considered in 2011 (when enacting the Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals)(England) Order 2011) that most mobile homes disputes should be dealt with in tribunals, with the benefits of expertise, greater accessibility and lower cost which dispute resolution in tribunals provides. They may also explain why, in 2014, Parliament gave tribunals enhanced powers, including the power to give direction requiring the payment of money by way of compensation, damages or otherwise, by one party to proceedings under the 1983 Act to another (see section 231A(4), Housing Act 2004, inserted by The Transfer of Tribunal Functions (Mobile Homes Act 2013

and Miscellaneous Amendment) Order 2014). The effect of these enhanced powers is that, in cases concerning mobile home parks, the risk that proceedings to resolve disputes may be required to be commenced in more than one forum is reduced.

38. The language of section 4 of the 1983 Act is very broad, and the powers conferred by section 231A of the 2004 Act are extensive and expressed in general terms. It should therefore be taken that (with the exception of disputes over termination) the proper forum for the resolution of contractual disputes between park home owners and the owners of protected sites in England is the FTT.

39. The residential property tribunal in the Scatterdells Park case came to a different conclusion in relation to a dispute about charges for electricity. The argument on the question of whether the maximum pricing regime applicable to electricity was applied to the park was ambitious (the residents argued that the tribunal should treat two companies as if they were one company), and the absence of professional representation may have discouraged the tribunal from tackling the issue. On the material contained in the decision itself it is not clear to me why the tribunal considered that it lacked jurisdiction. The question whether the residents were charged too much for their electricity was a question which arose under their pitch agreements. The residential property tribunal's decision should not be regarded as a precedent for other cases.

The appeal on the substantive issue

40. In his grounds of appeal, for which the FTT gave permission, Mr Sunderland pointed out that although there had been an overpayment in the period ending on 31 March 2016, by the time of the FTT's decision the calculations which he had provided to it showed that there was now a cumulative underpayment for the whole of the period of Wyldecrest's ownership. Having found that the practice of basing charges on actual costs in the previous year was a reasonable one, Mr Sunderland submitted that the FTT ought not to have found that the resulting overpayment amounted to a breach of the 2006 Order, especially as the imbalance had been reversed by the time of the decision. For the same reason the FTT ought not to have made an order for immediate repayment of the sum overcharged up to 31 March 2016, since the effect of doing so would be that Wyldecrest would have to bill each resident an additional sum to recoup the shortfall in 2016-17, which would be unwelcome to residents managing a fixed budget.

41. Mr Sunderland explained that the system of using the previous year's bills to estimate a fixed monthly charge at the beginning of the year was adopted on all of Wyldecrest's parks. The relatively substantial overcharge in this case was due to its predecessor's estimate (inherited at a time when Wyldecrest had no data of its own on which to base a different charge); that estimate was based on an apportionment of the supply to two parks served by a single meter which had turned out to be inaccurate. In more typical circumstances, because water charges tended to rise, the practice of basing the future charge on the previous year's bills meant that the risk of underpayment was on the site owner, but in Mr Sunderland's considerable experience

the changes from one year to the next were modest and evened themselves out. There was always the option to adjust the monthly charge a little, in either direction, if a surplus or deficit arose, but Mr Sunderland said that this was rarely done in practice. The implied terms did not prescribe how water or other utilities should be charged for, and did not require that agreement be reached on the method to be adopted. Mr Sunderland's system had the great merit of simplicity and avoided recalculation when new bills were received. This was of benefit to residents on fixed incomes who would know at the beginning of each year how much they would have to pay each month for water.

42. For the residents Mr Hassall did not disagree with the general approach of fixing a monthly sum based on previous consumption and sticking to it through the year, but there would have to be exceptions. One such exception should have been made when Wyldecrest received its first bill in January 2016 from which it was obvious that the estimate made by its predecessor would result in a substantial overpayment by residents unless a rebate was provided. It was accidental or fortuitous that the overpayment had eventually been wiped out by a shortfall in the sums collected by the time of the FTT hearing. Mr Hassall emphasised that a park owner should not make decisions about water charging without consultation with residents; no doubt very small overpayments would not be of concern and could be carried forward, but where an overpayment of almost £150 had built up, it was necessary that it be paid back promptly, rather than being allowed to roll over into the next year, especially where there was no transparent scheme of regular accounting year on year.

43. Mr Hassall also made it clear that the calculation provided by Mr Sunderland was accepted, and that as matters had stood at the date of the FTT's decision there had been no overpayment by residents. None of the residents were suggesting that a payment need to be made by Wyldecrest.

44. There is nothing of immediate financial significance left in the appeal. It is common ground that by the time of the FTT's substantive decision a small underpayment had built up over the whole of Wyldecrest's period of ownership. No payment is therefore due to the residents, nor was any such payment due at the time the FTT directed that each resident should receive £148.75 within 28 days. If the FTT was aware that the overpayment had already been wiped out, it was clearly wrong to order an immediate repayment, but I assume that was not the case. If the FTT did not appreciate the state of the account then it fell into inadvertent error. In either case the appeal against the order for repayment made in paragraph 1(d) of the FTT's substantive decision must be allowed.

45. There remain two questions of continuing significance.

46. The first is whether the FTT was correct to find, in paragraph 1(a) of its substantive decision, that there had been a breach of clause 6 of the 2006 Order. Wyldecrest is understandably sensitive about being found to have breached the law. It is a substantial company in this often disputatious sector and is concerned about its

reputation. It is also concerned that, should a "fit and proper person" condition be introduced for the licensing of protected sites in England and Wales, as has happened in Scotland and as Mr Sunderland told me was a possibility in this jurisdiction, the FTT's finding may cause difficulty in the future.

47. The second issue is whether the FTT was correct in its finding in paragraph 1(c) of its substantive decision that where there has been an overpayment in breach of the 2006 Regulations, the re-seller is liable to refund the overpayment straight away or credit it against the next instalment of monthly water charges until the overpayment has been used up.

48. The two issues are connected. It was the fact that there had been a breach which prompted the FTT to say that an immediate remedy was required. More generally, if the consequence of adopting its current approach of estimating future bills is that it risks being found in breach of the 2006 Order and comes under an immediate obligation to reimburse any sum overcharged (which would incur a further administrative cost), Wyldecrest would be inclined to move to a system of requiring payment in arrears. That would enable it to charge when it knew exactly what costs it had incurred, thereby avoiding the risk of breaching the 2006 Order, but it would result in bills being delivered at six monthly intervals, which would be likely to create budgeting issues for residents.

49. Overcharging is dealt with in article 10 of the 2006 Order, which provides as follows:

> "Where a Purchaser pays a charge in respect of anything to which this Order relates and the amount paid exceeds the maximum charge fixed by this Order,
>
> (1) the amount of the excess; and
>
> (2) simple interest on that amount at the rate of twice the average base rate of the Bank of England which was applicable during the period in respect of which the excess is calculated
>
> shall be recoverable by the Purchaser from the Re-seller to whom he paid the charge."

50. The 2006 Order does not specify the period in respect of which any excess charge should be calculated, nor does it identify when a re-seller will be in breach of the requirement not to charge more than it has paid for water supplied to a purchaser. Nor does article 10 say when any necessary repayment should be made. Article 6(2) prescribes a moderately complicated method for calculating the maximum charge payable by a purchaser whose own supply is not metered; unless a higher charge is justified the maximum is the average bill payable by the water undertaker's own domestic customers, which is published from time to time by the Director of OFWAT. The maximum sum payable by individual purchasers is determined by ascertaining the sum paid by the reseller, deducting any metered supplies and then apportioning the balance amongst all unmetered purchasers by reference to the size or number of occupants in each of the affected purchasers' dwellings. It is likely that in

many or perhaps most cases the maximum sum which may be charged will not be known until some time after the water has been supplied. There is no prohibition on requiring payment in advance and, as Mr Sunderland pointed out, the terms of the pitch agreements used at the Park, and the implied terms, do not specify when bills may be delivered.

51. Given the lack of precision surrounding charging for water I am not prepared to say that a method of charging which the FTT found to be reasonable, which the residents of the Park agree is reasonable, and which is said to operate without difficulty in a large number of protected sites, amounts to a breach of the 2006 Order simply because in one period of 10 months it resulted in the residents paying more than the maximum charge. The fact that an overcharge occurred gave rise to a right on the part of the residents to recover the overpayment under article 10, but in this case recovery has taken place. In the circumstances of this case I do not think the FTT should have described Wyldecrest as having breached the 2006 Order, and I therefore allow Wyldecrest's appeal against paragraph 1(a) of the substantive decision.

52. As for the timing of the duty to reimburse overpayments, it seems to me that moderate and realistic approach taken by both sides in this appeal suggests a common sense solution which makes a precise answer unnecessary. Whatever the size of an overpayment the purchaser is entitled to recover it when they choose. In practice, however, they are unlikely to require immediate repayment unless the sums involved are significant. The residents acknowledged through Mr Hassall that small overpayments need not be reimbursed straight away, in the same way as small underpayments should not bring the premature variation of a charge intended to last for a year. It is of benefit to both resellers and purchasers for small fluctuations not to be allowed to disturb a system of fixed monthly charges. That is a reasonable approach to the 2006 Order which the parties are free to adopt without the re-seller being said to be in breach.

53. If, as happened in this case, a significant overpayment builds up, so that the purchaser is not content to see it dealt with by an adjustment to the monthly payments which will fall due in the next year, it does not seem to me that they can be required to wait. In my judgment article 10 of the 2006 Order puts the initiative in the hands of the purchaser by whom the overcharge is recoverable. If the purchaser requests reimbursement the reseller is required to comply, or will be in breach of article 10.

54. In this case by the time of the hearing before the FTT there was no need for reimbursement.

Martin Rodger QC
Deputy Chamber President

1 February 2018