UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 147 (LC) UTLC Case Number: LC-2022-617

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

PARK HOMES – PITCH FEE REVIEW – whether the presumption of RPI increase displaced – deterioration in the condition and amenity of the site

BETWEEN

WICKLAND (HOLDINGS) LIMITED

Appellant

-and-

AMELIA ESTERHUYSE

Respondent

Re: 16 Meadowview Park,
St Osyth Road,
Little Clacton,
Essex, CO16 9NT

Judge Elizabeth Cooke
Determination on written representations
Decision Date: 30 June 2023

Mr Stephen Goodfellow for the appellant, instructed by Fisher Jones Greenwood solicitors

The following cases are referred to in this decision:

Britanniacrest Limited v Bamborough [2016] UKUT 0144 (LC)

Vyse v Wyldecrest Limited [2017] UKUT 24 (LC)

Introduction

1. The is an appeal by the owner of Meadowview Park, where the respondent Ms Esterhuyse lives in a mobile home pursuant to an agreement with the appellant made in 2017. The appeal is from the decision of the First-tier Tribunal refusing the appellant's application to have the pitch fee for the respondent's home increased in line with the retail prices index for the year 2022.

2. The appeal has been decided under the Tribunal's written representations procedure. The appellant's grounds of appeal were drafted by Mr Stephen Goodfellow of counsel; the respondent has chosen not to take part in the appeal.

The factual and legal background

3. Ms Esterhuyse has lived at Meadowview Park since 2017. Her agreement with the appellant provides for her pitch fee to be reviewed on 1 January each year. The park is a "protected site" under the Mobile Homes Act 1983 and accordingly terms are implied into the agreement by Schedule 1 of that Act. The provisions of that Schedule relating to England are contained in Chapter 2 of the Schedule.

4. Paragraph 16 of Chapter 2 provides that the pitch fee can only be changed in accordance with paragraph 17, either with the agreement of the occupier or if the FTT on the site owner's application considers it reasonable for the pitch fee to be reviewed and so orders. Paragraph 17 sets out the procedure for reviewing the pitch fee.

5. Paragraph 18 states (so far as relevant) that when the amount of the new pitch fee is determined "particular regard shall be had to –

> "(1) ... (aa) in the case of a protected site in England, any deterioration in the condition, and any decrease in the amenity, of the site or any adjoining land which is occupied or controlled by the owner since the date on which this paragraph came into force (in so far as regard has not previously been had to that deterioration or decrease for the purposes of this subparagraph)."

6. Paragraph 20 provides:

> "in the case of a protected site in England, unless this would be unreasonable having regard to paragraph 18(1), there is a presumption that the pitch fee shall increase or decrease by a percentage which is no more than any percentage increase or decrease in the retail prices index ..."

7. The applicant seeks to increase the pitch fee for 2022 reviewed in line with the RPI, and therefore by 6% from £193.32 per month to £204.92. There is no dispute that the applicant followed the procedure prescribed by paragraph 17. Ms Esterhuyse refused to agree the increase and in June 2022 the appellant applied to the FTT for an order that the pitch fee be increased by 6%, noting in its statement of case that Ms Esterhuyse had refused to pay the increase "largely on the basis that the hardstanding supporting her mobile home

requires repair". Ms Esterhuyse made written representations to the FTT. Neither party asked for a hearing and the FTT made its decision on the papers.

8. I pause there to say that there were contested issues of fact between the parties; Ms Esterhuyse complained of damp condensation, mould and a leaking pipe, which the appellant says either was not true or her own responsibility. So the FTT's decision to determine the application without a hearing was surprising.

9. However, as will be seen, the FTT made its decision on the basis of facts that were not in dispute. The parties' accounts of one aspect of their dealings was consistent; it it is agreed that shortly after she took up residence at the park Ms Esterhuyse became aware of cracks to the hardstanding beneath her mobile home. This was repaired by the appellant. Ms Esterhuyse regarded the repair as unsatisfactory, and complained to the local authority .As she later said in her statement of case to the FTT:

> "In 2018 Cement base repaired but as a botched backyard job using the Gardener of our Park, working on his own. I asked questions and took photos. I was unhappy. My home was moving and shifting and not levelled and has caused damage that was on going. I asked our Council for assistance."

10. The local authority agreed with her, and on November 2019 it served on the appellant a Compliance Notice, alleging breach of one of the conditions of the appellant's licence to operate the protected site. The Notice required the appellant to employ a fully qualified structural engineer to inspect the hardstanding thoroughly and to carry out works to guarantee the structural integrity of the hardstanding.

11. By January 2022 when the pitch fee review notice was served the appellant still had not caried out that work; the appellant's statement of case to the FTT in June 2022 stated that the work had been delayed due to the pandemic and because of Ms Esterhuyse's ill-health but was due to commence on 10 July 2022. She was going to have to move out because her mobile home would need to be moved, and the appellant was going to fund accommodation for her because there were no spare pitches on the site.

The FTT's decision

12. In light of the statutory provisions set out above the FTT had to decide whether it was reasonable for the pitch fee to be increased, and whether the presumption of an increase in line with the RPI was displaced, having particular regard to the factors mentioned in paragraph 18. As the FTT put it at its paragraph 12:

> "Upon application, the Tribunal must determine two things. Firstly, that a change in the pitch fee is reasonable and, if so, it must determine the new pitch fee."

13. The FTT at its paragraph 32 directed itself to consider whether there had been a deterioration in the condition or amenity of the park and said that if it so found then:

> "33. … it must decide whether it would be unreasonable for the pitch fees to be increased on the basis of the increase in the retail prices index (RPI)."

14. At paragraph 34 the FTT noted Ms Esterhuyse's evidence of cracking of the base on which her home stood, and said that there were other issues between the parties. It said no more about the "other issues" but went on to mention the Compliance Notice and observed that the site owner accepted that the hardstanding required repair and had so required since 2019. The FTT referred to the decision of the Tribunal (HHJ Alice Robinson) in *Vyse v Wyldecrest Limited* [2017] UKUT 24 (LC) where it was said at paragraph 45:

> "the factors which may displace the presumption are not limited to those set out in paragraph 18(1) but may include other factors …

15. The FTT also quoted part of paragraph 50, Judge Robinson explained that if none of the factors mentioned in paragraph 18 applied then it is necessary to consider whether any other factor displaces the presumption of an increase in line with the RPI:

> "By definition, this must be a factor to which considerable weight attaches … it is not possible to be prescriptive … What is required is that the decision maker recognises that the 'other factor' must have sufficient weight to outweigh the presumption in the context of the statutory scheme as a whole."

16. The FTT concluded:

> "38. In this case, notwithstanding the responsibility for the other defects complained of, the landlord has accepted that repairing the cracked base is their responsibility. As at 1 January 2022 they had failed to repair it. It is clearly causing Ms Esterhuyse distress and worry and goes to the heart of her occupation of the park.
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> 39. The tribunal finds that this is a factor to which, in this case, considerable weight attaches and outweighs the presumption that the pitch fee will increase by the RPI."

The appeal

17. The appellant has three grounds of appeal.

Ground 1: the FTT erred in fact in determining that the base had been cracked since 2018

18. The appellant points to paragraph 38 of the FTT's decision and says it is factually wrong. The base was cracked in 2018 but was then repaired. It had not been cracked since. Further work was required but there were no more cracks and Ms Esterhuyse did not say that the base had been cracked or otherwise damaged since the initial repairs had been done.

19. That is a mis-reading of the FTT's reasoning. What troubled the FTT was that the repairs had not been done properly; there had been, as Ms Esterhuyse complained and as the local authority agreed, a "botched job" (done by the gardener, Ms Esterhuyse said). As at January 2022 the appellant had failed to carry out proper repairs to the cracked base - whether or not the actual cracks were still visible; the Compliance Notice stated that they had been covered by a sheet of reinforcing, and then concrete poured over, so it seems the cracks were still present under the new surface. Whether or not that is the case, at any rate the appellant had failed to repair the cracking properly, and that failure was causing Ms Esterhuyse distress and worry.

20. I find that there was no mistake of fact by the FTT and this ground fails.

Ground 2:the FTT erred in fact or in law in determining that there had been a deterioration or decrease in the amenity of the site

21. The appellant here refers to paragraph 18(a) and argues that the condition and amenity of the site had not deteriorated. The condition of the hardstanding had been the same since the first repair work. And the FTT made no fining of fact about damp, mould or leaks of which Ms Esterhuyse complained. Furthermore, if there was any deterioration it had not taken place since the last pitch fee review in January 2021.

22. There are two misconceptions here.

23. The first is that there is no requirement in the statute that the deterioration referred to in paragraph 18 should have taken place since the previous review. As can be seen from paragraph 5 above, sub-paragraph (1)(aa) refers to deterioration since the provision came into force (in 2014), and which has not previously been taken into account in a pitch fee review. So the appellant's point about date is a non-starter.

24. However, the ground is without substance in any event because, despite its reference to deterioration in condition and amenity in its paragraphs 32 and 33 the FTT did not base its decision on a finding that there had been a deterioration in the condition or amenity of the site. It found that the presumption of an RPI increase was displaced by a factor outside paragraph 18, namely the failure to get the repairs done properly. This is clear from the reference to *Vyse v Wyldecrest* and the FTT's paragraph 39 (quoted above at paragraph 16).

25. This ground of appeal fails.

Ground 3: The tribunal erred in law and/or in the exercise of its discretion when applying the test as it failed to consider that, "unless this would be unreasonable" the presumed RPI linked increase in pitch fee should be allowed and/or placed too much weight on any alleged defect in the hard standing.

26. The appellant says that the FTT mis-stated the test. It was wrong to set off at its paragraph 12 (quoted above) on the basis that it must first determine whether the pitch fee was

reasonable and then determine the new pitch fee. On the contrary, there is a presumed increase unless that it unreasonable.

27. In assessing this argument I start with paragraph 16 of Chapter 2, Schedule 1, which says:

> "The pitch fee can only be changed in accordance with paragraph 17, either—
> (a) with the agreement of the occupier, or
> (b) if [the FTT] , on the application of the owner or the occupier, considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee."

28. The precise relationship between paragraph 16 and paragraph 20 is not stated in the Schedule. Paragraphs 18 and 19 set out factors to which particular regard is to be had, and also factors that are not to be taken into account in determining the amount of the new ptch fee (not in determining whether there should be an increase). Then paragraph 20 says:

> "(A1) In the case of a protected site in England, unless this would be unreasonable having regard to paragraph 18(1), there is a presumption that the pitch fee shall increase or decrease by a percentage which is no more than any percentage increase or decrease in the retail prices index."

29. In *Wyldecrest Limited v Vyse* the Tribunal referred to *Britanniacrest Limited v Bamborough* [2016] UKUT 0144 (LC), where the Tribunal (the Deputy President, Martin Rodger QC, and Mr Peter McCrea FRICS) "identified three basic principles that shape pitch fee reviews: annual review, no change without agreement unless the FTT considers it reasonable and determines the amount of the new pitch fee and the presumption of change in line with RPI."

30. At paragraph 22 in *Britanniacrest* the Tribunal expanded on those three principles and elucidated the relationship between paragraphs 16 and 20:

> "These three principles (annual review; no change without agreement unless the FTT considers it reasonable and determines the amount of the new pitch fee; and a presumption of a change in line with the variation in RPI) give the statutory scheme its basic structure. They do not provide a benchmark by reference to which a new pitch fee is to be determined, such as the amount which might reasonably be expected to be agreed as the pitch fee in the negotiation of a new pitch agreement in the open market. The FTT is given a very strong steer that a change in RPI in the previous 12 months will make it reasonable for the pitch fee to be changed by that amount, but is provided with only limited guidance on what other factors it ought to take into account. It is clear, however, that other matters are relevant and that annual RPI increases are not the beginning and end of the determination, because paragraphs 18 and 19 specifically identify matters which the FTT is required to take into account or to ignore when undertaking a review."

31. Accordingly the FTT in the present case was right, at its paragraph 12, to identify the primary question as whether it was reasonable to increase the pitch fee, but then in its later discussion to focus on whether the presumption on an increase in line with the RPI was

displaced. The FTT was perfectly clear that there was such a presumption, and made it equally clear that it was displaced by the appellant's failure to get the repairs done properly. The "strong steer" of paragraph 20 was observed, but displaced. There was no error of law. To argue, as the appellant does, that the FTT failed to observe the provision that the RPI increase must be applied unless that would be unreasonable is a misreading of the FTT's decision; that was explicitly the reasoning the FTT undertook.

32. As to whether the FTT placed too much weight on the failure to repair the hardstanding properly, the appellant argues that there was insufficient evidence for the FTT to conclude that the failure properly to repair the hardstanding was causing Ms Esterhuyse distress and worry. I disagree. The FTT's decision about the effect of the problem upon Ms Esterhuyse was one that was open to it on the basis of Ms Esterhuyse's evidence. It was an evaluation of that evidence with which the Tribunal will not interfere in the absence of some error of law or irrationality.

33. Finally the appellant says that the alleged distress and worry does not establish a deterioration in the condition or amenity of the site. That is the fallacy identified at paragraph 24 above: the FTT did not find that the presumption was displaced by paragraph 18(1)(aa).

Conclusion

34. The appeal fails on all grounds and the pitch fee for 2022 remains at £193.32 per month.

Judge Elizabeth Cooke

30 June 2023

Right of appeal

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