Neutral Citation Number: [2024] UKUT 55 (LC)

Case Nos: LC-2023-307
LC-2023-407

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) AND THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)
FTT Refs: MAN/30UN/PH1/2022/0001, 3, 8, 10, 11, 17, 19, 21, 23, 28 and 35
RPTW Refs: RPT/18-42/01/23

Liverpool Civil, Family and Tribunals Centre

27 February 2024

PARK HOMES – PITCH FEE REVIEW – presumption of RPI/CPI increase displaced by decrease in amenity – whether contractual entitlement to enjoyment of amenity required – whether assessment of impact on individual pitches required – assessment of new pitch fee – Sch.2, Mobile Homes Act 1983, Sch.2, Mobile Homes (Wales) Act 2013 – appeals allowed

BETWEEN:

WYLDECREST PARKS (MANAGEMENT) LTD

Appellant

-and-

MR ALAN WHITELEY and others
(Occupiers of pitches at Penwortham Park, Preston)

-and-

MRS ALVES and others
(Occupiers of pitches at Willow Park, Mancot)

Respondents

Penwortham Park, Preston PR1 9YD
and
Willow Park, Mancot CH5 2TX

Martin Rodger KC, Deputy Chamber President
16 February 2024

Mr David Sunderland, director, for the appellant
Mr John Fulham and *Mrs Elizabeth Duncan* for the Penwortham Park respondents
Mr Alistair Ibbotson and *Mr Sam Swash* for the Willow Park respondents

The following cases are referred to in this decision:

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

John Sayer's Appeal [2014] UKUT 0283 (LC)

Vyse v Wyldecrest Parks (Management) Ltd [2017] UKUT 24 (LC)

Introduction

1. Each of these appeals is concerned with the determination of new pitch fees for pitches on protected park home sites. In one appeal the site is in England, and is governed by the Mobile Homes Act 1983, while in the other it is in Wales, and the Mobile Homes (Wales) Act 2013 applies, but the issues raised in both appeals are the same.

2. In each appeal the relevant tribunal (the First-tier Tribunal (Property Chamber) and the Residential Property Tribunal (Wales) respectively) determined that the amenity of the site had been reduced significantly by the withdrawal of car parking areas to accommodate pitches for additional homes and, in the English case, by the conversion of a large area of open green space in the centre of the park to provide further new pitches.

3. Each tribunal decided that the reduction in amenity at the site was sufficiently substantial to displace the statutory presumption that pitch fees should increase annually by an amount equal to the increase in the retail prices index (England) or the consumer prices index (Wales). Freed of the statutory RPI/CPI presumption, each tribunal also decided that the pitch fees for every pitch under consideration should not increase at all. Had the presumption been applied, the respective increases would have been 6% at the English park and 11.1% at the Welsh park.

4. The owner of both parks, Wyldecrest Parks (Management) Ltd, now appeals against the decisions of the two tribunals. It says that they were wrong in principle to take the withdrawal of parking or green space into account because in neither case were the occupiers entitled to the continuation of those amenities under the terms of their agreements with the park owner, and in neither case did the site licence require that parking facilities or green space must be maintained at the same level. Wyldecrest also says that, even if there was a reduction in amenity at the parks sufficient to displace the presumption of an RPI/CPI increase, that should not have caused the tribunal to make no increase at all. Finally, it says that different pitches on each park benefitted from the amenities to a greater or lesser extent depending on the location of the pitch and the characteristics of the occupiers, and the tribunals should have taken those differences into account.

5. The English appeal concerns Penwortham Park on the outskirts of Preston. The decision of the First-tier Tribunal, Property Chamber (the FTT) on 27 March 2023 determined the pitch fee reviews for 16 pitches which were due with effect from 1 January 2022. The respondents to the appeal are the 21 occupiers of 15 of those pitches, who are listed in the first part of the appendix to this decision.

6. The Welsh appeal concerns Willow Park at Mancot in Flintshire. By its decision of 19 June 2023 the Residential Property Tribunal (Wales) (the RPTW) determined new pitch fees for 23 pitches with effect from 1 January 2023. The 31 occupiers of those pitches who are respondents to the appeal are listed in the second part of the appendix.

7. I heard the two appeals together. Wyldecrest was represented by its Estates Director, Mr David Sunderland. In the Penwortham Park appeal the Park residents were represented by Mr John Fulham assisted by Mrs Elizabeth Duncan, both of whom live on the Park and

are respondents to the appeal. In the Willow Park appeal Mr Alistair Ibbotson, a senior case worker acting for the local Member of Parliament, Mr Mark Tami MP, and Councillor Sam Swash, a member of Flintshire County Council, spoke on behalf of all of the respondents. I am grateful to all of those who participated in the appeal for their assistance.

The Parks

8. Penwortham Park is situated about two miles from the centre of Preston and is currently licensed by South Ribble Borough Council for up to 99 pitches. The Park is approximately triangular in shape, with the entrance to the site being about halfway along one of its three sides. At this entrance there was originally a parking area with space for 10 or 12 vehicles. In the centre of the Park was a large open grassy space, which I will refer to as "the Green". From the site plan which I was shown it appears that about 20 pitches would have had a view looking directly or obliquely onto the Green, while anyone walking around the Park would have been aware of it. The Green features in Wyldecrest's description of the Park on its website.

9. Wyldecrest acquired the Park in December 2018 and at that time there were about 82 pitches on site. Sometime in 2019 it divided the Green into 6 new pitches, laid hardstanding and services and positioned six, large new park homes on the area. A further four new pitches were created in 2020 at one end of the Park. While this work was being undertaken the parking area at the entrance to the site was used for the storage of building materials and spoil. Once the spoil had been removed, a final three additional pitches were created on the parking area, reducing its capacity (as the FTT found) from up to 12 space to 7. All of this work was carried out before an uncontested pitch fee review in January 2021. The FTT found that each pitch on the Park could accommodate at least one vehicle, but that by the date of the review there was poor provision for visitor parking.

10. Willow Park is located on the fringe of the Deeside village of Mancot in Flintshire. It is a large, protected site with a site licence permitting up to 204 mobile homes. It is also owned by Wyldecrest. At the date of the RPTW's inspection in June 2023 there were 161 pitches on the Park. As it had originally been configured the Park benefitted from two large parking areas at opposite ends of the site: the "top car park" had space for approximately 40 vehicles while the "bottom car park" had space for more than 60. Additional parking for up to 45 vehicles was available on the Park roads. At some time before 1 January 2023 (the review date) the bottom car park was taken out of use and reconfigured for an additional ten pitches.

The legislation

11. I will begin by explaining the significant features of the legislation which applies to the determination of pitch fees on park homes sites. Since the English appeal started first in time I will refer principally to the English legislation. Fortunately, although different statutes apply on each side of the border, there is only one relevant difference in the substance of the applicable law which is that, at the relevant time, the inflation index used for sites in England was the retail prices index, while in Wales it was the consumer prices

index. I was told that this difference had changed recently and CPI is now the standard measure of inflation for sites on both sides of the border.

12. The law regulating protected sites in England is found in two separate statutory regimes. Subject to irrelevant exemptions, section 1 of the Caravan Sites and Control of Development Act 1960 requires a site licence to be obtained from the local authority for use of land as a caravan site. A site licence can be granted subject to conditions (section 5) and almost invariably it will be.

13. The Mobile Homes Act 1983 ("the 1983 Act") governs the terms on which someone may station a mobile home on land and occupy it as their only or main residence. It does so by implying standard terms into every agreement between the owner of a site and the occupier of a pitch entitling the occupier to station their home on the pitch (section 2). These terms were amended in 2013 and regulate every important aspect of the relationship between owner and occupier including the duration and termination of pitch agreements, the maintenance and repair of the mobile homes and sites, the payment and review of pitch fees, the sale of homes and so on.

14. When a site owner and an occupier first agree a fee for the right to station a home on a pitch, there is no restriction on the amount they are able to agree. The only relevant implied terms are concerned with the annual review of the pitch fee and not with its original determination; market forces govern that bargain, but any subsequent increase is limited by the statutory implied terms.

15. The implied terms in Chapter 2 of Schedule 2 to the 1983 Act (both in their original form and as amended by the Mobile Homes Act 2013) provide for pitch fees to be reviewed annually, either by agreement or by the FTT (referred to in the Act as the "appropriate judicial body") on the application of the owner or the occupier. By paragraph 16 of Schedule 2, if the parties cannot agree, the pitch fee may only be changed by the FTT if it "considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee."

16. The procedure for obtaining a new pitch fee is specified in paragraph 17 of Schedule 2. The pitch fee can be reviewed annually at the review date. The owner must give notice of its proposed increase at least 28 days before that date, and if the occupier agrees to the proposal the proposed new pitch fee becomes payable. If the occupier does not agree, the owner may apply to the FTT for an order determining the amount of the new pitch fee.

17. Paragraphs 18, 19 and 20 of Schedule 2 explain what is to be taken into account in determining a new pitch fee. These provide the only guidance to the FTT on what it is to do if, having received an application from an owner or occupier, it considers it is reasonable for the pitch fee to be changed. Unfortunately, they are not as informative as they might have been.

18. Omitting irrelevant parts, paragraph 18 now says this:

> 18 (1) When determining the amount of the new pitch fee particular regard shall be had to -

(a) any sums expended by the owner since the last review date on improvements—

(i) which are for the benefit of the occupiers of mobile homes on the protected site;

(ii) which were the subject of consultation in accordance with paragraph 22(e) and (f) below; and

(iii) to which a majority of the occupiers have not disagreed in writing or which, in the case of such disagreement, the appropriate judicial body, on the application of the owner, has ordered should be taken into account when determining the amount of the new pitch fee;

(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;

(ab) in the case of a protected site in England, any reduction in the services that the owner supplies to the site, pitch or mobile home, and any deterioration in the quality of those services, since the date on which this paragraph came into force (in so far as regard has not previously been had to that reduction or deterioration for the purposes of this subparagraph);

(b) [Wales];

(ba) in the case of a protected site in England, any direct effect on the costs payable by the owner in relation to the maintenance or management of the site of an enactment which has come into force since the last review date; and

(c) [Wales]

(1A) But, in the case of a pitch in England, no regard shall be had, when determining the amount of the new pitch fee, to any costs incurred by the owner since the last review date for the purpose of compliance with the amendments made to this Act by the Mobile Homes Act 2013.

(2) [calculating a majority of the occupiers]

(3) In a case where the pitch fee has not been previously reviewed, references in this paragraph to the last review date are to be read as references to the date when the agreement commenced.

19. Paragraph 18 came into force in its current form on 26 May 2013. In summary, therefore, on a pitch fee review in England, "particular regard" is to be had to three matters: (1) sums expended by the owner on improvements since the last review date; (2) any deterioration in the condition, and any decrease in the amenity, of the site or adjoining land occupied or controlled by the owner since 2013 "in so far as regard has not previously been had to that deterioration or decrease for the purposes of this subparagraph"; (3) any reduction in, or deterioration in the quality of, services supplied by the owner since 26 May 2013 to which regard has not previously been had; and (4) any direct effect of legislation which has come into force since the last review date on the costs payable by the owner on the maintenance or management of the site.

20. Paragraph 19 then identifies certain costs which may not be taken into account in determining a new pitch fee (including costs of expanding the site or obtaining a site licence).

21. Finally, paragraph 20 trumps all the complexity that has gone before by creating a statutory presumption, as follows:

> "(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 calculated by reference only to—
>
> (a) the latest index, and
>
> (b) the index published for the month which was 12 months before that to which the latest index relates."

(The reference in paragraph 20(A1) to the retail prices index was changed to the consumer prices index with effect from 2 July 2023.)

22. These provisions, in their current and original forms, have been considered by the Tribunal in a number of cases. In most cases the issue has been whether some other factor, not mentioned in paragraph 18(1), may be relied on to justify an increase in the pitch fee which is different from the relevant change in RPI. That is not the question which arises in these appeals, but it is helpful to mention three of these cases and to note what they say about how the statutory presumption operates and what standard is to be applied in determining a new pitch fee when the presumption is displaced.

23. In *John Sayer's Appeal* [2014] UKUT 0283 (LC), at [21]-[23], which concerned charges for the supply of water and focussed on an earlier version of these paragraphs, I explained that the statutory implied terms do not provide a comprehensive code for the determination of the pitch fee. Their effect is that, unless a change in the pitch fee is agreed between the owner of the site and the occupier, the pitch fee will remain at the same level unless the tribunal considers it reasonable for the fee to be changed. If the tribunal decides that it is reasonable for the fee to change, the amount of the change is in its discretion, provided that it must have "particular regard" to the factors in paragraph 18(1), and that it must not take into account of the costs referred to in paragraph 19. It must also apply the presumption in paragraph 20(1) that any increase (or decrease) shall be no greater than the percentage change in the RPI unless that would be unreasonable having regard to the factors in paragraph 18(1). In practice that presumption usually means that annual RPI increases are treated as a right of the owner, but the trigger for any change is that it must be reasonable for there to be a change:

> "The overarching consideration is whether the [tribunal] considers it reasonable for the pitch fee to be changed; it is that condition, specified in paragraph 16(b), which must be satisfied before any increase may be made (other than one which is agreed)."

24. The Tribunal considered the proper approach to pitch fee reviews again in *Britanniacrest Ltd v Bamborough* [2016] UKUT 0144 (LC). The issue was whether the site owner could include within the pitch fee an administration fee associated with the provision of utilities. The Tribunal (Martin Rodger QC Deputy President 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. We continued:

> "These three principles… 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 it 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."

25. After referring to specific features of paragraph 18(1) the Tribunal continued at [31]:

> "…The fundamental point to be noted is that an increase or decrease by reference to RPI is only a presumption; it is neither an entitlement nor a maximum, and in some cases it will only be a starting point of the determination. If there are factors which mean that a pitch fee increased only be RPI would nonetheless not be a reasonable pitch fee as contemplated by paragraph 16(b), the presumption of only an RPI increase may be rebutted and a greater increase, one which raises the pitch fee to the level which the FTT considers reasonable, will be permissible."

The Tribunal concluded its review of the implied terms in *Britanniacrest* by agreeing with a submission by counsel for the site owner that:

> "the FTT has a wide discretion to vary the pitch fee to a level of a reasonable pitch fee taking into account all of the relevant circumstances, and that the increase in RPI in the previous 12 months is important, but it is not the only factor which may be taken into account."

26. In *Vyse v Wyldecrest Parks (Management) Ltd* [2017] UKUT 24 (LC) at [28], the Tribunal (HHJ Robinson) remarked again on the limited guidance provided by the statutory implied terms (which by then were in the same form as applies to these appeals):

> "It is to be noted that, other than providing for what may or may not be taken into account for the purpose of determining any change in the amount of the pitch fee, there is no benchmark as to what the amount should be still less any principle that the fee should represent the open market value of the right to

> occupy the mobile home. Indeed, in *Stroud v Weir Associates* [1987] 1 EGLR 190, the Court of Appeal held that pitch fees on other sites were not a relevant factor to be taken into account when reviewing the pitch fee, per Glidewell LJ at p.192L-M."

27. As for the operation of the presumption, at [48] Judge Robinson explained that the presumption of change in line with RPI was the starting point "unless this would be unreasonable having regard to paragraph 18(1)". If it would be unreasonable to apply the presumption, because of one of the factors mentioned in paragraph 18(1), the presumption does not arise; that was not strictly a case of the presumption being displaced, but rather of circumstances in which it would not apply at all. Where it applied, the presumption was still only a presumption, and it could be displaced by other factors, not mentioned in paragraph 18(1) (of which an example was given at [54]) if those other factors were of sufficient weight or importance that they outweighed the presumption of RPI. To have that effect the relevant factor, not mentioned in paragraph 18(1), would have to something "to which considerable weight attaches", which was for the tribunal to assess in each case (at [50]).

28. In summary, where none of the factors in paragraph 18(1) is present, and no other factor of sufficient (considerable) weight can be identified to displace the presumption of an RPI increase, the task of the tribunal is to apply the presumption and to increase the pitch fee in line with inflation. Where one of the factors in paragraph 18(1) is present, or where some other sufficiently weighty factor applies, the presumption does not operate or is displaced. Then the task of the tribunal is more difficult, because of the absence of any clear instruction on how the pitch fee is to be adjusted to take account of all relevant factors. The only standard which is mentioned in the implied terms, and which may be used as a guide by tribunals when they determine a new pitch fee, is what they consider to be reasonable. Paragraph 16 provides that, if the parties cannot agree, the pitch fee may only be changed by the FTT if it "considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee." The obvious inference from paragraph 16 is that the new pitch fee is to be the fee which the tribunal considers to be reasonable.

The issues in the appeals

29. When granting permission to appeal in the Willow Park case, I identified the following three issues:

> 1. Whether the tribunal had been entitled to treat the reduction in car parking provision as a decrease in amenity for the purpose of paragraph 18(1), and therefore as capable of rebutting the presumption of a CPI increase, where the removal of the former car park was lawful in planning and site licensing terms and no individual occupier of the Park had a contractual right to park on it.
>
> 2. If so, whether the tribunal was entitled to determine that no increase in pitch fees was justified at all, without considering (a) the extent to which individual pitches were affected by the relevant loss of amenity, and (b) whether some increase may be justified even if not by the full amount of the increase in CPI since the last review.

3. Whether the tribunals were entitled to find that there had been a relevant decrease in amenities when those changes had occurred before the previous pitch fee increase.

30. The same issues also arise in the Penwortham Park case (with the substitution of RPI for CPI). When granting permission in that case I identified an additional issue, namely:

4. What approach to valuation should be applied to the determination of a new pitch fee where there is found to have been a loss of amenity?

Issue 1: Loss of an amenity to which there is no contractual right and where removal is consistent with planning permission and site licence conditions

31. I was not shown the terms of occupation of pitches on either of the parks, but it was not suggested in either case that any individual agreement for the occupation of a pitch gave the occupiers a right to park in a particular parking space or generally in one of the car parks which was later removed. Nor was it suggested that the residents of Penwortham Park had a contractual right, in their written agreements, to have the Green preserved as an open space.

32. Mr Sunderland pointed out that there was nothing in the site licences or planning permissions for either of the parks which prevented Wyldecrest from taking the two car parks and the Green out of use for their original purpose and turning them instead into additional pitches. The number of pitches on each of the parks, after the changes, was still within the levels permitted by the site licence.

33. In those circumstances, Mr Sunderland argued that as there was no right to the enjoyment of the amenities which had been withdrawn, the change brought about by their withdrawal should not be regarded as a "decrease in the amenity" of the park or of any individual pitch. In his written argument Mr Sunderland submitted that: "it cannot reasonably be argued that this results in a loss, given that there was no right to have this in the first place, it was simply a change of arrangements." Without a decrease in amenity, he suggested, there was no reason not to apply the RPI presumption.

34. In the Penwortham Park case the FTT adopted as a working definition of "amenity" that it "refers to the quality or character of an area and elements that contribute to the overall enjoyment of an area". In the Willow Park case the RPTW did not feel it necessary to offer a definition. An amenity is anything which is a desirable or useful feature or facility of a building or place. There was no dispute before the tribunals below or on appeal that a car park and a large open green space were capable of being amenities. The only issue is whether it is necessary that there should have been some right to a particular amenity before it can be said to have decreased.

35. I do not accept Mr Sunderland's submission.

36. Paragraph 18(1)(aa) of the implied terms identifies "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" as matters to which "particular regard shall be had" when

determining a new pitch fee. There is no express requirement that the amenity must be one to which the occupier has a contractual right, either through the terms of their pitch agreement or as a matter of licensing. Nor is there anything in the context which would justify reading such a requirement in to the implied terms. It would be very unusual for an agreement to specify features of a park which were to be guaranteed for the duration of the agreement. As Mr Sunderland pointed out in relation to a different part of the argument, a park may have numerous features which can be described as amenities, all of which contribute to the setting and environment, or the facilities, available to residents, without these being listed in an agreement. Paragraph 18(1)(aa) is not confined to amenities on the park, but includes features of adjoining land provided it is occupied or controlled by the owner. It would be even more unusual for a pitch agreement to give the occupier a right to a facility which was located off the park itself.

37. There is no reason to add any additional requirement to paragraph 18(1)(aa) along the lines suggested by Mr Sunderland. An amenity can be enjoyed without any right to its preservation, and the decrease of such an amenity would be capable of making a park a less attractive place to live. It is therefore perfectly understandable that the implied terms specify such a decrease as a factor to which consideration should be given, whether or not the decrease is an infringement of a legal right or a contravention of a site licence or planning control.

Issue 2: Should the tribunals have considered (a) the extent to which individual pitches were affected by the loss of amenity, and (b) whether some increase may be justified even if not the full inflation linked increase?

38. Mr Sunderland submitted that the pitches on each park did not all benefit to the same extent from the amenities which had been withdrawn. At Penwortham Park some pitches faced directly onto the Green while others were a long way from it, had no view of it, and had access to much more extensive open space beyond the boundaries of the Park accessible by public footpath. Some pitches were very close to the car parking area and others were further away, so that visitors would be less likely to make use of it. At Willow Park there were two car parking areas at opposite ends of the Park, and those who lived on pitches adjacent to the top car park would be unlikely to be affected by the withdrawal of the bottom car park. Yet in both cases the tribunal had applied a blanket approach to all of the pitches under consideration, allowing a nil increase in every case. and, to a lesser extent Mr Ibbotson, took issue with Mr Sunderland's account of the facts. Mr Fulham emphasised in particular that all of the residents of Penwortham Park derived enjoyment and benefit from the preservation of the Green as an open space. At Willow Park, the consequences of the withdrawal of the car park may have been more widely experienced than Mr Sunderland appreciated, as visitors, carers or residents who did not have space to park on their own pitch may have been displaced to the Park roads or alternative car parks with knock-on effects throughout the Park.

39. Secondly, Mr Sunderland submitted that there was no justification for adopting a binary approach by which a choice was made between an RPI or CPI increase on the one hand, or no increase at all on the other.

40. It is convenient to begin with the second of these points.

41. The tribunal's task when an application is made to it under paragraph 16 of the implied terms is to determine a new pitch fee for the particular pitch to which the application relates. If a number of applications are made to the tribunal for different pitches on the same park, the tribunal's job is to determine each of them. On some parks residents of similar pitches may pay very different pitch fees, and in monetary terms the increase (or decrease) appropriate to different pitches will not be the same.

42. Where there is no reason to depart from the statutory presumption of an RPI /CPI increase, the increase in percentage terms for all pitches with the same review date will be the same. In that case there may be no need to distinguish between different pitches in any way, and it may be sufficient for the tribunal to state what the percentage increase is to be. But in cases where it is said that the presumption does not apply, because of a factor falling within paragraph 18(1), or where it is said it has been displaced by some other weighty factor, the tribunal will need to consider whether the factor which justifies a higher or lower increase than RPI/CPI affects all pitches equally. If it does not, then it is likely to be necessary for the tribunal to determine what is the reasonable pitch fee for each pitch, or each group of pitches affected to the same extent, rather than to adopt a blanket approach.

43. In principle, therefore, I agree with Mr Sunderland that each tribunal should have considered whether individual pitches were affected to different degrees by the decrease in amenities.

44. It is possible that, in each case, the tribunal did consider this issue and concluded that all pitches under consideration were affected to the same extent by the withdrawal of the car park or the Green. If so, they would have been entitled to apply the same adjustment, or no adjustment, to every pitch fee. But if that is what the tribunals were doing it was necessary for them to say so, so that the parties could understand why different pitches were treated identically.

45. The need for each tribunal to explain exactly what it was doing was of particular importance in these cases because, in each, the tribunal concluded that no increase was appropriate. It is possible that both tribunals considered that each pitch was affected equally by the loss of amenity and that, in view of that loss, the reasonable increase in the pitch fee was no increase at all. But it is also possible, and perhaps more likely, that the tribunals considered that they were required to make a choice between the full inflation linked increase and a nil increase. If that was the tribunals' thinking it would have been erroneous.

46. Nothing in paragraphs 18 or 20A of the implied terms provides that the pitch fee must either increase by a rate equal to the change in RPI/CPI or stay the same, with no other outcome being possible. The purpose of disapplying the presumption of an RPI/CPI increase where there has been a loss of amenity is not to punish the park owner for reducing amenities (which they may have been entirely within their rights to do) but to set a new pitch fee which properly reflects the changed circumstances. Those changed circumstances obviously include the reduction in amenity, but they will also include any change in the value of money i.e. inflation since the last review took place. For it to be appropriate for there to be no change in the pitch fee at all it would be necessary for factors justifying a reduction to (at least approximately) cancel out inflation and any other factors justifying an increase.

47. Mr Sunderland drew my attention to a number of tribunal decisions in which the presumption of an RPI/CPI increase had been displaced. In a decision of the Southern panel concerning St Dominic Park at Callington in Cornwall the FTT was satisfied that the condition of the Park had deteriorated as a result of development works to such an extent that the reasonable course was to limit pitch fee increases to half of the rate of increase in RPI. In another, concerning Fiveways Park on The Wirral, the Northern panel of the FTT had reduced an RPI increase of 13.4% to one of 12% because of the site owner's failure to undertake routine maintenance of the sewerage system. No doubt there are other examples which illustrate the willingness of tribunals to adopt an intermediate position between a nil increase and a full inflation linked increase in appropriate cases.

48. I am satisfied that in these cases both the FTT and the RPTW were entitled to find that the presumption of an RPI/CPI increase did not apply. They may also have been entitled to find that a nil increase was justified, but only if they made an assessment that all pitches were affected equally and that the loss of amenity cancelled out any increase which might have been justified by inflation. But if that was how each tribunal reached its conclusion it gave no indication of that thinking in its decision. Both decisions must therefore be set aside, either because of an error of law in treating an RPI/CPI increase or a nil-increase as the only available options, or for a failure in each case to provide a sufficient explanation of the tribunal's reasons for allowing no increase at a time of unusually high inflation.

Issue 3: Were the tribunals entitled to find that there had been a relevant decrease in amenities when those changes had occurred before a previous pitch fee increase?

49. This issue arises because in each case the relevant reduction in amenity occurred more than twelve months before the pitch fee review date, and a full RPI/CPI increase had previously taken place by agreement without any reference to the tribunal and without any mention having been made on either side of the effect of the reduction. Thus, the changes at Willow Park had occurred during 2020 and a pitch fee review increasing fees by the CPI rate of 1.3% had been instigated without challenge with effect from 1 January 2021. The changes at Penwortham Park had also taken place before 1 January 2021 and there had been an uncontested pitch fee review by reference to RPI of 1.3%.

50. Mr Sunderland submitted that the residents' acquiescence in pitch fee reviews after the relevant reductions in amenities had used up their opportunity to have the changes taken into account for the purpose of avoiding the presumption of an RPI/CPI increase. What would be unfair, he suggested, would be to allow residents to ignore a decrease in amenity in years when the relevant inflation index was very low, but then to rely on it in years, like 2022 or 2023, when inflation was very high.

51. In its original form, before the amendments made to the implied terms by the Mobile Homes Act 2013, paragraph 18(1)(b) provided that when determining the amount of a new pitch fee particular regard was to be had to "any decrease in the amenity of the protected site since the last review date". By paragraph 18(1)(a), particular regard was also to be had to a site owner's expenditure on improvements "since the last review date".

52. If the implied terms had remained in that form, there would have been no doubt that Mr Sunderland's submission would have been correct, and that any changes whether in the

form of reductions in amenity or expenditure on improvements would be taken into account at the next review date or the opportunity to have them taken into account for the purpose of paragraph 18(1) would be lost.

53. But the implied terms have not remained in that form. With effect from 26 May 2013 in England, and 1 October 2014 in Wales, the implied term has required particular regard to be had to:

> "[…] 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)"
>
> (in England, paragraph 18(ab), Schedule 1, Chapter 2, Mobile Homes Act 1983; in Wales, paragraph 18(1)(b), Schedule 2, Mobile Homes (Wales) Act 1983)

54. No corresponding change has been made to the requirement to take improvements into account, and in both statutes paragraph 18(1)(a) still refers to expenditure on improvements "since the last review date".

55. The change in the wording of the implied term has made a real difference to the treatment of adverse changes. Previously the only type of change which was within the paragraph was a "decrease in the amenity of the protected site". Now particular regard must also be had to a "deterioration in the condition" of the site. Additionally, and for the first time, other land must also be taken into account: a deterioration in the condition of adjoining land occupied or controlled by the owner, or a decrease in the amenity of such adjoining land, have been added as factors to which particular regard must be had.

56. Of relevance to the issue now being considered, there has also been a change in the time when the relevant deterioration in amenity may have taken place. The point of reference is no longer the last review date but has become "the date on which this paragraph came into force" (25 May 2013 in England and 1 October 2014 in Wales). Any deterioration or decrease since that date must be taken into account, unless the exception in brackets applies. The exception is expressed in convoluted language: "(in so far as regard has not previously been had to that deterioration or decrease for the purposes of this subparagraph)". It means: unless that deterioration or decrease has previously been taken into account when determining a new pitch fee.

57. The correct answer to issue 3 depends on the meaning of that exception.

58. I am satisfied that the exception applies only if there has been a previous pitch fee review since the relevant deterioration or decrease which has involved a determination by a tribunal, and in which the deterioration or decrease has been taken into account. In my judgment the exception does not apply where the owner has obtained an increase since the deterioration or decrease simply by making a proposal under paragraph 17 which the

occupier has agreed to or acquiesced in without the involvement of the tribunal. I have reached that conclusion for the following reasons.

59. First, the clear change in language introduced by the 2013 amendments must have been intended to bring about a real change in the treatment of losses of amenity. It cannot have been intended that the previous rule, that only changes since the last review date, should continue to apply. That would be the effect of accepting Mr Sunderland's submission.

60. Secondly, the exception applies only where the relevant deterioration or decrease has previously been "taken into account". Where the statutory presumption of an RPI/CPI increase has been applied, the only matter which is taken into account is the rate of change in the relevant index; the facts on the ground, as it were, are not taken into account. I appreciate that it might be said that both the owner who proposes an RPI/CPI increase and the occupier who accepts it might as part of that process consider whether any decrease in amenity has been sufficient to justify a different pitch fee from the one proposed, and so might be said to have taken it into account, but it seems to me that a more deliberate and consequential taking into account is what is being referred to.

61. Thirdly, and more significantly, the exception applies where the deterioration or decrease has been taken into account "for the purposes of this sub-paragraph". The sub-paragraph is sub-paragraph 18(1) which provides instructions "when determining the amount of the new pitch fee"; the purpose of the sub-paragraph is therefore the determination of a new pitch fee. Paragraph 17(1) provides that the pitch fee can only be changed in one of two ways; either "with the agreement of the occupier" or "if a tribunal … makes an order determining the amount of the new pitch fee". There is a distinction between a new pitch fee which is agreed and one which is determined by a tribunal, and the purpose of paragraph 18(1) is solely in connection with the latter. It follows that an agreement between a site owner and the occupier of a pitch over a new pitch fee is not a determination; whatever they may have taken into account when reaching their agreement will not have been taken into account for the purposes of sub-paragraph 18(1) and will not fall within the exception.

62. Mr Sunderland made the perfectly reasonable point that if a loss of amenity could only trigger the exception in paragraph 18(1)(ab) once it had been taken into account in a tribunal determination, a site owner who agreed that there should be no increase, or a below RPI/CPI increase, to take account of a loss of amenity would be at risk of the same factor being relied on in a future pitch fee review. There are two answers to that concern. First, the problem could be avoided by the owner making an application to the tribunal asking it to make a determination of the new pitch fee in the agreed amount. That would be cumbersome but effective to avoid the risk of the same loss of amenity being taken into account in a future review. Secondly, as the Tribunal explained in *Vyse* at [54], the factors identified in paragraph 18(1) are not the only factors which a tribunal may take into account when determining a new pitch fee. If a tribunal was satisfied that a loss of amenity had already been fully reflected in a previous new pitch fee which had been agreed rather than determined, while it would be required to have "particular regard" to the loss of amenity, it would not be obliged to ignore the fact that the same loss of amenity had already been taken into account when determining the current pitch fee.

63. For these reasons, in my judgment the residents of both parks were entitled to rely on the decrease in amenity as a reason why the presumption in paragraph 20A of an RPI/CPI increase does not apply to their 2023 pitch fee review.

Issue 4: What approach to valuation should be applied to the determination of a new pitch fee where there is found to have been a loss of amenity?

64. I have already explained, in addressing issue 2, that where there has been a loss of amenity the decision for the FTT is not simply a choice between an RPI/CPI increase and a nil increase. An increase of less than RPI, but more than a nil increase, may well be appropriate. I have also explained that where the presumption of an RPI/CPI increase has been disapplied by one of the factors in paragraph 18(1), or by some other sufficiently weighty factor, the task of the tribunal is to determine a new pitch fee which it considers to be reasonable.

65. The final issue in both appeals is about how the tribunal should determine what a reasonable new pitch fee should be. The main points of dispute were whether the tribunal would be entitled to take into account personal characteristics of individual residents in determining what increase would be appropriate for each pitch, and whether some sort of apportionment of a pitch fee could be identified which would enable the adjustment made to reflect a loss of amenity to be limited to a proportion of the RPI/CPI increase.

66. Mr Sunderland submitted, and I have already accepted, that in principle different pitches may be affected to different degrees by a reduction in amenity. But Mr Sunderland took this proposition further and argued that factors which have nothing to do with the individual pitch would sometimes be relevant to determining what would be a reasonable increase, or a reasonable pitch fee. Two examples were suggested. The first was the hypothetical case of a resident who did not drive; such a resident, Mr Sunderland suggested, would be likely to be less affected by the closure of a car park than other residents who did drive and who parked in that car park. The second, also hypothetical, was the case of a resident who was blind and housebound; such a resident would be likely to be less affected by the loss of the Green than a sighted resident who enjoyed looking at it or walking there. In those case, Mr Sunderland proposed, the tribunal should be willing to award a full RPI/CPI increase since the resident would not have been disadvantaged by the loss of amenity.

67. I do not accept Mr Sunderland's suggestion. While the statutory implied terms do not dictate an open market valuation approach to the new pitch fee (which, conventionally, would ignore any personal qualities of the buyer or seller, or the landlord or tenant) the tribunal is still required to determine the reasonable fee for the pitch, and not the reasonable fee for the current occupier, or any other particular occupier. The personal characteristics of a particular occupier have nothing to do with the pitch and are not part of what the fee is paid for. It would be unreasonable to allow them to influence the amount of the pitch fee. It would also be impractical.

68. Mr Sunderland next pointed out that paragraph 29 of the implied terms includes a definition of "pitch fee" which means the amount which the occupier is required by the agreement to pay to the owner for the right to station the mobile home on the pitch and for

use of the common areas of the protected site and their maintenance. He suggested that the annual pitch fee increase was paid for each of these three things: the right to station a home on the pitch, the right to use the common areas of the park, and the right to have those common areas maintained by the owner. He argued that the most significant of these rights was the right to place a mobile home on the pitch and to occupy it. He proposed that that right should be assumed to account for half the pitch fee, and half of any increase. The right to use the common areas, and the right to have them maintained, were both important and he suggested that each should be taken to account for a quarter of the pitch fee, and a quarter of the annual increase. A reduction in amenity was a change to the common areas of the park, and it followed, Mr Sunderland suggested, that such a change should not be capable of affecting the amount of the RPI/CPI increase which would otherwise have been allowed by more than 25%.

69. Mr Sunderland suggested a second refinement, which was that when there had been a loss of amenity, rather than varying the amount of the annual pitch fee increase by some proportion of the RPI/CPI rate for that single year, an annual average over the last three or five years should be calculated. It was not reasonable for the park owner to be made to forego a proportion of a 12% increase when, if the same loss of amenity had been taken into account in the previous year, the increase which would have been lost would be some proportion of 1.5%.

70. The answer to both these points is the same. It is that it is for the tribunal which is tasked with determining the new pitch fee to decide what it considers to be a reasonable new figure. Parliament has chosen to adopt a relatively crude standard for pitch fee determinations and to give very little guidance on how that standard should be applied. It is not for this Tribunal to lay down a rule where Parliament had chosen not to do so.

71. In general, for cases where the presumption of an RPI/CPI increase has been displaced, tribunals should try to adopt a relatively simple approach, because the sums involved are modest and the material available is likely to be quite limited. Unless different pitches are affected to a materially different degree by a loss of amenity such that there is a good reason for differentiating between them in determining new pitch fees, tribunals should not feel obliged to do so. They should determine what in their view is a reasonable increase or a reasonable pitch fee having regard to the owner's expenditure on improvements, and to the loss of any amenity at the park or deterioration in its condition and having regard to the change in the general level of prices measured by RPI or CPI, and such other factors as they consider relevant. They should use whatever method of assessment they consider will best achieve that objective. Mr Sunderland's suggestions strike me as rather too rigid or mechanical, but that does not mean that a tribunal which sees more in them would be wrong to adopt them.

Disposal

72. For the reasons which I have given both appeals are allowed. It is not possible for this Tribunal, which has not seen the Parks, to substitute a decision of its own on the appropriate new pitch fees and it is therefore necessary for both appeals to be remitted to the relevant tribunal for reconsideration. There is no reason why the same tribunal panel should not redetermine the cases. The parties may first wish to consider whether agreement can be reached on a compromise and I therefore direct that within six weeks of

the date of this decision Wyldecrest should apply to the relevant tribunal for further directions.

Martin Rodger KC,
Deputy Chamber President

27 February 2024

Appendix

I. Penwortham Park respondents

1. Allan Whiteley
2. Craig McGarry
3. John & Liz Duncan
4. Peter and Brenda Coward
5. Jim Briggs
6. John and Barbara Whitelegg
7. Dee and Peter Millington
8. Arthur Bradshaw and Carol Steed
9. Dorothy Wells
10. Jadz Lenart
11. Hazel Breteton
12. Norma Simmons
13. Stuart and Jean Riddle
14. Susan Gale
15. Melvyn Gardner
16. John and Jacqueline Fulham

II. Willow Park respondents

1. Mrs Rawlinson
2. Mr D and Mrs E Battison
3. Mr and Mrs Willis

4. Mrs Eaton
5. Mr Whelan
6. Mr T Challinor
7. Mrs J Smith
8. Mr and Mrs Bergeson
9. Mr S Last
10. Mr D Stewart
11. Mr and Mrs Gallagher
12. Mrs M Heaney
13. Ms V Foster
14. Mrs Lambert
15. Mrs Jones
16. Mr and Mrs Worrall
17. Mrs Sawyer
18. Mr John and Mrs Wilson
19. Mr K Pierce
20. Mr J Callaghan
21. Mr Plank and Ms Foreshaw
22. Mr and Mrs Robinson

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.