UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – Pitch Fee Review – annual licence fee payable by park owner to local authority – delay in introducing licence fee - whether fee to be taken into account in determining pitch fee review – paras 18(1)(ba) and 20(A1), Sch 1, Mobile Homes Act 1983 – 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 AND MRS P KENYON AND OTHERS
(Occupiers of pitches at Bartington Hall Park)

Respondents

Re: Bartington Hall Park,
Warrington Road,
Bartington
Cheshire
CW8 4QU

Martin Rodger QC, Deputy President

Tribunal Hearing Centre, Town Road, Stoke-on-Trent
12 December 2016

Mr David Sunderland, a director of the appellant, represented the appellant.
Mr Alan Savory, of the Independent Park Homes Advisory Service, represented the respondents.

The following cases were referred to in this decision:

Britaniacrest Ltd v Bamborough **[**2016] UKUT 144 (LC)
Re: Sayer [2014] UKUT 283 (LC)
Pepper v Hart [1993] AC 593
Stroud v Weir Associates Ltd [1987] 1 EGLR 190
Vyse v Wyldecrest Park (Management) Ltd [2017] UKUT 24 (LC)
Warfield Park Homes Ltd v Warfield Park Residents Association [2006] EWCA 283

Introduction

1. On 1 April 2014 the licensing regime under which local authorities in England regulate the standard of protected sites under the Mobile Homes Act 1983 was strengthened as a result of amendments to the Caravan Sites and Control of Development Act 1960 made by the Mobile Homes Act 2013. The amendments included the addition of section 5A and section 10A into the 1960 Act. Section 5A(1) provides that a local authority which has issued a site licence in respect of a protected site in its area may require the licence holder to pay an annual fee fixed by the authority. Section 10A(2) provides additionally that, before charging such a fee, the local authority must prepare and publish a fees policy.

2. This appeal concerns the entitlement of the owner of a protected site to increase the pitch fees payable by the occupiers of homes located on the protected site to reflect the increase in the owner's costs of managing the site caused by the introduction of an annual licence fee by the local authority responsible for licensing the site.

3. Bartington Hall Park at Bartington in Cheshire ("the Park") is a protected site acquired by the appellant, Wyldecrest Parks (Management) Limited, from a previous owner in 2015. The respondents are the residents of mobile homes on 18 pitches on the Park. A full list of the respondents appears in the second appendix to this decision.

4. On 2 March 2016 the appellant applied to the First-tier Tribunal (Property Chamber) ("the FTT") for a determination of the new pitch fees payable by the respondents with effect from 1 February 2016

5. By a decision given on 20 June 2016 the FTT ruled that the pitch fees should increase by 1.1%, equivalent to the increase in the retail prices index ("RPI") since the previous review date. The FTT ruled that an annual licence fee which became payable by the appellant for the first time in March 2016 could not be taken into account in determining the new pitch fees because the enactment under which the licence fee was payable, section 5A of the 1960 Act introduced by the 2013 Act with effect from 1 April 2014, had come into force before the previous pitch fee review date.

6. With the permission of the FTT the appellant now appeals to the Tribunal.

7. At the hearing of the appeal the appellant was represented by one of its directors, Mr David Sunderland. The respondents were represented by Mr Alan Savory of the Independent Park Homes Advisory Service and by Mr Alan Green, the Chairman of the Bartington Hall Park Residents Association. I am grateful to all three representatives for their assistance in this appeal.

The facts

8. 20 of the 21 pitches on the Park are occupied under agreements which provide for the payment of a monthly pitch fee reviewed annually on 1 February. The first pitch fee review after the commencement of the 2013 Act was on 1 February 2015. By that date no site licence fee had yet become lawfully payable by the licence holder (the appellant's predecessor).

9. On 29 October 2014 the local authority, Cheshire West and Chester Council, had purported to charge a licence fee to the appellant's predecessor, but it did so without first publishing a fees policy as required by section 10A(2) of the 1960 Act. Although the fee was paid by the Park owner it was subsequently refunded by the local authority. The agreed pitch fee review which took effect from 1 February 2015 was therefore limited to the rate of RPI increase in the previous 12 months and did not take any account of the additional cost which would become payable as a result of the coming into force of section 5A of the 1960 Act once a valid fees policy was published.

10. On 28 April 2015 the local authority belatedly published a fees policy explaining the basis on which it intended to charge annual fees to the holders of licences for protected sites. Under the policy the fee payable in respect of the Park was £576.57, which was paid by the appellant shortly after the next pitch fee review date of 1 February 2016.

11. Although I have not been shown the relevant documents it is common ground that the appellant served valid pitch fee review notices in the prescribed form inviting the respondents to agree an increase with effect from 1 February 2016. The appellant proposed an increase of 1.1% (the amount by which RPI had increased since the previous review date) plus a supplement of £2.40 per month to enable it to recoup the full cost of the annual site licence fee from the occupiers of pitches on the Park.

12. The respondents were content to agree an RPI increase but refused to agree the additional sum reflecting the site licence fee.

13. On 2 March 2016 the appellant applied to the FTT for a determination of the 2016 pitch fee review.

The relevant statutory provisions

14. Every agreement for the use of a pitch on a protected site to which the 1983 Act applies includes standard terms implied by statute. In the case of protected sites in England the relevant terms are contained in Chapter 2 of Part 1 of Schedule 1 to the 1983 Act (as amended). It is convenient to refer to these as "the implied terms".

15. There is no restriction on the pitch fee which may be agreed between a site owner and an occupier at the commencement of an agreement to station a mobile home on a protected site. Nor is there any restriction on the frequency or amount of any variation in the pitch fee which may subsequently be agreed between the parties. Paragraphs 16 to 20 of the implied terms do, however, regulate the timing and circumstances of any change in the pitch fee where the parties are not in agreement and identify certain criteria which must be taken into account or ignored when a new pitch fee is determined. The implied terms have been much amended and for ease of reference they are reproduced in full in the first appendix to this decision in the form in which they now apply to protected sites in England (the provisions for Wales are now different, at least in language if not in effect).

16. The evolution and amendment of the terms on which pitch fees can be reviewed has resulted in a scheme which is not as clear or coherent as might be wished. Originally no criteria for reviewing pitch fees were prescribed by the 1983 Act or its predecessor the Mobile Homes Act 1975, although under section 2 of the 1983 Act the county court could imply terms concerning the sums payable by occupiers and allowing the review of those sums at annual intervals. Rudimentary terms commonly included or implied in standard forms of agreements at that time provided for annual increases to be determined by an arbitrator who was to take into account the index of retail prices, sums expended by the site owner for the benefit of occupiers and any other factors which the arbitrator considered relevant.

17. The factors which it was legitimate for arbitrators to take into account were the subject of a few decisions of the Court of Appeal which suggested that a wide range of factors might potentially be relevant. In *Stroud v Weir Associates Ltd* [1987] 1 EGLR 190, 192G-M, the Court of Appeal held that pitch fees payable on other sites were not a relevant factor and could not be taken into account on an annual review, but that the reduction provided for by the 1983 Act in the maximum commission which a site owner could charge on the sale of a mobile home was a relevant factor and could be taken into account. In *Warfield Park Homes Ltd v Warfield Park Residents Association* [2006] EWCA 283 Carnwath LJ suggested that the primary purpose of the same standard form of pitch fee review clause was "to achieve an appropriate variation in the previous fee to take account of price-changes and other events in the immediate preceding year" but that the judge or arbitrator was otherwise "given a wide discretion as to the factors to be taken into account."

18. The Mobile Homes Act 1983 (Amendment of Schedule 1)(England) Order 2006 introduced more detailed provisions into the implied terms setting out the circumstances in which a pitch fee could be changed and identifying a wider list of specific matters to be taken into account on an annual review. The implied terms were further amended by section 11 of the 2013 Act which now requires notices of proposed increase to be served and supplements the factors expressly required to be taken into account or disregarded. The 2013 Act also made the important changes referred to in paragraph 1 above concerning site licensing and the introduction of annual licence fees.

The FTT's decision

19. The question for the FTT in this case was whether the annual pitch fee increase to take effect from 1 February 2016 could include the proposed supplement of £2.40 per month reflecting the cost to the appellant of the new annual licence fee. The respondents pointed out that the effect of an enactment may only be taken into account under paragraph 18(1)(ba) at the review date immediately following the coming into force of that enactment, and argued that it was too late for the licence fee to be taken into account because it was a cost incurred as a result of the 2013 Act, which had come into force before, rather than after, the previous review date. The respondents suggested that while the appellant's predecessor could have sought an increase in February 2015 (if the local authority had published its fees policy in time), but that it was too late for the appellant to do so in February 2016.

20. The appellant, represented before the FTT by Mr Sunderland, argued that paragraph 18(1)(ba) should be interpreted as referring to the date on which the practical effect of an enactment was experienced by a site owner in the form of additional costs, and not the date on which the relevant enactment itself came into force. He supported that argument by referring to certain Parliamentary material which made it clear that paragraph 18(1)(ba) had been introduced as part of a package of amendments intended to allow site owners to recoup the cost of the new site licence fees from the occupiers of pitches.

21. In paragraph 20 of its decision the FTT declined to accept Mr Sunderland's interpretation of paragraph 18(1)(ba) for these reasons:

> "The word "enactment" must refer to a statutory provision (such as section 5A(1) of the 1960 Act); it is inapt to refer to a local authority's decision, for example, to charge an annual site licence fee or to the publication of its fees policy. In addition, the association of a reference to an enactment with the concept of something "coming into force" is a common legislative drafting technique. There is nothing on the face of the provision which supports Mr Sunderland's contention that the provision should effectively be read as referring to the coming into force of the effect of the enactment on the costs in question."

22. The FTT considered the Parliamentary material relied upon by Mr Sunderland, but found it unhelpful and ruled it to be inadmissible having regard to the decision of the House of Lords in *Pepper v Hart* [1993] AC 593. The FTT therefore concluded that it should give the language of paragraph 18(1)(ba) its natural effect, which it regarded as fatal to the appellant's case:

> "Section 5A(1) of the 1960 Act came into force from 1 April 2014. This was before the last review date (1 February 2015). It follows that the cost of the annual site licence fee which became payable by the Site Owner to [the local authority] on or after 28 April 2015 is not a cost to which particular regard must be had when determining the amount of the pitch fees payable from 1 February 2016."

The F-tT considered that it was reasonable for the pitch fee to increase by 1.1% in line with the relevant increase in the retail prices index, but by no more.

The appeal

23. When the FTT made its decision it was unaware of this Tribunal's decision in *Britaniacrest* (which was published only shortly before the hearing). When the decision was brought to its attention the FTT granted permission to appeal, saying that it was arguable that it should have had regard to factors other than those listed in paragraph 18(1) of the implied terms. It considered that it was less clear that it was entitled to have regard to a factor "which appears to be implicitly excluded from paragraph 18(1)".

24. At the hearing of the appeal Mr Sunderland submitted that the proper approach was that the site licence fee should be capable of being taken into account in the first review date after it became payable, whether or not that date was more than 12 months after the commencement of section 5A of the 1960 Act on 1 April 2014. In his extensive experience as the manager of 21 protected sites in England, only 5 local authorities had introduced a valid licence fee in the 12 months following introduction of the power to do so. A number had introduced fees since that date but some had not yet issued fees policies or indicated an intention to do so. He pointed out that a site owner has no control over the date on which a local authority begins to levy an annual licence fee and suggested that it would be perverse if the opportunity to recoup the cost of the site licence through the pitch fee depended on the timing and validity of a local authority's decision.

25. In the alternative Mr Sunderland argued that the delayed introduction of the annual licence fee should be capable of being taken into account in its own right whenever it occurred and that it was reasonable for the pitch fee to be varied by an amount greater than RPI in order to reflect the additional cost of management caused by the new licence fees regime.

26. On behalf of the respondents Mr Savory argued that paragraph 18(1)(ba) should be interpreted strictly and did not cover either the introduction of the fees policy or the levying of the fee itself. Neither of these was an "enactment" which had come into force, so they could not be taken into account in their own right. The only enactment was the 2013 Act itself, the commencement of which predated the last review date and was therefore excluded from consideration. He accepted that the list of factors in paragraph 18(1) was not exhaustive and that other relevant factors could be taken into account in determining a new pitch fee, but argued that items which were already listed in paragraph 18(1) could only be taken into account in the circumstances described in that paragraph. Mr Savory agreed with the FTT that this may not have been the result Parliament intended and that on his approach the timing of a local authority's decision to introduce fees could adversely affect a site owner. On the other hand, he pointed out, it would be harsh on pitch occupiers for a licence fee to become incorporated as part of the pitch fee and thereafter increased annually by RPI even if the licence fee itself did not increase or even reduced.

Previous consideration of the implied terms by the Tribunal

27. In *Britaniacrest Ltd v Bamborough* [2016] UKUT 0144 (LC) the Tribunal considered the implied terms for pitch fee review (as they apply to protected sites in England) and identified three basic principles which shape the scheme, namely:

(1) That pitch fees may be reviewed annually as at the review date (paragraph 17(1)).

(2) In the absence of agreement there can be no change in the pitch fee unless the first-tier tribunal "considers it reasonable for the pitch fee to be changed" and makes an order determining the amount of the new pitch fee (paragraph 16(b)).

(3) Unless it would be unreasonable having regard to paragraph 18(1), there is a presumption that the pitch fee shall increase or decrease by no more than any percentage increase or decrease in RPI since the previous review date (paragraph 20(A1)).

28. As the Tribunal noted in *Britaniacrest*, these principles do not provide a clear benchmark by reference to which a new pitch fee can be determined. There is no direction, for example, that the pitch fee is to be reviewed to "open-market value". Important assistance is nevertheless provided by paragraphs 18 and 19 of the implied terms, which identify matters which a tribunal is required to take into account or to disregard when undertaking a review. These are set out in full in the Schedule to this decision.

29. Paragraph 18(1) requires that when determining the amount of a new pitch fee "particular regard shall be had to" a list of factors including expenditure by the owner on improvements since the last review date, any deterioration in the condition or amenity of the site, or any reduction in services supplied by the owner. Central to the issue in this appeal is the factor identified in paragraph 18(1)(ba), inserted by section 11(3)(d) of the 2013 Act; by that provision particular regard is to be had to:

> "(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."

30. Paragraphs 18(1A) and 19 then provide a list of matters which must not be taken into account in determining the amount of a new pitch fee. These include expenditure by the owner on expanding the protected site, costs incurred in the conduct of proceedings, and costs incurred in connection with enforcement action taken by a local authority. Paragraph 19(3), which was inserted by section 1(8) of the 2013 Act prohibits certain fees payable under the 1960 Act from being taken into account but does not refer to the annual licence fee payable under section 5A of that Act. When this provision is read together with paragraph 18(1)(ba) the intention appears clearly to have been that the newly introduced annual licence fees were to be capable of being taken into account to the extent that they had a direct effect on the costs of

management payable by a site owner. It is not necessary to refer to the Parliamentary material relied on by Mr Sunderland to discern that intention.

31. The pitch fee review criteria found in the implied terms are not always easy to understand or apply. They are capable of interpretation in a way which could produce an inflexible framework, allowing little room for pitch fees to be increased or reduced to reflect real changes in the value of the right of occupation. The terms are also capable of being interpreted more purposively, on the assumption that Parliament cannot have intended precisely to prescribe all of the factors capable of being taken into account. That approach is in the spirit of the 1983 Act as originally enacted when the basis on which new pitch fees were to be determined was entirely open.

32. In their current form the pitch fee review provisions give rise to at least three questions.

33. The first concerns the direction in paragraph 16(b) that the pitch fee can only be changed if the appropriate judicial body "considers it reasonable for the pitch fee to be changed"; are these words simply an introductory pre-condition to the criteria which follow, or do they import a standard of reasonableness, missing elsewhere, to be used to determine not only whether there should be a change in the pitch fee, but also to influence the amount of the appropriate increase or decrease?

34. The second question concerns the status of the factors in paragraph 18(1) to which "particular regard" is to be had when determining the amount of a new pitch fee; are these the only factors which may be taken into account, or may other factors be considered despite the absence of any express reference to them?

35. The third question concerns the relationship between paragraphs 16(b) and 18(1) on the one hand and the statutory presumption of RPI increases or decreases in paragraph 20(A1) on the other: how strong is the presumption and in what circumstances, if any, may it be rebutted?

36. Since jurisdiction in park homes cases was transferred from the county court to the unified tribunal system in June 2013 the Tribunal has considered these provisions on a number of occasions. Two of its previous decisions were referred to in argument on this appeal. The second was *Britaniacrest* which I have already referred to; the first was *Re: Sayer* [2014] UKUT 0283 (LC).

37. In *Sayer* the question was whether a change in the basis on which water charges were levied at a protected site provided grounds for a pitch fee to be varied by more than RPI. Mr Sayer's pitch agreement included an obligation to pay a separate charge for water, but no separate charge had been made and, over time, the cost of water had come to be regarded as included in the pitch fee. Mr Sayer wished to separate the charge for water from the pitch fee (and obtain the benefit of OFWAT regulation); the Tribunal held that, in principle, he could so by giving notice reverting to the original

agreement that water would be the subject of a separate charge. The Tribunal said that if he did so it would be necessary to consider whether such a change would justify a change in the pitch fee, but in principle it would be a relevant matter to be taken into consideration.

38. In *Britaniacrest* the site owner wished to increase pitch fees to compensate for an earlier decision of the Tribunal that in the absence of a specific provision in its pitch agreements it was not entitled to levy a separate charge to cover the cost of reading meters and administering utility bills for the site. Some of its pitch agreements did include such a charge, while others did not, but Britaniacrest wished in all cases to subsume this cost in the pitch fee by a single increase greater than RPI.

39. In both *Sayer* and *Britaniacrest* the Tribunal made clear its view that while the factors in paragraph 18(1) of the implied terms must be taken into account in all cases, they are not the only factors which may be relevant to a change in the pitch fee. Although there are no general words expressly indicating that other matters may also be taken into account the list of factors to which "particular regard" is to be had does not purport to be exclusive.

40. In *Sayer*, which predated the changes made by the 2013 Act, the Tribunal commented on the operation of paragraphs 18 and 19 and what is now paragraph 20(A1) (the RPI presumption) as follows:

> "22. The effect of these provisions as a whole 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 RPT considers it reasonable for the fee to be changed. If the RPT decides that it is reasonable for the fee to be changed, then 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 the costs referred to in paragraph 19 incurred by the owner in connection with expanding the site. It must also apply the presumption in paragraph 20(1) that there shall be an increase (or decrease) no greater than the percentage change in the RPI since the last review date 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."

41. Having referred to the presumption of an annual RPI increase, the Tribunal went on to suggest in paragraph 23 that:

> "The overarching consideration is whether the RPT 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). It follows that if there are weighty factors not referred to in paragraph 18(1) which nonetheless cause the RPT to consider it reasonable for the pitch fee to be changed, the presumption in paragraph 20(1) that any

variation will be limited by reference to the change in the RPI since the last review date may be displaced."

42. The Tribunal focussed again on the effect of the statutory presumption of an RPI increase in *Britaniacrest* at paragraph 31, saying this:

> "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 the 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."

43. The Tribunal went on to consider the effect of the direction in what is now paragraph 20(A1) that the presumption of no more than RPI increases applied "unless this would be unreasonable having regard to paragraph 18(1)". Focussing in particular on one of the paragraph 18(1) factors, the site owners expenditure on improvements, the Tribunal said this:

> "32. … If improvements have been carried out which make it unreasonable for the presumption to apply then the presumption is disapplied. If there are no such improvements the presumption remains a presumption rather than an entitlement or an inevitability. If there are other factors - not connected to improvements - which would justify a greater than RPI increase because without such an increase the pitch fee would not be a reasonable pitch fee, then they too may justify an above RPI increase. …
>
> 33. We therefore agree … 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 although the increase in RPI in the previous 12 months is important, it is not the only factor which may be taken into account."

44. Shortly after the appeal in this case was heard the Tribunal heard a second appeal raising similar issues and involving the same park owner and the same representatives. In *Vyse v Wyldecrest Park (Management) Ltd* [2017] UKUT 0024 (LC) the Tribunal (Her Honour Judge Alice Robinson), whose decision I have had an opportunity to consider in draft, the issue is whether, a new site licence fee having been taken into account in determining pitch fees in the year of its introduction, a subsequent increase in the site licence fee by 50% in the year after its introduction may be taken into account as justifying an above RPI increase. The decision includes a further detailed and illuminating consideration of the statutory scheme, emphasising a number of important considerations, of which I draw attention to two in particular. The first, at paragraph 47, is that although the FTT may not alter the amount of the pitch fee unless it considers it reasonable to do so, the issue of reasonableness is not at large:

> "It is not open to the FTT simply to decide what it considers a reasonable pitch fee to be in all the circumstances. Reasonableness has to be determined in the context of the other statutory provisions."

45. The second matter to which I draw attention is the Tribunal's discussion (from paragraphs 48 to 57) of the relative weight to be given to the RPI presumption and other factors in considering the amount of a pitch fee increase. In particular, at paragraph 50:

> "If there is no matter to which any of paragraph 18(1) in terms applies, then the presumption arises and it is necessary to consider whether any "other factor" displaces it. By definition, this must be a matter to which considerable weight attaches. If it were a consideration of equal weight to RPI, then, applying the presumption, the scales would tip the balance in favour of RPI. Of course, it is not possible to be prescriptive as to precisely how much weight must be attached to an "other factor" before it outweighs the presumption in favour of RPI. This must be a matter for the FTT in any particular case. 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."

46. The Tribunal goes on to identify important practical reasons why the RPI presumption should not lightly be allowed to be displaced by other factors, at paragraph 57:

> "There are a substantial number of mobile home sites in England occupied pursuant to pitch agreements which provide for relatively modest pitch fees. The legislative framework for determining any change in pitch fee provides a narrow basis on which to do so which no doubt provides an element of certainty and consistency that is of benefit to site owners and pitch occupiers alike. The costs of litigating about changes in pitch fee in the FTT and in the Tribunal are not insubstantial and will almost invariably be disproportionate to any sum in issue. I accept the submissions of Mr Savory that an interpretation which results in uncertainty and argument at many pitch fee reviews is to be avoided and that the application of RPI is straightforward and provides certainty for all parties."

47. Based on this review of the Tribunal's decisions in this area, which were not challenged by either party in the appeal, the effect of the implied terms for pitch fee review can therefore be summarised in the following propositions:

(1) The direction in paragraph 16(b) that in the absence of agreement the pitch fee may be changed only "if the appropriate judicial body … considers it reasonable" for there to be a change is more than just a pre-condition; it imports a standard of reasonableness, to be applied in the context of the other statutory provisions, which should guide the tribunal when it is asked to determine the amount of a new pitch fee.

(2) In every case "particular regard" must be had to the factors in paragraph 18(1), but these are not the only factors which may influence the amount by which it is reasonable for a pitch fee to change.

(3) No weight may be given in any case to the factors identified in paragraphs 18(1A) and 19.

(4) With those mandatory consideration well in mind the starting point is then the presumption in paragraph 20(A1) of an annual increase or reduction by no more than the change in RPI. This is a strong presumption, but it is neither an entitlement nor a maximum.

(5) The effect of the presumption is that an increase (or decrease) "no more than" the change in RPI will be justified, unless one of the factors mentioned in paragraph 18(1) makes that limit unreasonable, in which case the presumption will not apply.

(6) Even if none of the factors in paragraph 18(1) applies, some other important factor may nevertheless rebut the presumption and make it reasonable that a pitch fee should increase by a greater amount than the change in RPI.

Determination

48. In the light of these propositions the outcome of this appeal is relatively straightforward.

49. The FTT was clearly correct in its interpretation of paragraph 18(1)(ba) as it applied to the new fee regime for site licences. The only relevant enactment which had come into force was section 5A of the 1960 Act as a result of the commencement of the 2013 Act on 1 April 2014. Paragraph 18(1)(ba) therefore required that when determining the next pitch fee review, on 1 February 2015, "particular regard" had to be had to any direct effect of that enactment on the costs payable by the owner in relation to the maintenance or management of the Park. But by that review date the new enactment had had no direct or even indirect effect on the cost of management because no valid licence fee had yet been demanded or paid. I do not think it would be legitimate to treat paragraph 18(1)(ba) as extending to any potential effect in future; only a "direct effect" must be taken into account, and I take this to require a real effect to be experienced during the year in which the reviewed pitch fee will be payable.

50. There was therefore no obligation on the FTT to take the additional cost of the licence fee into account on the February 2016 review. But the absence of an obligation is not the same as a prohibition. I consider that the FTT was therefore in error in its conclusion, cited in paragraph 22 above, which treated the delay in introducing the annual site licence fee not only as meaning that the fee was not something to which particular regard must be, but as meaning that it could not be taken into account at all. While the question posed by the FTT when it granted permission to appeal (i.e. whether it was entitled to have regard to a factor "which

appears to be implicitly excluded from paragraph 18(1)") is a legitimate one, I am satisfied that on examination it is not an obstacle to this conclusion. The implied terms are specific in identifying those factors which "shall not be taken into account", listing them in paragraph 18(1A) and paragraph 19, and changes in site licence costs are not among them. It is not appropriate to treat a mandatory requirement to give particular consideration to a factor if it occurs within a specified period as if it were a prohibition on considering the same factor should it occur after that period.

51. I am therefore satisfied that an additional cost which it is known will be payable by site owner in the period during which the reviewed pitch fee will apply is a matter capable of being taken into account in determining the amount of that pitch fee.

52. It was obviously Parliament's intention, for the reason given in paragraph 30 above, that the cost of the annual licence fee should be taken into account. The reference to "costs payable by the owner in relation to the … management of the site of an enactment", which was added when the licence fee regime was introduced, coupled with the express exclusion from consideration by paragraph 19(3) of certain other new fees payable under the 1960 Act introduced at the same time, point clearly in that direction. The paragraph nevertheless gives rise to what must have been unintended consequences, in particular by taking no account of the time which would be required for the enactment to have any direct effect on the site owner's costs of management. If a site conducted its annual reviews on 2 April in each year there would be no possibility of a new fees policy being adopted by a local authority in sufficient time to enable the resulting fees to be taken into account under paragraph 18(1)(ba). Even where review dates fall much later in the year after commencement of section 5A, as they do at the Park, the application of paragraph 18(1)(ba) to a new licence fee depended entirely on the efficiency of the local authority.

53. In my judgment the only possible obstacle to the legitimacy of having regard to the licence fee for the purpose of the 2016 review is the presumption in paragraph 20(A1) that the pitch fee will be limited to no more than an RPI increase "unless this would be unreasonable having regard to paragraph 18(1)". Might it be said that only a factor referred to in paragraph 18(1) could justify departure from that presumption? If so the late introduction of the site licence fee is not such a factor and the presumption would have to apply.

54. Presumptions are ordinarily encountered as part of the law of evidence (often in the context of criminal proceedings, such as the presumption of innocence until guilt is proved). In that context a presumption is a rule of law which permits or requires a court or tribunal to assume a fact is true until it is shown by evidence to be untrue, in which case the presumption is said to have been rebutted, and is no longer applied. Where the operation of a presumption is being considered there are generally two questions which need to be considered: first, is the presumption engaged at all i.e. do circumstances exist which justify making the presumption in the first place; and secondly, if the presumption is engaged, has it nevertheless been rebutted by evidence sufficient to show that the true facts are different from those which would otherwise have to be presumed.

55. In the field of valuation statutes sometimes direct that a specific "assumption" (rather than a "presumption") should be made; a relatively well known example is found in section 70(2), Rent Act 1977, where the fair rent of a dwelling house let on a regulated tenancy is to be determined on the assumption that there is no scarcity in the number of such dwelling houses available to be let in the market. The making of that assumption is mandatory. But the use of a "presumption" as part of a scheme of valuation is peculiar and its intended effect in this case is uncertain.

56. In its original form, as considered by the Tribunal in *Sayer* and before its amendment by the 2013 Act, the presumption appeared in paragraph 20(1) and was formulated in rather simpler terms:

> "There is a presumption that the pitch fee shall increase or decrease by a percentage which is not more than any percentage increase or decrease in the retail prices index since the last review date, unless this would be unreasonable having regard to paragraph 18(1)."

Expressed in that way it is apparent that the exemption from the RPI limitation was itself part of the presumption. If one of the paragraph 18(1)(ba) factors made it unreasonable to limit the increase to no more than RPI the presumption was that the increase would not be so limited.

57. After amendment by the 2013 Act the presumption is expressed somewhat differently in what is now paragraph 20(A1):

> "… unless this would be unreasonable having regard to paragraph 18(1), there is a presumption that the pitch fee shall increase or decrease by no more than any percentage increase or decrease in the retail prices index calculated by reference 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 express exemption from the presumption is now placed at the beginning of the statement, rather than at the end, as previously. I do not think that this re-ordering of the statutory language was intended to bring about any substantive change in the operation of the presumption itself. The purpose of the change was apparently to be more specific about the period over which the change in RPI was to be measured and to exclude the possibility that an increase reflecting a change over more than 12 months could be required if an annual review was not implemented. It seems to me still to be appropriate to regard the reference to paragraph 18(1) as identifying circumstances in which the presumption has no application at all, rather than as prescribing the only circumstances in which it can be rebutted.

58. For these reasons I adhere to my previous view that factors not encompassed by paragraph 18(1) may nevertheless provide grounds on which the presumption of no more than RPI increases (or decreases) may be rebutted. If another weighty factor means that it is reasonable to vary the pitch fee by a different amount, effect may be given to that factor. The additional cost of the annual site licence in the first year of its introduction is such a factor.

Disposal

59. I therefore allow the appeal.

60. It remains to consider what effect the additional cost of management represented by the new annual licence fee should have on the pitch fees payable at the Park.

61. The appellant seeks to pass the whole of the cost on to the respondents by dividing it amongst the occupiers of 20 of the 21 pitches on the Park, resulting in an addition of £2.40 per pitch per month plus a 1.1% RPI increase. This basis of apportionment appears not to have been contentious at the FTT.

62. Neither party addressed me on the amount of the appropriate increase in the event that the appeal was allowed, but in exchanges after a draft of this decision was made available it became apparent that the only issue was whether the correct monthly apportionment should be £2.28 per pitch rather than £2.40. This was on the grounds that although only 20 pitches are occupied under agreements to which the 1983 Act applies, there is one further pitch on which is sited a mobile home belonging to the appellant which it lets on an assured tenancy. The sum involved is too small to justify remitting the application to the FTT for further consideration and, as no point was taken before the FTT on this issue and no relevant facts were found, I am satisfied that the better approach is to apportion the fee only amongst the 20 pitches occupied under agreements to which the 1983 Act applies.

63. The monthly pitch fee payable by the respondents with effect from 1 February 2016 are therefore the figures determined by the FTT in its decision of 20 June 2016 plus an additional £2.40 per month.

Martin Rodger QC

Deputy Chamber President

25 January 2017

Appendix 1

Chapter 2 of Part 1 of Schedule 1 to the Mobile Homes Act 1983 (as amended)

The pitch fee

16 The pitch fee can only be changed in accordance with paragraph 17, either –

(a) with the agreement of the occupier, or

(b) if the appropriate judicial body, 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.

17 (1) The pitch fee shall be reviewed annually as at the review date.

(2)-(12) [provisions concerning the proposals and applications for determination of pitch fee increases and other procedural matters]

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 sub-paragraph);

(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 sub-paragraph);

(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;

(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) When calculating what constitutes a majority of the occupiers for the purpose of sub-paragraph (1)(b)(iii) each mobile home is to be taken to have only one occupier and, in the event of there being more than one occupier of a mobile home, its occupier is to be taken to be the occupier whose name first appears on the agreement.

(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 (1) When determining the amount of the new pitch fee, any costs incurred by the owner in connection with expanding the protected site shall not be taken into account.

(2) In the case of a protected site in England, when determining the amount of the new pitch fee, no regard may be had to any costs incurred by the owner in relation to the conduct of proceedings under this Act or the agreement.

(3) In the case of a protected site in England, when determining the amount of the new pitch fee, no regard may be had to any fee required to be paid by the owner by virtue of –

(a) section 8(1B) of the Caravan Sites and Control of Development Act 1960 (fee for application for site licence conditions to be altered);

(b) section 10(1A) of that Act (fee for application for consent to transfer site licence).

(4) In the case of a protected site in England, when determining the amount of the new pitch fee, no regard may be had to any costs incurred by the owner in connection with –

(a) any action taken by a local authority under sections 9A – 9I of the Caravan Sites and Control of Development Act 1960 (breach of licence condition, emergency action etc);

(b) the owner being convicted of an offence under section 9B of that Act (failure to comply with compliance notice).

20(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 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.

(A2) In sub-paragraph (A1), "the latest index" –

(a) in a case where the owner serves a notice under paragraph 17(2), means the last index published before the day on which that notice is served;

(b) in a case where the owner serves a notice under paragraph 17(6), means the last index published before the day by which the owner was required to serve a notice under paragraph 17(2)."

(1) [Wales]

(2) Paragraph 18(3) above applies for the purposes of this paragraph as it applies for the purposes of paragraph 18.

Appendix 2

List of respondents

Pitch	Respondent
1	Mr & Mrs Kenyon
2	Mrs Stead
4	Mrs Fletcher
5	Mr & Mrs West
6	Mr & Mrs A Green
7	Mr & Mrs J Green
8	Mr Balmer
10	Mrs Bottomley
11	Ms Burgess
12	Mr Motram
13	Mr & Mrs Heaton
14	Mr Lott
16	Mr & Mrs Lightfoot
17	Mr & Mrs McGuire
18	Mr & Mrs Kennington
19	Mr & Mrs Todd
20	Mr & Mrs Jump
21	Mr & Mrs Sefton