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RESIDENTIAL PROPERTY TRIBUNAL

RENT ASSESSMENT COMMITTEE

Reference:	RPT/0074/03/19, RPT/0075/03/19, RPT/0076/03/19
In the Matter of:	Numbers 5, 2, 80, Caerwnon Park, Builth Wells, Powys
In the Matter of: Homes	An Application to determine a new pitch fee under the Mobile (Wales) Act 2013.
Applicant:	The Berkeley Leisure Group Limited
Respondents:	Mr & Mrs Bradley, Mr & Mrs Klompenhouwer, Mrs Braznell
Tribunal:	Trefor Lloyd, Legal Chair Kerry Watkins, Surveyor Dr Angela Ash, Lay Member
Hearing:	Town Hall, Builth Wells
Dated:	1st October 2019

Representation for the Applicant:
Miss Musson (Solicitor)
Mr Drew, Mr Philip Newton Webb

The Respondents were represented by:
Mr R G Mountford the Chair of the Residents Association assisted by Mrs Richardson.

DECISION

ORDER

The revised pitch fees will be determined at the sum of: £155.32 per month payable from the 1st January 2019.

Background

1. The Berkeley Leisure Group ("the Applicant") is the freehold owner of a mobile home site situated at Caerwnon Park, Builth Wells, LD2 3RP ("the Park").

2. The three properties in question are situated on a rural and secluded Park Home site known as Caerwnon Park on the outskirts of Builth Wells Powys. Access to the site is via narrow lanes due to its remote location. Local services and facilities are therefore extremely limited, these being located in the town of Builth Wells some four miles distant.

3. The Park has capacity to site up to 182 mobile homes, however at this time it is not fully occupied. Apparently the original part of the Park was situated to the rear of the site and was enlarged to form the site as it stands today.

4. Mains electricity and water are connected to the Park; the drainage system is a private sewer which connects to a private sewage treatment plant to the rear of the site.

5. On the 23rd November 2018 the Applicant served the occupiers of the site with a Notice of proposed new pitch fee ("the Notice") which, if agreed would take effect on the 1st January 2019.

6. The current pitch fee is £155.66 per month. The Notice proposed an increased figure of £159.66 per month which comprised the current fee of £155.66 per month plus a CPI adjustment of £3.62 and a contribution of £5.22 to sewage costs (inclusive of £0.93 NEA(Natural Resources Wales) discharge fee) less relevant deductions of £4.89.

7. Five of the occupiers objected to the proposed increase namely Mrs Bradley (5 Birch Way), Mr & Mrs Klompenhouwer (2 Spruce Way) and Mr & Mrs Braznell (80 The Dell) as a result of the Respondents' objections the Applicant made three separate Applications, one in relation to each property seeking a determination as to the level of the proposed new pitch fee.

8. Directions were handed down which provided for all of the Applications to be determined together in accordance with Regulation 13(2) of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016.

The Inspection

9. We inspected the Park on the 1st October 2019. The Applicant was represented at the inspection by Ms Musson (Solicitor) and Mr Drew. The Respondents were represented by Mr Mountford.

10. The way by which the sewage plant operated was explained to us at the inspection and consisted briefly of incremental visits by a specialist contractor to flush the system and remove liquid: the liquid after passing through the various tanks being discharged into a nearby water course by virtue of a discharge permit granted by Natural Resources Wales.

The Hearing

11. The hearing was listed to take place at the Town Hall, Builth Wells on the 1st October 2019 at 10.30 am.

12. As stated above the Applicant was represented by Miss Musson (Solicitor) and we heard evidence from Mr Drew, director of the applicant Company and Mr Philip Newton Webb former Finance Director of the applicant Company. The Respondents attended and were represented by Mr Mountford and we also heard from Mrs Richardson on their behalf.

13. At the hearing Ms Musson had provided a Skeleton Argument with authorities.

14. Miss Musson's opening mirrored her submissions set out in the Skeleton Argument being in summary as follows: The starting point is that the CPI presumption applies to the whole pitch fee with a reference decision in ***Mrs Tony Vyse and Wyldecrest Parks (Management) Ltd [2017] UKUT 0024 (LC) paragraphs 54 to 64***.

15. The presumption applies unless a weighty factor exists.

16. The Respondents have not raised any weighty factors to displace the presumption in their favour. They relied upon and simply seek benefit of an earlier decision affecting other respondents without giving any reasons or evidence. The reference there being to the decision dated the 3rd December 2018 (Ref RPT/0005/04/18, RPT/0006/04/18, RPT/007/04/18, RPT/008/04/18, RPT/009/04/18 as amended) relating to nine other home owners in Caerwnon Park who resisted the January 2018 pitch fee increase culminating in a finding that the sewage charge was already included within the pitch fee and that had always been the case (see paragraph 33 to 57 of the decision dated 3rd September 2018).

17. In the alternative if we as a Tribunal decide to analyse last year's decision to consider whether it can be applied to other home owners as a weighty factor Ms Musson submitted that the current Respondents were not a party to proceedings and had agreed the proposed pitch fee. Further such an earlier finding is not res judicata (i.e. a matter which has been adjudicated upon) in relation to these proceedings and our deliberations.

18. In terms of the Applicant's case Ms Musson submitted that the Applicant had raised a weighty factor which displaces the presumption that being the cost of the utility services had changed by way of an increase since the previous year. Further in her submission on this park, practice had always been to make a charge for those services, initially by way of a separate invoice and later by adjusting the pitch fee annually to reflect those charges.

19. Against that background the Respondents opened their case with reference to what is referred to as a Statement of Fact signed by each of the five Respondents in similar terms by which they state:
"*Our monthly pitch fee payments were identical to the residents involved in the Tribunal dated 3rd September 2018 where a Tribunal ruled that the sewage charges were an integral part of the pitch fee, therefore the Tribunal reduced the pitch fee accordingly. We ask the Tribunal to rule that we be treated in the same manner as our agreement is identical to theirs*".

20. We then heard live evidence firstly from Mr Drew who confirmed the content of his Witness Statement which can be found at pages 15-21 in the bundle. He was cross-examined by Mr Mountford who put to him that in relation to the email that can be found at page 141 Shelley Green who previously worked at the Park had confirmed sewage charges were included in the pitch fee. It was put to Mr Drew that his comments at paragraphs 31 and 32 and more specifically that Shelley Green was "*Good friends with the Respondents*" and

would benefit from the decision was not true, that Shelley Green had always kept herself at essentially arms length and as she was not a Respondent in these proceedings would not in any event benefit to which he disagreed.

21. It was also put to Mr Drew that the Respondents held agreements with the Park's previous owner and the sewage was included in the pitch fee and essentially they should all be treated the same.

22. We then heard from Mr Newton Webb who made two Statements, one at pages 784 to 786 and another dated the 4th of September 2019 in respect of which the Respondents agreed it could form part of the Trial Bundle although filed and served late. Mr Newton Webb confirmed his Statements were true to the best of his knowledge and belief. He was then cross-examined by Mr Mountford who put to him that it was incorrect that letters were sent together with the invoices to the residents to explain charges. It was further put to him that the residents had written to the Applicant to request information which had been refused, until they eventually discovered that service included the NEA discharge fee.

23. In relation to the covering letter, Mr Newton Webb asserted it was typed by his secretary and his recollection was that the NEA discharge was included in the fee and the sewage was included in the NEA fee. It was again put to Mr Newton Webb that it was never mentioned that the sewage was part of the NEA discharge fee to which he replied by reference to the letter at page 132 from the then owners of the Park that it was clear enough their practise was to charge for sewage separately.

24. When asked by the Tribunal Chair why he had not made reference to the covering letters in the earlier May Statement his answer was that that Statement had to be produced quickly in order to be filed and served in time and that upon further reflection he had recalled the covering letters. When asked how clear his recollection was, bearing in mind he ceased employment in 2012 he said his recollection was "*Clear enough*". When asked if he was able to produce a copy of either one of the letters or a generic letter he said that he could not.

25. Mr Newton Webb then went on to say that in looking at the papers his memory had been jogged to recall the covering letters.

26. He was cross-examined by Mrs Richardson putting to him that she had retained all correspondence and bills and had never received such a letter explained that the sewage charge was in addition.

27. We then heard from the Respondents, Mr Mountford firstly again making the point that they hold identical Mobile Home Agreements and he relied upon the previous Tribunal decision (referred to above) stating: "*As far as we are concerned it was put to bed. The consensus by the Respondents is that they feel entitled to be treated in the same way*".

28. We then heard from Mrs Richardson who stated that all they want is equality. She made the point that some older members although desirous of equal treatment were too frightened to become Respondents, some of whom were widowed and had no-one to support them in any objection.

29. She was then cross-examined by Ms Musson in relation to page 141 about the tone of the email between her and Shelley Green. It was specifically put to her that if it was her case that she and Shelley Green were not friends it was strange for the email to be signed off with "*love Sue*" and also Shelley Green's signed off with "*xx*".

30. Mrs Richardson answered that "*Yes that is the way I am it does not mean we were best friends, we are friendly people not politically correct people*". She went onto to answer the questioning by stating that she and Shelley Green had never mixed socially.

31. We then heard the Closing Submissions from Mr Mountford who stated the claim is exactly as the Statement of Fact was and invited us to agree with the previous Tribunal's decision making the point that they all hold the same Mobile Home Agreement and as the previous decision had ruled that the sewage was an integral part of the pitch fee he asked that the Respondents be treated in this manner.

32. We then heard Closing Submissions on behalf of the Applicant from Ms Musson. She referred us again to the Skeleton Argument and the starting point of the CPI presumption of an increase in the pitch fee. The Respondents had not raised any weighty factors. There is no evidence that Shelley Green was ever involved with the charging practises at the time (by reference to the email). She relied on the evidence of Mr Drew and Mr Newton Webb in support of the fact that sewage was charged separately.

33. She referred to the ***Shortferry Caravan Park case*** and then invited us to consider the Howard Engineering Ltd costs for the sewage plant (pages 122 to 127) which related to the now contended for increase as compared with the previous year's increases, (pages 179 to 183).

34. She again invited us to consider the letter at page 132 and also the letter to Mr Mountford on the 4th July 2017 (page 131) in relation to the overcharging of the NEA discharge fee and submitted that we should accept that it was not unreasonable for the covering letters as referred to by Mr Newton Webb to no longer be available and concluded by stating that the Applicant had raised a weighty factor being the increased costs whereas the Respondents had not provided any evidence.

35. Finally, Ms Mousson submitted that in the alternative it might be the case that the Tribunal could find that the sewage costs would come under the express term 3b of the Agreement between the Applicant and the Respondents should be separately invoiced.

The Law

THE RELEVANT LEGAL PRINCIPLES

a) Schedule 2, Part 1, Chapter 2 of the Act, contains the terms of mobile home agreements implied by the Act dealing with pitch fee reviews at paragraphs 17 – 20. Paragraph 18 says as follows;

"18 (1) When determining the amount of the new pitch fee particular regard is to 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(1)(e) and (f), and

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

(b) 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 sub-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),

(c) 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 sub-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), and

(d) 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.

(2) But no regard is to 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 complying with provisions contained in this Part which were not contained in the Mobile Homes Act 1983 in its application in relation to Wales before the coming into force of this Part.

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

(4) 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."

36. Paragraph 20 states that unless it would be unreasonable having regard to paragraph 18(1) there is a presumption that the pitch fee is to increase or decrease by a percentage which is no more than any percentage increase or decrease in the consumer prices index (and details are given as to how this is to be calculated).

37. All the Agreements at Caerwnon Park are governed by a mixture of terms implied by the Act and by express terms of the written Agreement relating that particular occupier and pitch.

Relevant Implied Terms

38. It must first be noted that under Section 62 of the Act "*pitch fee*" means:
"*The amount which the occupier of a mobile home is required by an agreement to pay 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, but does not include amounts due in respect of gas, electricity, water and sewage or other services, unless the agreement expressly provides that the pitch fee includes such amounts*".

39. Under Chapter 2 of Part 1, Schedule 2 at paragraph 21
"*Occupiers obligations which include 21(1) the occupier must -*
a. pay the pitch fee to the owner,
b. pay to the owner all sums due under the agreement in respect of gas, electricity, water and sewage or other services supplied by the owner".

40. At paragraph 22 the owner has other obligations that include:
"22(1) the owner must if requested by the occupier provide (free of charge) documentary evidence in support and explanation of:
(i) any new pitch fee,
(ii) any charges for gas, electricity, water, sewage or other services payable by the occupier to the owner under the agreement, and
(iii) any other charges, costs or expenses payable by the occupier to the owner under the agreement".

41. From the above it can be seen that the implied terms distinguished between the pitch fee and the charges and costs for other services payable by the occupier to the owner under the Agreement.

42. The Applicant has exhibited the Respondents' Agreements all of which were initially granted by its predecessor in title.

43. In relation to the express terms of the Agreement, paragraph 3 is relevant and is set out as follows:
"*Occupiers undertaking to pay pitch fee -*
3. The occupier undertakes with the owner as follows -
a. to pay the owner an annual pitch fee of ... subject to reviews as hereinafter provided by equal monthly payments in advance on the first day of each month.
b. to pay outgoings.
c. to pay and discharge all general and/or water rates which may from time to time be assessed, charged or payable in respect of the mobile home or the pitch (and/or a proportionate part thereof where the same are assessed in respect of the residential part of the park) and charges in respect of electricity, gas, water, telephone and other services.

44. The deliberations relating to whether or not sewage costs fell within paragraph 3b was considered in the case of ***P R Hardman & Partners -v- Greenwood & Another*** ***[2017] EWCA Civ 52*** In summary the decision was that the costs of the same were only recoverable in the pitch fee.

45. The Applicants have drawn our attention to the decision of the Upper Tribunal in ***P R Hardman & Partners -v- Mrs Marilyn Fox, Mrs Brenda Greenwood & Others*** ***[2019] UKUT 0248 (LC) LRX/Trowerby 2018***.

46. We form the view that the present case before us can be distinguished from the facts of that case insofar as the parties to the dispute in ***Hardman [2019]*** had agreed that the cost of inter alia sewage services and environment discharge permits were accrued through the charge authorised by paragraph 3b of the Agreement whereas in this present case no such concession has been made.

47. Having looked at the matter in detail the actual difference between the parties is the initial starting point for the pitch review. In simple terms the Respondents seek the review to be engaged based upon the basic pitch fee as determined by the 2018 decision [as referred to above] and rely upon that decision as a weighty matter to displace the presumption in their favour whereas the Applicants seek to base it upon the 2018 pitch fee as charged to the Agreement holders who were not Respondents in 2018.

48. Although we are not bound by the 2018 Tribunal decision and look at matters afresh that decision in our view is a weighty matter which enables displacement of a presumption as to an increase by way of CPI only. Having read and analysed that decision carefully and also heard the evidence as aforesaid we find the following:

    (1) The current Respondents' Agreements are all similar and do not depart from the Agreements in favour of the nine Respondents in the earlier Tribunal hearing in 2018. In this regard we refer specifically to the fact that despite Mr Mountford and Mrs Richardson giving evidence to this effect that aspect of their case was not challenged by way of cross-examination.

    (2) We were not impressed by the evidence of Mr Newton Webb. Having been asked to produce an initial Witness Statement he did so without reference to covering letters. Latterly in his Statement dated the 4th September 2019 he maintains such matters were self-explanatory by reference to covering letters being sent out to describe the various elements of charge and the fact that the sewage charge was included under the label NEA discharge and charged accordingly.

    (3) In our view it is far from clear from the correspondence the basis of charges. Furthermore, the absence of any single copy covering letter or generic format of the same does not assist the Applicant's case.

    (4) Conversely, we accept the evidence of Mrs Richardson that she never received such a covering letter and in relation to her relationship (or to be more correct absence of such) with Shelley Green. Whilst we recognise that we did not hear evidence from Shelley Green there was no suggestion that the emails at pages 141 were not contemporaneous and clearly in our view indicate at the very least Ms Green's understanding as to what was included within the pitch fee as she previously worked for the Applicant's predecessors in title.

    (5) Despite what was said by the Applicants with reference to the amount the home owners paid being more than the Natural Resources Wales (former Environment Agency for Wales) discharge fee and reliance upon the letter at page 132 in the bundle (dated 9th August 2003) from the Applicant's predecessor in title to a firm of solicitors where it is stated at paragraph 5:

" ... single park homes pay £89.94 per calendar month with one exception at £87.31. All park home owners pay £79.36 per annum for NEA discharge.
And the fact that it can be seen that such a sum exceeds the actual cost of the then Environment Agency discharge fee in our view one thing is clear is that confusion has reigned in relation to charging policy generally.
In our view upon the balance of probabilities based upon all the evidence presented both oral and documentary it is more likely than not that the sewage charge was included within the pitch fee. We do not find that there is sufficient evidence to point towards the fact that the sewage charge has always been charged in addition in the manner the Applicant contends.

49. The evidence supplied in relation to the increase in the net cost of dealing with sewerage rose from £8,655.74 to £9,383.40 being an increase of £727.66 or £4 per pitch per annum or £0.33 per month. The CPI figure is agreed at £3.62 per month

50. In the circumstances and having considered all the evidence both documentary and oral we find that the new pitch fee is to be £155.32 broken down as follows:

Adjusted Current Pitch Fee		£150.77 *
CPI Adjustment	£	3.62
NEA Charge	£	0.93

* Current Pitch Fee less additional sewerage fee

Dated this 17th day of December 2019

CHAIRMAN