IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 0123 (LC)
Case No: LRX/88/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES - FTT procedure – protected site – parking – whether FTT has jurisdiction to direct that access to pitch be kept free of obstruction – whether order going further than necessary for the "just, expeditious and economical disposal of the proceedings" – s.4(1), Mobile Homes Act 1983 – s.231A(4), Housing Act 2004 – appeal allowed

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

BETWEEN:

AWAY RESORTS LIMITED **Appellant**

and -

MS ROSALIND MORGAN **Respondent**

Re: 117 Sandy Balls Estate,
Godshill,
Fordingbridge,
Hampshire
SP6 2LA

Martin Rodger QC, Deputy Chamber President

Havant Justice Centre, Havant, Hampshire
on
8 February 2018

Paul Kelly of Tozers, Solicitors for the appellant
The respondent did not attend and was not represented

The following cases are referred to in this decision:

Elleray v Bourne [2018] UKUT 0003 (LC)

Coates v Marathon Estates Ltd [2018] UKUT 0031 (LC)

London Borough of Southwark v Mills [1999] UKHL 40

Wyldecrest Parks (Management) Ltd v Santer [2018] UKUT 0030 (LC)

Introduction

1. This is another appeal concerning the extent of the powers conferred on the First-tier Tribunal (Property Chamber) ("the FTT") in proceedings under the Mobile Homes Act 1983. The question is whether the FTT was entitled to direct the owner of a protected site to ensure that access to a pitch on the site was not obstructed by inconsiderate parking on the part of the occupiers of other pitches.

Jurisdiction

2. Section 4(1) of the 1983 Act confers jurisdiction on the FTT:

1. to determine any question arising under the 1983 Act or any agreement to which it applies; and
2. to entertain any proceedings brought under the 1983 Act or any such agreement.

Subject only to limited exceptions contained in sub-sections (2) to (6) concerning the termination of agreements (which is reserved to the court) and arbitration, section 4(1) therefore gives the FTT very broad power to determine "any question" and to entertain "any proceedings" arising under the 1983 Act or under any agreement to which it applies.

3. The powers of the FTT under section 4 of the 1983 Act are enhanced by provisions introduced into the Housing Act 2004 by the Transfer of Tribunal Functions (Mobile Homes Act 2013 and Miscellaneous Amendments) Order 2014. So far as is relevant, section 231A, Housing Act 2004 now provides as follows:

"231A. Additional powers of First-tier Tribunal and Upper Tribunal

(1) The First-tier Tribunal and Upper Tribunal exercising any jurisdiction conferred by or under the Caravan Sites and Control of Development Act 1960, the Mobile Homes Act 1983, the Housing Act 1985 or this Act has, in addition to any specific powers exercisable by them in exercising that jurisdiction, the general power mentioned in subsection (2).

(2) A tribunal's general power is a power to give such directions as the tribunal considers necessary or desirable for securing the just, expeditious and economical disposal of the proceedings or any issue in or in connection with them.

(3) [Directions under the Housing Act 2004]

(3A) [Directions under the Caravan Sites and Control of Development Act 1960]

(4) When exercising jurisdiction under the Mobile Homes Act 1983, the directions which may be given by the tribunal under its general power include (where appropriate –

(a) directions requiring the payment of money by one party to the proceedings to another by way of compensation, damages or otherwise;

(b) directions requiring the arrears of pitch fees or the recovery of overpayments of pitch fees to be paid in such manner and by such date as may be specified in the directions;

(c) directions requiring cleaning, repairs, restoration, re-positioning or other works to be carried out in connection with a mobile home, pitch or protected site in such manner as may be specified in the directions;

(d) directions requiring the establishment, provision or maintenance of any service or amenity in connection with a mobile home, pitch or protected site in such manner as may be specified in the directions."

4. Finally, by section 231C(1), Housing Act 2004 a person aggrieved by a decision of the FTT made under or in connection with the 1983 Act may appeal to the Upper Tribunal. This right of appeal is in addition to the right to appeal such a decision on a point of law under section 11 of the Tribunals, Courts and Enforcement Act 2007 and allows for appeals on wider grounds.

The facts

5. Sandy Balls Park at Fordingbridge in Hampshire ("the Park") is a protected site within the meaning of the Mobile Homes Act 1983. It was described by the FTT as an extensive development with a network of access roads to various communal facilities and to a variety of timber and metal mobile homes, some of which are in permanent residential occupation while others are used for short term holiday lets.

6. The three mobile homes with which this appeal is concerned are Nos. 116, 117 and 119. They are grouped together with three other homes surrounding a central gravelled area which is approached by a gravel drive leading from one of the main tarmacked estate roads. Each of the homes has its own allocated parking area which forms part of the pitch on which the home is situated. Nos. 116 and 119 are positioned at right angles to each other but they are separated by a gap through which it is necessary to pass to reach No. 117 and its allocated parking area, situated in the corner between the other two homes.

7. The dispute giving rise to this appeal came about because, in addition to parking vehicles in the allocated parking areas adjoining their own homes, the occupiers of Nos. 116 and 119 had been in the habit of parking directly in front of their homes, in such a way as to narrow the gap between Nos. 116 and 119 through which the occupiers of No. 117 had to drive to reach, or leave, their own parking area.

8. The agreement under which the permanent pitches on the Park are occupied is in a standard form incorporating the terms implied by Chapter 2 of Part 1 of Schedule 1 to the 1983 Act. Paragraph 11 of Chapter 2 provides that it is an implied term of any agreement to which that Chapter applies that:

> "The occupier shall be entitled to quiet enjoyment of the mobile home together with the pitch during the continuance of the agreement …."

9. Each occupier is required by their agreement to observe the Park rules. Rule 14 limits parking for each pitch to two vehicles and states that:

> "You must not park on the roads or grass verges or in any way which cause an obstruction to other vehicular access."

10. At the time when the dispute began No. 117 was occupied by Ms Rosalind Morgan under an agreement to which the 1983 Act applied. On 23 December 2016 she applied to the FTT for a determination of a number of questions relating to behaviour by her neighbours and visitors to the Park which was said to cause her nuisance or annoyance, including the obstruction of access to her designated parking area by inconsiderate parking.

11. The original respondent to Ms Morgan's application was Sandy Balls Estate Ltd, which was then the owner of the Park. Ms Morgan's complaint against it was that it had failed to enforce the Park rules and had thereby failed to protect her from the nuisance and annoyance of which she complained.

12. Shortly after the application was made the Park was sold to the appellant, Away Resorts Ltd, which was substituted as respondent to the FTT proceedings.

13. After the decision of the FTT on 26 June 2017 and after the appellant had applied for permission to appeal, Ms Morgan sold her home, and assigned the benefit of the agreement which had entitled her to station it on pitch No. 117. Ms Morgan has chosen not to participate in the appeal, for which permission was given by this Tribunal. The purchasers of her former home were offered the opportunity to join in the appeal as respondents but declined to do so.

The case before the FTT and its decision

14. Ms Morgan made a number of complaints concerning the activities of her neighbours. In relation to the issue of parking she gave evidence, which the FTT recorded in its decision, that her car was frequently blocked from entering or leaving her parking area on No. 117 by vehicles parked on the central gravel driveway. Her neighbours had a lot of vehicles, and she considered that the site owner had enforced the restriction on parking unfairly against her and her partner and had authorised the owner of No. 116 to park on the gravel drive.

15. Ms Morgan's complaint was that additional parking had been permitted for No. 116 in front of that home. She also complained that a sign had been erected on the fence adjoining No. 119, apparently erected by the appellant's predecessor in the spring of 2016, bearing the words "residents parking". It was Ms Morgan's case that by providing a sign indicating that residents could park in what was otherwise a no parking area, the Park owner had encouraged a breach of the site licence. The FTT was told that it was Ms Morgan's experience that, as a result, "rule breaking has become a habit" for her neighbours.

16. The case for the appellant was presented to the FTT by Mr Kelly, who also appeared before the Tribunal on the appeal. He drew the FTT's attention to a letter written by the appellant's predecessor as Park owner on 1 May 2015 after the local authority had undertaken an inspection of the Park to monitor compliance with the site licence.

17. The letter was addressed to the occupiers of Nos. 116, 117 and 119. It laid down a number of requirements in clear terms, including the following: first, that the allocated parking for No. 116 was to be alongside the occupier's home, with visitors' parking behind it; secondly, that the area between Nos. 117 and 119 was available for parking, but any parking in this position should not obstruct access to No. 117; thirdly, that the gravelled area between homes was designated as highway and should be kept clear at all times; and finally, that no signage was to be erected other than by the Park owner.

18. The FTT dealt with the issue of parking in paragraph 31 of its decision, as follows:

> "In regard to the issue of parking and access the Tribunal notes the letter issued by the owner to residents dated 1 May 2015 … specifically the letter gives notice of various requirements, including that "the open gravelled area between homes/lodges is designated as highway and should be kept clear at all times." However the photographs … show a sign attached to the fence of No. 119 adjoining such gravelled area which reads "Sandy Balls – Residents Parking"; ... the Tribunal notes the unequivocal requirement and notification to residents given in the letter dated 1 May 2015, that the gravel driveway is designated as highway and should be kept clear at all times. … The Tribunal considers the direction in such letter to be a clear and unequivocal instruction to pitch holders by the owner that such area should be kept clear at all times; accordingly parking on such an area is a wrongful act amounting to trespass and/or nuisance. Furthermore, the Tribunal considers the erection of a sign, bearing the owner's name, immediately adjacent to such gravel area and which reads "Sandy Balls – Residents Parking", to be an active authorisation by the owner to third parties, to carry out trespass and/or unlawful parking in breach of the site licence. In consequence and while such sign had apparently been replaced at the time of the inspection, the Tribunal nevertheless considers that in this regard, the covenant for quiet enjoyment owed to the applicant, and implied by Part 1, Chapter 2, paragraph 11 of the Mobile Homes Act 1983, has been breached; the Tribunal determines that the respondent shall ensure that such gravelled area is kept clear at all times for the benefit of each of the six adjacent pitches and so that each pitch holder may use such shared driveway to obtain access to and egress from their home."

19. The basis of the FTT's decision was therefore that, although the letter of 1 May 2015 was a sufficient instruction to residents to comply with the Park rules and keep access routes clear, the appellant's predecessor had subverted that instruction by authorising parking in breach of the licence. The FTT did not base its decision on any additional permission given to the occupier of No.116 to park in front of that pitch, but relied solely on the notice.

20. The FTT gave effect to its conclusions in paragraph 1 of its decision by making a direction in the following terms:

> "The Tribunal determines that the respondent shall comply with the implied term providing for entitlement to quiet enjoyment by ensuring that the shared gravel area leading to, and providing access variously to pitch Nos. 113, 114, 115, 116, 117, 118 and 119 Sandy Balls Estate, is kept clear at all times."

The appeal

21. The unspoken premise of the appeal was that the FTT's direction continues to bind the appellant, and to be enforceable against it, despite Ms Morgan, in whose favour the direction was given, no longer having an interest in No.117. It is not necessary for the purpose of this appeal to consider whether that is the effect of the FTT's direction. The question of jurisdiction which the appeal raises is sufficiently important, and the making of a peremptory order of this nature has sufficient potential adversely to affect the appellant's business (which operates in a context of statutory licensing) to make it both understandable and appropriate for the appeal to be pursued in any event.

22. In his submissions in support of the appeal Mr Kelly first challenged the FTT's finding that the appellant's predecessor had acted in breach of its obligation under the pitch agreement, and in particular the covenant for quiet enjoyment.

23. A covenant for quiet enjoyment is an agreement on the part of a landlord that a tenant's lawful possession of land will not be substantially interfered with by the acts of the landlord or those lawfully claiming under the landlord. In principle it gives protection to a tenant against disturbance caused by authorised acts by the tenant of the same landlord in adjoining premises: *London Borough of Southwark v* Mills [1999] UKHL 40. The relevant principle as between landlord and tenant is summarised in *Woodfall* at paragraph 11.275:

> "The covenant for quiet enjoyment is also broken by interruption of the enjoyment by the tenant of adjacent premises held under a common landlord, if the landlord has, in the lease or otherwise, authorised that tenant to do the act which causes the interruption. … But unless the landlord has let adjacent premises for a purpose which must necessarily involve a nuisance amounting to an interruption or disturbance of the enjoyment of demised premises, he is not liable merely because he knows the other tenant is causing a nuisance and takes no steps to prevent it: there must be consent or active participation on the landlord's part to make him liable for breach of covenant in such a case."

Mr Kelly acknowledged that the same principle should be taken to apply as between the owner of a protected site under the 1983 Act and the occupiers of pitches on that site, although the relationship between them that of licensor and licensee, rather than landlord and tenant.

24. Mr Kelly suggested that the notice authorising residents' parking was in an area which ought not to have given rise to any obstruction of access to No.117, and a specific instruction had been given in the letter of 1 May 2015 making it clear that occupiers were not permitted to park in others areas in such a way as to cause an obstruction. In the face of that letter it could not be said

that the Park owner had authorised behaviour by occupiers which gave rise to a substantial interference with the right of Ms Morgan to gain access to her pitch.

25. While I accept Mr Kelly's submission that the letter of 1 May 2015 was sufficient to absolve the Park owner of responsibility for parking on the gravelled area between homes, which it had specifically prohibited, I am not prepared to disturb the FTT's finding that the effect of exhibiting a notice authorising parking in a specific area adjacent to No.119 was to encourage an obstruction to Ms Morgan's access. This appeal is a review of the FTT's decision. The FTT had the benefit of a site visit, which I have not, and although the sign had been removed by the time of that visit its location was clear from photographs and it would have been obvious on the ground whether parking in the vicinity of the sign would have made access significantly more difficult. The FTT was satisfied that it would have done. There was material on which the FTT could properly reach that conclusion, and there is no basis on which this Tribunal may properly interfere with its assessment.

26. The more substantial ground of the appeal presented by Mr Kelly was his challenge to the remedy which the FTT had awarded, in the form of its direction to the Park owner to ensure that the shared gravelled area providing access to the various pitches was kept clear at all times.

27. Mr Kelly submitted that the FTT's jurisdiction under section 4(1) of the 1983 Act was limited to the determination of specific questions and proceedings, and did not extend to directing remedies consequential on its determinations. In particular, the FTT had, he submitted, no jurisdiction to grant what was in effect an injunction, or to require a party to take specific steps. It was specifically this ground which prompted the Tribunal to grant permission to appeal.

28. The Tribunal has had to consider the scope of the FTT's jurisdiction under section 4(1) of the 1983 Act and section 231A, Housing Act 2004 in two recent appeals.

29. In *Elleray v Bourne* [2018] UKUT 0003 (LC) the Tribunal considered whether the FTT had jurisdiction to order repayment of part of the purchase price of a mobile home where there appeared to have been a mistake over the manner in which parties bargain had been recorded. At paragraph 29 the Tribunal discussed the scope of the two material provisions, saying this:

> "Despite the apparent breadth of section 4, a power to determine questions or entertain proceedings is not the same as a power to grant specific remedies. The FTT has no inherent jurisdiction and may only make such orders or grant such remedies as Parliament has given it specific powers to make or grant. Although it is rather strangely described as part of a "general power" to "give directions", in section 231A(4)(a) of the Housing Act 2004 Parliament has given the FTT a specific power to require the payment of money by one party to the proceedings to another. Such "directions" may be given where the FTT considers it necessary or desirable for securing "the just, expeditious and economical disposal of the proceeding." The use of the word "directions" in this context might give the impression that section 231A(2) is concerned only with procedural matters. It is clear from section 231A(4),

however, that the power to give directions is a power to make substantive orders, including for the payment of money, the carrying out of works, and the provision of services."

30. I am therefore unable to accept Mr Kelly's submission that the FTT's jurisdiction does not extend to granting remedies consequential on its determination of disputes under section 4(1) of the 1983 Act. The power to grant additional remedies is exactly what section 231A, Housing Act 2004 provides. The fundamental question in this appeal is whether the remedies available to the FTT extend as far as the making of an order requiring that a park owner bring about a particular outcome or state of affairs which depends on the actions of others, rather than an order for the owner to carry out specific works or provide specified services. That question has not so far been considered by this Tribunal in its recent decisions concerning the scope of the FTT's powers.

31. In *Elleray* the Tribunal expressed a provisional conclusion, without having to reach a firm decision on the point, that section 231A does not give the FTT power to rectify a defective instrument to make it accord with the true bargain reached between the contracting parties. No such power is referred to in section 231A(4). Nevertheless, referring to the broad parameters of the power described in section 231A(2), the Tribunal considered that if the FTT was satisfied that the parties' true intentions had not been properly recorded in their contract, it could have achieved justice by directing a payment of money as it considered necessary for the "just, expeditious and economical disposal of the proceedings."

32. In *Wyldecrest Parks (Management) Ltd v Santer* [2018] UKUT 0030 (LC) the Tribunal ruled that the FTT did have jurisdiction under the 1983 Act to determine whether there had been a breach of the Water Resale Order 2006. The question of how much an occupier of a mobile home was obliged to pay for water under paragraph 5.2 of the standard form of pitch agreement was an issue which "arises under" that agreement, and proceedings commenced by occupiers to recover alleged overpayments were "brought under" their agreements, so that the FTT had jurisdiction to determine them under section 4(1), 1983 Act.

33. In paragraph 37 of *Wyldecrest v Santer* the Tribunal suggested that the policy of the legislation was that most mobile homes disputes should be dealt with in tribunals rather than courts because of their greater expertise and accessibility and lower cost. The enhanced powers conferred by section 231A, Housing Act 2004 were consistent with that policy since they reduced the risk that proceedings to resolve disputes may be required to be commenced in more than one forum. The Tribunal went on in paragraph 38:

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

34. A variety of directions which the FTT may give under the "general power" conferred by section 231A, Housing Act 2004, are listed in sub-section (4). They include a broad power to

order the payment of money by one party to another "by way of compensation, damages or otherwise" (sub-section (4)(a)) and a specific power to direct the payment or repayment of pitch fees (sub-section (4)(b)). They also include a general power to require works in connection with a mobile home, a pitch or a protected site to be undertaken (sub-section (4)(c)). The power to give such directions is analogous to the power of a court to grant a mandatory injunction ordering a party to carry out work. The obvious difference is that the FTT lacks the powers of enforcement of a court, so that in the event that its order is not complied with it is necessary for the party in whose favour the order has been made to seek the assistance of the court.

35. That assistance is readily available. Section 231D, Housing Act 2004, allows any decision of the FTT under the 1983 Act or the 2004 Act itself (except an order for the payment of money) to be enforced with the permission of the County Court in the same way as orders of that Court. Where the tribunal's decision is to direct the payment of a sum of money (such as under section 231A(4)(a)-(b), Housing Act 2004) that sum is recoverable as if it were payable under an order of the County Court or of the High Court. Where section 231B(2) of the 2004 Act is engaged the directions of the FTT may be enforced by an order of the transferring court, but I do not read that provision as applying to proceedings which originated in the tribunal itself. A transfer of the proceedings to this Tribunal for enforcement through the use of its High Court powers is not an option (see *Coates v Marathon Estates Ltd* [2018] UKUT 0031 (LC) on the scope of the FTT's powers of transfer and section 25, Tribunals, Courts and Enforcement Act 2007).

36. None of the powers so far considered is sufficiently broad, in my judgment, to justify the making of an order requiring a park owner to ensure that an access area leading to a pitch is kept clear at all times. Compliance with such a direction does not require the performance of specific work of any description, but rather involves the achievement of an outcome, namely the prevention of third parties (occupiers of other pitches or visitors to the Park) from parking in such a way as to create an obstruction. The direction will be breached if, at any time, the designated area is not kept clear.

37. The only part of section 231A(4) which might arguably provide jurisdiction for an order in the terms made by the FTT is subsection (4)(d), which allows the making of:

> "directions requiring the establishment, provision or maintenance of any service or amenity in connection with a mobile home, pitch or protected site in such manner as may be specified in the directions."

Although this power is expressed in fairly general terms I am in some doubt whether the words "any service or amenity" would naturally be taken to include the maintenance of free access to a designated parking space. Keeping an area clear could perhaps be regarded as a service (just as keeping an area clean might be), and the clear access itself could be seen as an amenity which the park owner might be said to establish or provide, but the power could equally be seen as being concerned with the provision of specific facilities which it was within the capacity of the park owner to provide. The difficulty with construing subsection (4)(d) as widely as would be required to justify the FTT's order that a particular state of affairs be achieved, is that it would involve a power to require a party to do something which it may be unable to do.

38. I am conscious that this appeal has been argued on one side only, and for that reason I am reluctant to give a decision on an issue of some difficulty which would then be binding on first-tier tribunals. I am nevertheless satisfied that this appeal can be disposed of without resolving definitively the extent of the FTT's power under section 231A(4)(d).

39. On the assumption that section 231A(4)(d), Housing Act 2004 does provide jurisdiction to order that a service or amenity in the nature of a clear access be provided, I am persuaded that the order of the FTT in this case was not a proper exercise of that power. It should be remembered that Ms Morgan's complaint in this case was not that the Park owner had itself obstructed access to her designated parking area, but that it had encouraged others to do so by placing a sign designating an area as residents' parking which resulted in an obstruction. The effect of the FTT's direction that the Park owner should ensure that the access was kept clear was to enlarge, rather than enforce, the owner's obligation and to make it a guarantor of the good behaviour of other Park residents.

40. Because the FTT's direction required the achievement of an outcome which depended on the behaviour of third parties, it was capable of being breached whether or not the Park owner did as much as it reasonably could to avoid the blocking of access. The direction was not one which it was within the power of the Park owner to comply with, and the owner might find itself in breach of the direction despite not being personally at fault. In principle it would be wrong to make such an order.

41. The FTT's general power under section 231A(2) is a power to give such directions as it "considers necessary or desirable for securing the just, expeditious and economical disposal of the proceedings." The FTT's direction was not necessary for the just disposal of the proceedings. All that was required for that purpose was a direction for the removal of the sign and a reiteration of the prohibition on parking on access routes contained in the letter of 1 May 2015. Nor was the FTT's direction desirable. On the contrary, by requiring the Park owner permanently to regulate the behaviour of third parties over whom it had no authority (except by the enforcement of the terms of their own pitch agreements) the FTT made a continuation and expansion of proceedings distinctly likely.

42. In my judgment the only proper order the FTT could have made in the light of its conclusion that the Park owner had encouraged inconsiderate parking, was an order limited in the way I have described i.e. for the removal of the sign which provided the encouragement and the reiteration and enforcement of the Park rules on parking. The directions which the FTT gave went far beyond those limits and, for that reason, its decision must be set aside.

43. As Ms Morgan is no longer resident at the Park, and as the sign has been removed and the current occupiers of No.117 have expressed no wish to participate in the proceedings, there is no reason for the Tribunal to any directions of its own in substitution for those of the FTT.

44. The appeal is therefore allowed.

Martin Rodger QC
Deputy Chamber President
16 April 2018