UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – CARAVAN SITE LICENCE – Caravan Sites and Control of Development Act 1960 – licence conditions – planning permission

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

BETWEEN:

AMBER VALLEY BOROUGH COUNCIL

Appellant

and

HAYTOP COUNTRY PARK LIMITED **Respondent**

Re: Haytop Country Park,
Alderwasley Park,
Whatstandwell,
Matlock,
DE4 5HP

Judge Elizabeth Cooke
3 March 2020
Derby Justice Centre

Mr James Howlett for the appellant.
Mr Richard Harwood QC for the respondents, instructed by Apps Legal Limited.

The following case is referred to in this decision:

Daejan Investments Limited v Benson and others [2013] UKSC 14

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") which required the appellant to issue a caravan site licence to the respondent, pursuant to section 3 of the Caravan Sites and Control of Development Act 1960 ("the 1960 Act").

2. I heard the appeal at the Derby Magistrates' Court on 3 March 2020. Mr James Howlett of counsel represented the appellant and Mr Richard Harwood QC the respondent; I am grateful to them both.

3. In the paragraphs that follow I first sketch out the law relating to the licensing of caravan sites, and then give a very brief summary of the facts because much of the detailed factual background is not relevant to what I have to decide. I then turn to the decision in the FTT, the grounds of appeal, the parties' submissions and my conclusion.

The law

4. Section 1 of the 1960 Act provides that it is an offence for an occupier of land to use or to permit it to be used as a caravan site unless he is the holder of a site licence.

5. Section 1(4) of the 1960 Act defines "caravan site" as:

> "land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed."

6. Section 29 of the 1960 Act defines "caravan" as:

> "any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include [railway rolling stock or tents]."

That definition includes both touring caravans which can be towed behind a family car, and park homes that cannot be towed but can be moved on a much bigger vehicle.

7. Section 3 provides for application to be made to the local authority for a site licence; section 3(2) requires the applicant to give the authority such information as it reasonably requires. Section 3(3) says this:

> "A local authority may on an application under this section issue a site licence in respect of the land if, and only if, the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site granted under Part III of the Act of 1947 otherwise than by a development order."

So it is a condition precedent for the grant of a licence that the applicant has planning permission for the use of the site as a caravan site (as defined).

8. Section 5 enables the authority to grant a licence subject to such conditions as it thinks "necessary or desirable to impose on the occupier of the land in the interests of persons dwelling thereon in caravans, or of any other class of person, or of the public at large". It states that conditions may, for example, restrict the number of caravans on the site or the times of year when they may be there, or relate to the size or state of repair or any other feature of the caravans (but not the material of which they are made) or their position on the land.

9. The provisions I have set out so far are from the 1960 Act as originally enacted. In 2014 the 1960 Act was amended so as to make additional provision for "protected site applications", defined in section 3(7) as applications for a site licence other than for holiday use only or for seasonal use only. So an application for a site licence authorising residential use is a protected site application, and it is not in dispute that the application to which this appeal relates was a protected site application.

10. Section 3(4) of the 1960 Act now reads as follows:

> "(4) If at the date when the applicant duly gives the information required by virtue of subsection (2) of this section he is entitled to the benefit of such a permission as aforesaid, ~~the local authority shall~~ the local authority may (where they are in England and are considering whether to grant a relevant protected site application) or shall (in any other case) issue a site licence in respect of the land within two months of that date or, if the applicant and the local authority agree in writing that the local authority shall be afforded a longer period within which to grant a site licence, within the period so agreed.

The words struck through were repealed in 2014 and the underlined words that follow them were substituted. So before 2014 a site licence was a matter of entitlement; provided there was planning permission for a caravan site and the applicant provided the information that the local authority reasonably required, the local authority was obliged to grant a licence but, as we have seen, could impose conditions.

11. Section 7 gives to any person aggrieved by any condition of a site licence a right of appeal to (now) the FTT against conditions; the FTT may vary or cancel a condition if is satisfied that it is unduly burdensome. Section 8 enables the local authority to alter the conditions attached to a licence, after giving the licence-holder the opportunity to make representations, and there is a right of appeal against such an alteration to the FTT.

12. Section 3(5A), (5B) and (5C) enable the making of regulations about matters that the local authority must take into consideration when deciding whether to issue a licence in response to a protected site application, requiring the authority to give reasons for the refusal of a licence, and creating a right to appeal against the refusal. That right did not exist in the unamended 1960 Act because the grant of a licence was a matter of entitlement and not a discretion.

13. The regulations made under those sub-sections are the Mobile Homes (Site Licensing) (England) Regulations 2014 ("the 2014 regulations"). Regulation 3 sets out the matters to which the local authority "must have regard", including the following:

> "(2) In relation to the management of the site and the proposed licence holder—
>
> (a) the proposed licence holder's interest or estate in the land forming the site, including, where relevant, the duration of the lease and any restrictions contained in the lease;
>
> (b) the proposed licence holder's ability to comply with any conditions of the site licence and to provide for the site's long-term maintenance;
>
> (c) the funding arrangements in place for managing the site and complying with any conditions of the site licence;
>
> (d) the management structure that will apply to the site, including the competence of the proposed licence holder and any other person nominated to manage the site; and
>
> (e) whether the proposed licensing arrangements would reduce the amenity of, access to or quality of services on the site, or reduce the local authority's ability to ensure that the site as a whole is adequately managed and maintained."

14. Regulation 6 of the 2014 regulations gives the applicant the right to appeal to the FTT against a decision not to issue, or consent to the transfer of, a site licence. The appeal is to be a re-hearing, and the FTT is to take into account any matters that it thinks are relevant including anything of which the local authority was unaware. Regulation 6(3) says:

> On determining the appeal, the tribunal may-
>
> (a) confirm the local authority's decision; or
>
> (b) reverse the local authority's decision, by ordering that the local authority issues a site licence, or consents to the transfer of a site licence, as applicable."

15. Regulation 6 says nothing about conditions, and it will be recalled that there is a separate right of appeal against conditions that are unduly burdensome (paragraph 10 above).

The facts

16. Haytop Country Park is a caravan site near Whatstandwell in Derbyshire. The respondent bought it in 2016, and wishes to operate it as a site for modern twin-unit type caravans, or park homes as they are called, for residential occupation. It has carried out a great deal of work on the site, including the felling of trees and the installation of concrete bases. There are park homes already installed on some of the pitches and there are people living in them.

17. The respondent applied to the appellant in 2018 for the transfer to itself of the previous site licence, granted to a Mr George in 1968. The appellant refused on the basis that that licence had expired. On 2 August 2018 the respondent applied for a new site licence. The application said that there were to be 30 permanent residential pitches; in answer to "does the site have planning permission" the applicant said that there was a permission dated 27 March 1952.

18. Two planning permissions have been granted in relation to the site. The permission granted in 1952 authorised the use of the site for 30 caravans, and specified that they had to be touring caravans (capable of being towed). A further permission was granted in 1966, and it allowed an additional 30 caravans; but the additional caravans had to be for holiday use. There is clearly an issue, therefore, as to whether the use to which the respondent wishes to put the site is a breach of planning control. The appellant says it is, because there is permission for residential use but only for touring caravans. The respondent says it is not, because the enactment of the 1960 Act changed the definition of a caravan to include a park home, and that change has a retrospective effect upon the 1952 permission. The respondent also says There are proceedings on foot between the parties as to which interpretation is correct; the respondent has applied for a certificate of lawful use which, as I understand it, has been refused and the respondent has appealed; the appellant has issued enforcement notices in relation to the site.

19. On 21 December 2018 the appellant refused the licence on the basis that

    a. the site did not benefit from an appropriate planning permission as required by section 3(3) of the 1960 Act;

    b. the proposed arrangements would reduce the appellant's ability to ensure that the site was adequately managed because the respondent had been convicted of two offences under the Town and Country Planning Act 1990 in relation to the site, had breached planning control in relation to the site and was currently in breach of section 1 of the 1960 Act by allowing persons to reside there when there was no site licence; and

    c. the respondent was not a fit and proper person to hold a site licence."

20. The respondent appealed to the FTT.

The decision of the FTT

21. The FTT gave consideration both to the conduct of the respondent and to the planning situation.

22. The FTT described the respondent's conduct as "reprehensible, not merely incompetent". It said that by reason of incompetence and repeated breaches of statutory obligations and restrictions there was a strong case for refusing to grant the licence. However, it concluded that refusal of a licence would be disproportionate in view of the investment of £750,000 that the respondent had put into the site, of the appellant's failure to enforce the requirement

for a licence for so long, and of the fact that it was likely that the planning issues would be resolved.

23. There is no appeal from that aspect of the FTT's decision and therefore I make no comment on it. The appeal focuses on the other aspect of the FTT's reasoning, which related to planning.

24. What the FTT said was that, first, there is planning permission for the use of the site as a caravan site. That is an uncontroversial reading of the 1952 permission and it follows from the definition of "caravan site" in the 1960 Act. So the condition precedent in the 1960 Act (section 3(3)) is satisfied.

25. At its paragraph 103 the FTT said:

> "However, we do not consider that the 1952 consent on its face permits the type of caravan proposed by the Applicant. If the Applicant considers that it does (or that subsequent alterations in the definition of a caravan mean that it should be construed in that way), then there is a planning dispute between the parties, which we understand is already being litigated by the parties. It is not for the [FTT] to be involved in endeavouring to determine that dispute.
>
> 104. We therefore also agree, as was indeed suggested by Mr Harwood, that the Respondent is not obliged to grant a licence to allow the site to be used in such a way as would breach what it regards as the current planning consent. It would therefore be entitled to impose conditions, if it wishes, regarding the type of caravan permitted, and the layout it considers appropriate. One option it has is to grant a licence on the same or similar terms as the 1968 licence."

26. So the FTT acknowledged that there was a dispute as to whether the use proposed by the respondent was a breach of planning consent, noted that that dispute was being litigated elsewhere and therefore – correctly, as both parties agree – refrained from deciding it.

27. Having therefore disposed of the objections made on the ground of the respondent's conduct and competence, and having established that there was a dispute as to whether there was planning permission for what the respondent wanted to do that was being determined in another forum, the FTT directed that the appellant grant a licence to the respondent.

The grounds of appeal

28. The respondent wants to put 30 park homes on the site; the 1952 permission referred only to touring caravans. There is a dispute as to whether the effect of the 1966 permission and the 1960 Act together mean that there is in fact planning permission for park homes. The appellant takes the view that there is no permission for what the respondent wants to do and is therefore reluctant to grant a licence as required by the FTT.

29. The grounds of appeal in respect of which permission was given are that the FTT "erred in law:

    a. By ordering the grant of a licence which bore no relationship to the terms of the application made by the Respondent;

    b. By ordering the grant of a licence which did not accord with the application without stipulating the essential particulars of the alternative licence to be granted;

    c. By allowing the Respondents to evolve a caravan scheme during the course of the proceedings, thereby allowing an abuse of process;

    d. By failing to provide any reasons for its decisions on (a), (b) and (c) above, these being matters [going] to its jurisdiction;

    e. By reaching a decision which was unreasonable in the "Wednesbury" sense, in that it was unreasonable to order a licensing authority to issue a wholly inappropriate licence in the circumstances of this case."

30. Ground (c) above was not pursued at the hearing by Mr Howlett (who did not draft the grounds). Nor did he pursue ground (b) unless, he said, I were to find, contrary to the submissions of both parties, that it was possible for the FTT to direct the appellant to grant a licence subject to specified conditions. I will comment upon that shortly. In the course of the hearing I asked Mr Howlett if another way of putting ground (a) would be to say that the FTT erred, according to the appellant, in requiring the grant of a licence either for a use for which there is no planning permission or for a use that is within the planning permission which is not the use the respondent wants to make of the site. Mr Howlett agreed.

31. It seems to me that, put that way, ground (e) is another way of putting ground (a). At the heart of the appeal is the complaint that the FTT should not have required the grant of a licence to the respondent where what he wants to do either is or may be outside the terms of the current planning permission.

Could the FTT have required the imposition of conditions on the site licence?

32. The FTT is, of course, a creature of statute, and can only do what the statute enables it to do. Regulation 6 of the 2014 regulations enables it to confirm a refusal of a licence or to direct the grant of a licence, and as I observed above makes no mention of conditions.

33. At first blush the idea that the FTT is not able to impose licence conditions under section 5 of the 1960 Act is odd. The FTT is conducting a re-hearing and must put itself in the place of the local authority, which will invariably impose conditions when granting a licence, so it would be very odd for the FTT to be required to direct a grant without even, for example, being able to specify how many caravans are allowed on the site – a basic feature of licence conditions.

34. The FTT clearly took the view that it was not able to specify conditions, and both Mr Howlett and Mr Harwood QC agree that it cannot do so. I am not required to decide the point because there is no appeal on this point (ground (b) above not being pursued). However, because the position as agreed is surprising, it may be helpful for me to make some observations.

35. If the FTT is unable to impose licence conditions under section 5 of the 1960 Act, then only the local authority can do so. A person aggrieved by a condition can appeal to the FTT on the basis that the condition is unduly burdensome. By contrast if the FTT itself were able to impose conditions, there would almost certainly be an appeal only on a point of law to this Tribunal, which could put the licensee in difficulties.

36. Moreover, licence conditions are likely to be determined in accordance with local conditions and needs, of which the FTT may be unaware. There will be issues of consistency with conditions imposed on other sites. The FTT may be able to specify particular conditions but may not have the evidence necessary to make a judgment about others.

37. Obviously, if the FTT cannot require the imposition of conditions and cannot prevent the imposition of conditions then the local authority can grant a licence, in accordance with the FTT's direction, but subject to conditions that frustrate the FTT's intention. If it did so it would be susceptible to judicial review. Equally it can impose conditions that the licensee cannot fulfil, and thereby make the licence useless – as indeed the FTT appeared to envisage in this case. That the FTT envisaged such a condition is highly relevant to the appeal.

38. The Supreme Court in *Daejan Investments Limited v Benson and others* [2013] UKSC 14 held that where a court or tribunal has a discretion, it can always exercise that discretion subject to conditions. In that case, for example, the FTT had a discretion whether to dispense with a landlord's obligation to consult its lessees before being able to recover certain service charges (pursuant to section 20ZA(1) of the Landlord and Tenant Act 1985). Lord Neuberger explained at paragraph 55:

> "In the absence of clear words precluding the LVT imposing terms, I consider that one would expect it to have power to impose appropriate terms as a condition of exercising its power of dispensation".

39. That meant that the FTT could dispense with the consultation requirement provided that the landlord paid the lessees' costs. The FTT exercised its discretion on that condition. Equally I consider it obvious that the FTT could, in a site licence case, impose a condition on its direction that the licence be granted, for example that certain works be done or structures removed. That was not something to which it gave consideration in this case and no-one suggested that it should; but it may be important in future cases. The ability of the FTT to attach a condition to the exercise of its discretion is not the same as the power to impose a licence condition under section 5 of the 1960 Act, which appears to be conferred upon the local authority alone – although it is important to note that I have heard no argument contrary to that view and that the discussion above cannot be regarded as a decision on the point.

The appellant's arguments

40. I revert to Mr Howlett's submissions, which can be summarised very briefly. He says that the FTT failed to take account of a relevant matter, namely the planning situation, and that in the light of the fact that the planning situation is uncertain the FTT should have refused a licence. He agrees with Mr Harwood QC that it is not open to the FTT to impose licence conditions under section 5 of the 1960 Act. Given the consequences of directing a grant, namely the fact that the local authority must either grant a licence on conditions that authorise a use that it regards as unlawful, or must impose conditions that make the licence useless to the respondent, the FTT should have upheld the local authority's refusal.

The respondent's arguments

41. Mr Harwood QC argued that that course was not open to the FTT.

42. He says that the discretion given to the local authority – and therefore to the FTT on appeal – is constrained by the terms of the 1960 Act and by the content of the 2014 regulations. True, section 3(4) of the Act says that the local authority "may" grant a licence. But in context that is not an open-ended discretion. To understand that, one has to go back to the unamended 1960 Act where the grant of a licence was not a matter of discretion. If there was planning permission for a caravan site, as set out in section 3(3), and if the applicant gave the local authority the information it required under section 3(2), then it was entitled to a licence. That was the position before the 2014 amendments changed things, and it remains the case for applications that are not protected site applications.

43. All that changed for protected site applications in 2014, it is argued, was that the local authority was required to consider the matters set out in regulation 5 of the 2014 regulations. Those matters are all about the management of the site, the ability of the respondent to comply with conditions, and the ability of the local authority to ensure that the site is properly managed. There is no reference to planning permission in the 2014 regulations and there is no new power to consider planning. The only planning question remains that set out in paragraph 3(3).

44. If that is right then the local authority, and the FTT standing in its shoes on appeal, was not concerned with whether what the respondent wants to do is a breach of planning permission. It is open to the appellant to impose conditions on the licence that ensure – in the light of the view it takes of the planning permission – that planning control is not breached. If it is breached, it can take enforcement proceedings. If conditions are imposed that the respondent finds unduly burdensome it can go round the appeal system again and ask the FTT to vary the conditions. But when considering whether to grant a licence the local authority can only ask one question about planning permission, namely whether there is permission for a caravan site under section 3(3). If there is, and if there are no other reasons not to direct the grant of a licence, the FTT must make that direction.

Discussion

45. I disagree with Mr Harwood QC on this point, for two reasons. First, there is nothing that expressly limits the scope of the discretion conferred by the word "may" in section 3(4) of the 1960 Act. The absence of an express limitation seems to me to be fatal to that argument. So is the wording of regulation 3 of the 2014 regulations, which states that the local authority "must have regard" to the matters there set out. It does not say that the local authority may not take any other considerations into account.

46. In any event the matters set out in regulation 3 may well encompass planning matters. The operation of a site in breach of planning control is directly relevant to the management of the site; it is likely to impinge upon the licence holder's ability to comply with conditions of the site licence (unless those conditions authorised a breach of planning control); it may well reduce the local authority's ability to ensure that the site is adequately managed and maintained.

47. If the local authority was able, as I find it was, to consider whether there would be a breach of planning control in the operation of the site as the respondent wanted, then so was the FTT. In any event the FTT in considering the matter afresh is entitled to have regard to anything it thinks relevant, and it is difficult to see why the lawfulness of the proposed use of the site is not relevant to the question whether to grant a licence. Accordingly in considering the appeal the FTT was right to think about the planning situation, as it did in its paragraph 103 quoted above. It was not required to go straight from the section 3(3) question to direct the grant of a licence, in the absence of any other reason not to do so.

48. To find otherwise would be to compel the conclusion that if a caravan site licence clearly and uncontroversially did not allow the type of site that an applicant proposed to operate, the local authority would be obliged, in the exercise of its powers under the 1960 Act or – on appeal if it refused to do so – by the FTT, to ignore that and to grant a licence that permitted the use of the site in breach of planning permission. That would be an irrational outcome because it would force the local authority to permit something that is illegal. If the authority then took enforcement action in its capacity as the local planning authority, it would be preventing with its left hand what its right hand had condoned. That is equally irrational and it cannot have been the intention of Parliament that that should be the effect of the 1960 Act and the regulations made under it.

49. Mr Harwood QC observes that there is nothing unusual in having an activity that is subject to more than one licensing regime, one of which permits it and the other that does not. But the example he gave was where there was planning permission that permitted a particular use but environmental regulations did not. That may be so, but that example does not involve a single body saying or doing two contradictory things, as the local authority would have to do in the scenario I have just set out.

50. In the present appeal it is not that the planning permission clearly does not permit what the respondent wants to do. There is a genuine dispute as to whether or not the proposed use is a breach of planning control. The FTT chose not to decide whether it was a breach because that dispute was already being litigated in another forum; the parties to this appeal both take

the view that that was the correct approach. I note that that was the FTT's choice and that neither party takes issue with it, but my decision is not to be taken as authority for the proposition that the FTT could not have made that decision itself..

51. In that situation, should the FTT have granted the licence, as the respondent says, or have refused it, as the appellant argues?

52. Mr Harwood QC points out that since this is a matter for discretion, a relevant consideration is the fact that the site is already occupied by residents who have set up home there. It is not in their interests for the site to be without a licence and therefore if there is any doubt, as there is here, the FTT should direct the grant of the licence.

53. The effect of the FTT's decision is that the local authority has a choice. It must grant a licence, and therefore must do so either subject to conditions (as to number and type of caravan) that permit the current use of the site, which the appellant regards as illegal, or subject to conditions requiring compliance with the 1952 planning permission, which would require the removal of all the existing park homes and is not what the respondent wants.

54. The appellant reasonably regards both those options as unacceptable, and I take the view that it was irrational to make a decision that placed a public authority in such an impossible position. The FTT could have stayed the appeal pending resolution of the planning position; or it could have upheld the authority's decision (leaving the respondent without a licence, but free to apply for one again if the planning position is resolved in its favour); or it could have directed the grant of a licence on condition that it would not take effect until the planning dispute was resolved in the respondent's favour, with permission for either party to apply for further consideration if the dispute was not so resolved. I appreciate that the absence of a licence is a problem for the current residents, but that is a problem that the respondent has created and should not be prayed in aid to force the grant of a licence. I find that the grounds of appeal are made out. I allow the appeal and I set aside the FTT's decision.

55. In the light of the fact that the planning dispute between the parties will be determined by the planning inspectorate before long, I remit the matter to the FTT for a re-hearing, and it will be open to the parties to ask the FTT to stay the matter until the planning dispute is resolved.

Judge Elizabeth Cooke

16 March 2020