Y TRIBIWNLYS EIDDO PRESWYL (CYMRU)

THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)

Reference: RPT/0048/08/18

Application: Application under section 54(1) of the Mobile Homes (Wales) Act 2013

Tribunal: Dr Christopher McNall (Lawyer - Chairperson)
Mr John Singleton (Surveyor Member)
Mr Bill Brereton (Lay Member)

Applicant: The Berkeley Leisure Group Limited
(Represented by Mrs Anouska Musson, Solicitor, of Tozers Solicitors, Exeter)

Respondents: Norman James Lawrence and Kathleen June Lawrence

Hearing: Heard in public at Southgate House, Cardiff on 26 February 2019, preceded by a site visit

Property: 45 Lighthouse Park, St. Brides, Newport NP10 8SL

Decision

Question 1:

By reason of Paragraph 4 Schedule 5 of the Mobile Homes (Site Rules) (Wales) Regulations 2014, the Respondents are not in breach of Term 3(j) of their Mobile Homes Act agreement in keeping a trailer at 45 Lighthouse Park.

Question 2:

The nature of the benefit enjoyed by the Respondents is that the Respondents are allowed to keep a trailer at 45 Lighthouse Park. It is unnecessary for us to articulate the circumstances in which that benefit will cease, and we decline to do so.

Reasons

1. This is our decision in relation to an application by the Applicant site owner, made on 3 August 2018 under section 54(1) of the Mobile Homes (Wales) Act 2013, for the Tribunal to determine the following questions:

    "1. Whether the Respondents are in breach of the terms of their Mobile Homes Act Agreement, specifically, Express Term 3(j), which requires that they comply with the park rules from time to time in force, by reason of their breach of Park Rule 25 ('**Question 1');** and

    2. If the Respondents are not in breach by reason of Paragraph 4 of Schedule 5 of the Mobile Homes (Site Rules) (Wales) Regulations 2014 because when the site rules were deposited on 13 January 2016 they enjoyed a benefit permitting them to have a trailer at the Park, then the precise nature of that benefit and the circumstances in which it will cease and the Respondents then be bound by Rule 25 (**Question 2'**)"

2. The Applicant asks the Tribunal to make an order that:

    "1. The Respondent (sic) is in breach of their Agreement, specifically, Clause 3(j) of the express terms contained in Part IV of the Agreement and Park Rule 25; and

    2. The Respondent (sic) be required to remedy their breach within a reasonable period of time, namely, within 28 days"

The Respondents' participation

3. Both Mr and Mrs Lawrence are the named occupiers, and both are the named Respondents. Given that Mr Lawrence has taken the lead in dealing with the Tribunal, we have taken it that his representations were intended to be made and read both on his own behalf and on that of Mrs Lawrence. We have not heard separately from Mrs Lawrence.

4. Although both Mr and Mrs Lawrence were present at the site visit, neither attended the subsequent oral hearing at Southgate House. Mr Lawrence had written to the Tribunal to say that he did not intend to come to the oral hearing, and he took pains at the site visit to reiterate his intention. It was explained to him that, if he did not come, he would not have the opportunity - amongst other things - to see and hear for himself what was

being said. He was urged to reconsider, and was given the assurance (extended to all litigants, whether represented or not) that the Tribunal would do its best to ensure that the hearing would be a fair one. That is part of its public duty as a judicial body.

5. The hearing was listed to begin at noon. The Tribunal waited until 12.20 before beginning the hearing, in case Mr or Mrs Lawrence had experienced any last-minute change of heart. Unfortunately, neither of them had.

6. Rule 32 of the Tribunal's Rules (The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016 SI 2016 Nr 1110 (W 267) permits the Tribunal to proceed with a hearing in the absence of a party when that party has been given notice of the hearing, and where there is no good reason for their non-attendance.

7. Mr and Mrs Lawrence were given notice of the hearing, and there was no good reason for their non-attendance. They had simply decided not to come. We do not consider either of the reasons which Mr Lawrence gave us - both in writing, and at the site visit - namely (i) that he did not consider the Tribunal to be fair; and (ii) that Legal Aid was not available, to be good reasons for the purposes of Rule 32.

8. Whilst (i) might well be Mr Lawrence's personal view (which he is free to hold, irrespective of its accuracy) it is not - no matter how strongly or sincerely held - an objectively good reason. If it were, parties could frustrate hearings simply by expressing lack of confidence in the Tribunal and not coming. Moreover, in the circumstances, the reason is unconvincing when viewed against the backdrop of Mr Lawrence's spirited engagement with the Tribunal up to and including the site visit. He corresponded extensively with the Tribunal, made written submissions, and invited the Tribunal to deal with the matter without a hearing. We do not understand why Mr or Mrs Lawrence were prepared to consider a 'paper' hearing - done in their absence - as fair, but a 'live' hearing - involving the same decision-makers - as unfair. Such concerns did not appear to have stood in the way of Mr Lawrence making earlier applications to the Tribunal in 2015 and 2016.

9. As to (ii), this is a matter of government policy and we cannot comment. However, to some degree it misses the point that part of the duty of the Tribunal is to ensure that all parties have an opportunity to participate fully in the hearing.

10. We wish to make it clear that Mr Lawrence's trenchantly expressed views as to the competence and integrity of the Tribunal, its chairpersons, and its membership have had no influence on us, whether in his favour or against him, and have not played any part in our decision-making.

11. Since Mr and Mrs Lawrence were the Respondents, and not the Applicant, their absence did not detract from the legal and evidential burdens placed on the Applicant.

The Facts

12. The only witness from whom we heard was Mrs Julie Lloyd. Mrs Lloyd signed the Statement in support of the Application (3 August 2018) and two further witness statements (9 November 2018 and 22 February 2019). She is an operations assistant for the Applicants, based at its office in West Coker. She is not based at the park. She is not the manager of the park. That was Lynne Lovett, who had recently retired, and from whom there was no evidence.

13. We found Mrs Lloyd to be a truthful witness. However, her evidence is of very limited utility in resolving this dispute, especially when it comes to trying to identify, with any degree of precision, the sequence of events, and especially the dates when Mr and Mrs Lawrence were keeping a trailer at the park, and when they were not.

14. Mrs Lloyd was careful to point out where matters of fact were outside her personal knowledge and where, accordingly, her evidence was entirely reliant on what she had been told by others. In response to questions from the Tribunal, she made sensible concessions. She has no personal knowledge of certain matters. The first she knew of the presence of a trailer on the Respondents' plot was in February 2018, when she was told by Ms Lovett.

15. On 25 November 2011, Mr and Mrs Lawrence took an assignment of a mobile homes agreement from Mr J Thomas. That agreement was originally made between Lighthouse Hotels Ltd as owner, Lighthouse Park Estate as the park, and Sidney Williams as the occupier. The agreement commenced on 24 April 1979 and is contained in a 'Written Statement under the Mobile Homes Act 1983' (**'the Old Agreement'**). Part IV sets out the Express Terms of the Old Agreement. Clause 3(j) is an undertaking by the occupier to the owner "to comply with the park rules from time to time in force a copy of the current park rules being annexed hereto".

16. At the time, the relevant park rule was Rule 13(g): "*Commercial vehicles, boats, touring caravans and motorhomes of any size may only be parked on the park with prior written permission from the company".* It is common ground that a trailer does not fall within Rule 13(g) and accordingly that the park rules in force in 2011 did not contain any prohibition on the keeping of a trailer.

17. On 27 October 2011, Mr and Mrs Lawrence met with Lynne Lovett, who was the park manager at the time. A note of their meeting, made at the time, and placed before us, records that Mr and Mrs Lawrence had a 'trailer-tent', but intended to part-exchange it in January or February 2012. The note does not say what they were proposing to part-exchange it for.

18. Hence, we find that Mr and Mrs Lawrence had a trailer tent in October 2011 and brought it onto the site with them when they moved in.

19. In early 2013, they were thinking of buying a Volkswagen camper van, but did not do so, on the basis that they were told that they would not be able to bring it onto the park, since it would be contrary to Park Rule 13(g) and the owner was not willing to give permission.

20. Mr and Mrs Lawrence still had the trailer-tent in mid-2014, when it seems to have been donated to the RSPCA. That took place in or about July 2014, following an unsuccessful attempt by Mr Lawrence to sell the trailer-tent.

21. Mr Lawrence became aggrieved with (i) the owner's refusal of permission for him to park a campervan (ii) what he considered to be the owners' inconsistent application of site rule 3(g), insofar as the occupants of other plots had vehicles of various kinds, and (iii) with the proposed introduction of Park Rule 25, which prohibited trailers where no such prohibition had existed before. His objection on the latter footing is explicable most readily on the footing either that he still had a trailer, or wanted to retain the right to have one.

22. He applied to the Tribunal in June 2015. That application (alongside that of another applicant with similar concerns) was heard in October 2015. At that point, Mr Lawrence still hoped to buy a campervan: see Paragraph [53] of the decision. The Tribunal inspected his plot and did not mention a trailer. However, given that the presence of a trailer at that time would not have been in contravention of Park Rule 3(g) we are unable to assess whether, in October 2015, Mr Lawrence still had a trailer. The Tribunal's

decision was published in December 2015: RPT/0012/06/15. Although the Tribunal expressed sympathy with Mr Lawrence's position, proposed Rule 25 (as it then was) was approved by the Tribunal: see Paragraph [68].

23. The trailer-tent donated to the RSPCA was reclaimed by the Lawrences or another trailer obtained by the Lawrences in 2014 or 2015. There was a gap when Mr and Mrs Lawrence did not have a trailer. Mrs Lloyd did not know how long the gap had been, and neither do we. It is a matter in relation to which Mr Lawrence, had he chosen to attend the hearing, doubtless could have assisted the Tribunal.

24. In 2016, Mr Lawrence made a further application to the Tribunal (RPT/0013/11/16). That was heard (by a different panel of the Tribunal from that which had dealt with his earlier application) in February 2017, and its decision was published in March 2017. The Tribunal considered what Mr Lawrence had been told by Mrs Lovett in 2011. The Tribunal concluded that there was no prohibition on the keeping of trailers in 2011, that Mrs Lovett 'indulged in a deliberate policy of misleading new occupiers concerning the content of the old rule 13(g)' in telling new occupants that trailers were not allowed: see Paragraph 40(f).

25. Moreover, the Tribunal went on to find (at Paragraph 40(g)):

"However, the position is clear. Changes in the Site rules cannot operate retrospectively. If an occupier enjoyed a benefit before the change he/she is allowed to retain that benefit even though exercising that benefit would now constitute a breach. There was no prohibition in respect of trailers before February 2016. Occupiers who brought trailers onto the Site before February 2016 remain entitled to do so".

26. There has been no appeal from the finding in Paragraph 40(f), or the Tribunal's statement of the law in Paragraph 40(g).

27. In his letter of 8 September 2018, Mr Lawrence suggests that he bought a second-hand camping trailer in response to the Tribunal's decision in March 2017.

28. A trailer was noticed by the site owner in February 2018. The then-site manager, Lynne Lovett, sent an email to Mrs Lloyd about it. It seems that this was the trailer which appears on the undated photograph at page 153 of the bundle.

29. That trailer is not a trailer-tent. It is not the same as the one brought onto the park in 2011 and/or (if different) the one donated to the RSPCA in 2014. It is a conventional trailer. It is about 2 feet wide, 3 feet long, and 18 inches high (a cubic capacity of about 9 square feet), on two wheels, with a vehicle hitch, and painted green. It has a hinged two-part solid pitched cover. The photograph shows it parked on a small flagged area on plot 45. The trailer was not at plot 45 when we visited, but we saw the same flagged area, and also a smaller area of hard-standing, behind the hedge, where Mr Lawrence told us he sometimes stored the trailer.

30. By way of observation, and for the sake of completeness, the trailer, when parked on the plot - whether on the flags or behind the hedge - would not easily be visible except from the very entrance to the plot, which itself is at the end of a cul-de-sac. The trailer is not parked on the road and is not visually intrusive. There would be no or next-to-no footfall from passers-by.

31. From our site visit, we can add that the overall context is that Lighthouse Park is one in which the occupants are obviously given a degree of latitude in what they put in their gardens, including greenhouses, sundials, statues, plants, trees and bushes, giving a variegated, attractive and busy streetscape. We saw two other trailers, which we gather were 'grandfathered' across from the old rules.

32. At a very late stage in the dispute, Mr Lawrence put forward what was said to be a receipt or a copy receipt, dated 20 May 2016, ostensibly recording the sale by him of a 'Raclet (Allegra) Trailer Tent' for £1,000 to a 'Mr D Kitchener' of Solihull. In a written direction, the Tribunal allowed Mr Lawrence to rely on this document. However, his failure to attend the hearing means that the evidential weight which can be placed on this document - even if it were relevant to the issue which we have to decide - is extremely limited. Many questions about that document, and the circumstances which surround and underpin it, remain unanswered.

33. This document attracted some controversy. In advance of the hearing, the Applicant raised the possibility of expert evidence being obtained in relation to this document, with the suggestion that it was not authentic. However, no expert evidence was obtained, nor details of an appropriate expert provided. The possibility of obtaining expert evidence was not placed front and centre at the hearing, and attracted only a passing mention in Mrs Musson's closing submissions.

34. That was a sensible and pragmatic approach to take. Expert evidence would have required an adjournment, introducing significant further delay and cost - both to the parties, and to the public purse. It could perhaps have been several months before the same panel of the Tribunal could meet again. In common with most civil proceedings, expert evidence is needed only where reasonably required to resolve the dispute. For the reasons set out below, we do not consider that this document is crucial to the decision which we have to make. Moreover, the Tribunal, in managing and hearing the dispute, has to have regard to proportionality: see Rule 3(2). This is assessed objectively. Ultimately, this is a dispute as to whether a small trailer can be kept on a plot at the end of a cul-de-sac.

The Law

35. The Mobile Homes (Site Rules) (Wales) Regulations 2014 (SI 2014 Nr 1764 (W 179) came into force on 1 October 2014. Paragraph 4 of Schedule 5 says:

> "4(1) Where:
>
> (a) prior to the deposit of a site rule, the occupier of a site enjoyed a benefit; and
>
> (b) the effect of the coming into force of the deposited site rule is that the enjoyment of the benefit by the occupier will be in breach of the deposited site rule;
>
> the occupier will not be in breach of the deposited site rule for the period that the benefit continues to subsist.
>
> (2) On the cessation of the benefit, the occupier will be bound by the deposited site rule"

36. On 13 January 2016, the Park Rules were changed. The new Park Rules contain the following Rule:

> "25. You must not keep Boats, Camper Vans, Motorhomes, Touring Caravans or Trailers of any sort on the park"

Discussion

37. Although this dispute has generated a significant amount of lively correspondence, with allegations and counter-allegations of various kinds, the point at issue is a narrow one. We are grateful to Mrs Musson for her well-focussed oral submissions.

38. The burden is on the site owner to prove (albeit, only to the civil standard, namely, the balance of probabilities) that there has been 'cessation of the benefit' within the proper meaning and effect of Paragraph 4(2). It is only then that Mr and Mrs Lawrence would be bound by the new deposited site rule. A breach of Rule 25 would then be a breach of Rule 3(j).

39. In our view, the Applicants have failed to discharge that burden in this case. They face a number of obstacles. One is the patchy nature of their evidence. Another is our reading of the legislation. A third is the clear statement of the Tribunal in March 2017, set out above, from which there was no appeal. Whilst that does not formally bind us, it nonetheless has to be given appropriate weight.

40. It is not in dispute that Mr and Mrs Lawrence did enjoy a benefit prior to the deposit of the site rule: i.e., prior to 13 January 2016. They enjoyed the benefit of having a trailer-tent in November 2011, and as late as July 2014. Paragraph 4(1)(a) is satisfied.

41. Paragraph 4(1)(b) must also be satisfied. The effect of the coming into force of Rule 25 would mean that the benefit would be in breach of the deposited site rule. The keeping of a trailer of the kind described above would be a breach of Rule 25.

42. The heart of the issue in this dispute is the end of this Paragraph: *"the occupier will not be in breach of the deposited site rule for the period that the benefit continues to subsist."*

43. Paragraph 4 calls for interpretation. It refers to the enjoyment of a benefit:

    43.1 A 'benefit' is an incorporeal right and can still be 'enjoyed' even if it is not being physically exercised. A right of way continues to exist even if the dominant owner does not happen to be walking along it at that very moment. The enjoyment of a benefit is not necessarily co-terminous with the existence of the benefit;

43.2 Paragraph 4(1)(a) refers to the enjoyment of a benefit 'prior' to the deposit of a site rule. It does not say enjoyment 'at the time' the site rule was deposited;

43.3 Paragraphs 4(1) and 4(2) may well have been intended to be mutually exclusive, and to cover all eventualities, but the language of Paragraph 4(1) - a continuance of the *subsistence* of the benefit - is not linguistically the precise counterpart of Paragraph 4(2) - the cessation of the benefit (rather than, for example, the benefit ceasing to subsist).

44. Taking the above features into account, our sense of the language used in Paragraph 4, which is a form of 'grandfathering' clause, is that it properly refers to states of affairs, and not to isolated moments in time, or a snapshot of the very moment (or even the day) that the site rule was deposited. Nor does it depend on actual physical enjoyment.

45. If that were indeed so, then absurd outcomes would ensue. A person would lose the benefit if it had ceased, even momentarily. Even if one were to read Paragraph 4 as subject to a 'de minimis' / triviality exception, one would still come up against the same difficulty: if a benefit is not being exercised in fact, at what point is the right to enjoy it lost as a benefit in law?

46. It seems to us that a purposive reading, designed to capture the underlying sense, is preferable to an exclusively literal reading.

47. Whether the benefit continues to subsist within the proper meaning and effect of Paragraph 4 is a matter of fact and degree, to be assessed in each case with reference to the circumstances of that individual case. That is to be approached with common sense, in the round, and without undue technicality.

48. Although the Applicant suggested that an entirely subjective test was appropriate - i.e., the benefit ceases to subsist when the owner of that benefit intends that it should cease to subsist - it seems to us that assessment of the thought-process of an individual occupant, and their motives, is a less sound and workable approach than an approach which looks objectively at the surrounding circumstances.

49. Moreover, an approach of the latter kind, seeking to avoid undue technicality as to precisely when the physical exercise of a benefit had ceased, and equating that to loss of the benefit as a matter of law, would

be consistent with what is, in our view, the good analogy to be found in the law of easements and profits, which are other sorts of incorporeal hereditaments.

50. In relation to easements and profits, mere or temporary non-user will not extinguish the right, even if accompanied by a mistaken belief that the right had been extinguished: see Megarry and Wade, the Law of Real Property (8th edition, 2012) §29-009. Such rights are not treated as lightly or easily lost. It has to be proved that the person having such a right intends to abandon it, and does not intend thereafter ever to exercise it again.

51. We do not go so far as to say that rights of the kind at issue here can only be deemed to have been abandoned when periods of the kind sufficient to accomplish this for an easement (sometimes, decades) have gone by. But it is clear that there has to be sufficient and satisfactory evidence that the right has been abandoned or relinquished, once and for all, and for good.

52. There is no such evidence here. The evidence, such as it is, points in the opposite direction. Mr and Mrs Lawrence did have have the benefit of a right, and the evidence points towards them intending to retain it, notwithstanding resistance from the owner.

53. Mr Lawrence had a trailer when he moved onto the site at the end of 2011. There was no prohibition against this in the then-rules. He had intended to 'part-exchange' it for something else. He brought that trailer onto the site in 2011 even though he had been told that trailers were not allowed. This to some degree speaks to his determination and state of mind: he had a trailer, and he wanted to keep it.

54. He had it for up to three years before giving it to the RSPCA in July 2014.

55. Even on those facts, he had therefore had a trailer for the overwhelming majority of his time at the site before the introduction of the new site rules.

56. Even if, on the date at which the new site rules were deposited (13 January 2016), Mr Lawrence could be shown by the owners not to have owned a trailer and/or could be shown not to have been keeping a trailer at his plot (which the owners have failed to show in this case), and even if it could be shown by the owners that he had disposed of his trailer in July 2014 and had never reclaimed it or acquired another before 13 January 2016 (which the owners have failed to show in this case), meaning he had

not had a trailer of any kind between July 2014 and January 2016 (= approximately 18 months) we would still find, in this case, that the benefit had not ceased within the proper meaning and effect of the Schedule.

57. The benefit is the benefit of being able to park a trailer. There is nothing to say that benefit has to be continuously exercised, or exercised without more than trivial interruption up to the moment the new site rules are deposited. Whilst there may well have come a point when, looked at objectively, it could be said that the benefit had ceased, in our view the Applicant has failed to show us, on the evidence, that point was reached here.

58. To avoid any doubt, we are not saying that a benefit, once acquired, cannot cease. That is necessarily implicit in the wording of the legislation. We are simply saying that, on 13 January 2016, the benefit enjoyed in this case had not ceased.

59. It was suggested that an 'integral' trailer (i.e., a trailer-tent) is not, in any event, the same as a trailer of the kind which Mr Lawrence now has, with the inference that if there was a benefit, it was limited to an integral trailer, and therefore must now have ceased because Mr Lawrence no longer has an integral trailer.

60. We disagree. We do not consider that any such 'like for like' requirement can be read into the legislation. We consider that to read the benefit as limited to a trailer-tent, or an integral trailer (if indeed that is something different) is unduly narrow and artificial.

61. In any event, we are not satisfied that a trailer-tent is a materially different thing from a trailer - both are pulled behind a vehicle (rather than being self-propelled), are of broadly similar dimensions, construction and appearance. The only real difference is that the trailer-tent contains a tent which can be unpacked and erected, with the trailer forming part of the structure, and the present trailer does not (although a free-standing - i.e., non-integral - tent could be stored within it).

62. The second part of Question 2 seeks more general guidance as to the circumstances in which the benefit ceases. We decline to give such general guidance. The Tribunal decides actual disputes, not hypothetical ones. The questions asked which are material to the present position of the parties to this dispute have been answered. There is no need to go further.

63. Moreover, the legislation is expressed in necessarily general terms, and it will be a matter for parties and their advisers, and the Tribunal, on a case-by-case basis, to decide how the legislation is engaged. We do not consider it necessary or helpful to try to set out the circumstances in which the benefit would cease, or the factors to be taken into account.

Dated this 29th day of March 2019

CHAIRMAN