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THE RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0003/05/23

In the matter of: 7 Westover Park, West Street, Whitland, Carmarthenshire, SA34 0AH, **and**

In the matter of: An application under section 54 of the Mobile Homes (Wales) Act 2013

APPLICANT:	Mr Stephen Edwards
RESPONDENT:	Wyldecrest Parks (Management) Ltd
TRIBUNAL:	Ms Claire Jones LL.B. (Chairperson) Mr David Evans FRICS. (Valuer Member) Dr Angie Ash (Lay Member)
HEARING:	Microsoft Teams Virtual Platform on 12 December 2023
APPEARANCE FOR APPLICANT:	The Applicant Mr Stephen Edwards in person. Assisted by Ms Debbie Williams
APPEARANCE FOR RESPONDENT:	Mr David Sunderland (the Respondent's Estates Director)

SUMMARY OF DECISION

The Tribunal determines that the 2023 Service Charge is not payable by the Applicant as it is not in line with the terms of the Agreement and the Mobile Homes (Wales) Act 2013.

The Tribunal determines that the 2023 Water Charge of £18.08 is payable by the Applicant with effect from the 11 May 2023, in line with the terms of the Agreement.

REASONS FOR DECISION

Background Facts

1. The mobile home park known as Westover Park, West Street, Whitland, Carmarthenshire, SA34 0AH ('the Park') is a protected site within the meaning of the Mobile Homes (Wales) Act 2013 ('the Act'). The Respondent became Owner of the site in late 2020. It was previously owned by a company linked to the Respondent. The Applicant purchased his mobile home in May 2020 and became a resident at the Park.

2. The Applicant and the Respondent's predecessor in title entered into an agreement in May 2020 to which the Act applies ('the Agreement'), and as recorded in a written statement under the Act.

3. The Respondent issued two letters to the Applicant dated 18 January 2023. The first stated that a monthly service/maintenance charge of £15.86 would be payable from 1 March 2023. The second said that the new monthly water charge of £18.08 would also be payable from 1 March 2023.

4. The Applicant made an application to the Tribunal dated 20 July 2023 ('the Application') for determination of questions arising under the Act or Agreement.

Questions for Determination

5. The points for determination are set out in the Applicant's Statement and formulated as questions in the Respondent's Statement as follows:

    5.1 Is the maintenance charge a new charge which does not form part of the existing agreement or an existing charge in line with the terms of the agreement?
    5.2 Has the resale of water been charged in line with the terms of the Applicant's agreement?
    5.3 Is the Respondent entitled to operate the Park without a Caravan Site Licence?

Preliminary Matters

6. The Tribunal considered two preliminary matters. Firstly, it considered the question for determination (paragraph 5.3 above) as to the operation of the Park without a Site Licence. Secondly, it dealt with the Applicant's request to include additional evidence outside the timetable set out in the Tribunal's Amended Directions dated 21 September 2023.

    6.1 <u>The Site Licence</u>

    The Tribunal noted that the Respondent had applied for a Site Licence for the Park in 2020. The Applicant's Witness Statement included a letter from the relevant Local Authority

which apologised for the delay in determining the Site Licence and said that it was working through issues with the Respondent. The Applicant agreed to withdraw this element of the Application, as a Site Licence had now been issued by the Local Authority on the 8 November 2023. The Respondent made no objection and the Tribunal formally recorded withdrawal of this element of the Application.

6.2 Additional Evidence

The Applicant explained that that the additional evidence addressed time-line contradictions in the Respondent's Witness Statement and would also show that leaks on the Park remained unrepaired, and that charges had been inflated. The Respondent considered this to be 'an ambush' and that introduction of this material after the relevant deadline meant that it had not had the opportunity to respond. In any event, it did not consider the material to be relevant to the Application and contained repetition and information which related to third parties. The Tribunal carefully considered the application. It had regard to the overriding principles contained in the Residential Property Tribunal Procedure & Fees (Wales) Regulations 2016 and the need to deal with an application fairly and justly. It considered that the evidence was unlikely to be of sufficient relevance to the Application or the Applicant's specific circumstances to be of assistance to the Tribunal in determining the Application. It did not therefore consider that it would be fair and proportionate to admit the additional evidence at this stage.

The Law

7. The relevant extracts from Sections of Part 4 of the Act state as follows:

'49 Particulars of agreements
(1) Before making an agreement to which this Part applies, the owner of the protected site must give to the proposed occupier under the agreement a written statement which—
(c) sets out the express terms to be contained in the agreement (including any site rules),
(d) sets out the terms to be implied by section 50(1) ...

50 Terms of agreements
(1) The applicable terms set out in Part 1 of Schedule 2 are implied in any agreement to which this Part applies; and this subsection has effect despite any express term of the agreement.

53 Successors in title
(1) An agreement to which this Part applies is binding on, and has effect for the benefit of, any successor in title of the owner ...
54 Jurisdiction of a tribunal or the court
(1) A tribunal has jurisdiction—
(a) to determine any question arising under this Part or any agreement to which it applies, and

(b) to entertain any proceedings brought under this Part or any such agreement...

62 Other interpretation
In this Act, unless the context otherwise requires—
'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 sewerage or other services, unless the agreement expressly provides that the pitch fee includes such amounts...

8. The relevant extract from Part 1 of Schedule 2, Chapter 1 of the Act states as follows:

'1(1) The implied terms set out in Chapter 2 apply to all agreements except an agreement which relates to a pitch on a local authority Gypsy and Traveller site.'

9. The relevant extracts from Part 1 of Schedule 2, Chapter 2 of the Act which set out the implied terms state as follows:

'*The pitch fee*
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...

Occupier's obligations and owner's corresponding obligations
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, sewerage or other services supplied by the owner...

Owner's other obligations
22(1) The owner must—
(b) 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, sewerage or other services payable by the occupier to the owner under the agreement, and
(e) consult the occupier about improvements to the protected site in general, and in particular about those which the owner wishes to be taken into account when determining the amount of any new pitch fee...

Owner's name and address
24(1) The owner must by notice inform the occupier...of the address in England or Wales at which notices (including notices of proceedings) may be served on the owner by the occupier...
(2) If the owner fails to comply with sub-paragraph (1), then...any amount otherwise due from the occupier...in respect of the pitch fee is to be treated for all purposes as not being due from the occupier to the owner at any time before the owner complies with sub-paragraph (1).'

The Agreement

10. The Agreement which incorporates the written statement is divided into three parts. Part 1 contains general information about the Applicant's rights. Part 2 contains the Particulars of the Agreement and the Annex to Part 2 sets out the *'implied terms which automatically apply to the agreement'*. Part 3 sets out the express terms of the agreement. Finally, Park Rules are also annexed to the Agreement.

11. The Particulars of Agreement refer to an agreement start date of 11 May 2020. The site owner party is recorded as being the Respondent's predecessor in title although it is signed, apparently in error, on behalf of the Respondent itself. It records the amount of the pitch fee at that time, the date and manner in which it would be payable, and the pitch fee review date. Under the heading *'the following services are included in the pitch fee'*, it states *'None'*, albeit that a note at the bottom of this section states '*cross out the services which are not included and add any others which are included in the pitch fee*'. Under the heading *'Additional charges'*, it refers to quarterly gas and electricity administration charges, monthly water and sewerage charges, and certain administration charges.

12. As to the express terms in Part 3, Paragraph 1 includes the following definitions:

(a) 'the Term' shall mean from the date of this agreement until the date when our interest in the land determines;
(e) 'the Estimated Service Charge' means the charge you must pay us in respect of our anticipated costs as set out in Clause 4 (d);
('f) 'the Actual Service Charge' means the actual amount spent on the Service Charge summarised in our account published each year;
(g) 'the Services' means the services to be provided by us under this agreement;

13. Under the heading *'your obligations',* the express terms at Paragraph 4 state as follows:

(b) 'to pay us in respect of all charges incurred by you for the supply of electricity, gas, telephone and all other services supplied to the mobile home...
(c) To pay the Estimated Service Charge for each year of the Term in equal monthly instalments, of the reasonable costs and expenditure...in respect of:

(i) providing and undertaking the Services, and performing our other obligations in this agreement;
(ii) employing the necessary people to perform the Services...
(iii) the expense of making, preparing, maintaining, rebuilding and cleaning anything, such as ways, roads, pavements, sewers, drains, pipes, watercourses...and other conveniences, used for the Park in common with any other pitches; ...
(v) providing and performing any reasonably necessary services for the better and more efficient management and use of the Park and the comfort and convenience of its occupants not specifically mentioned in this agreement;
(vi) discharging any ... charges ... in respect of the Park, including, without prejudice to the generality of the above, those for water, electricity, gas and telecommunications;'

14. Following this, the Agreement states that; *'If in any year of the Term the amount of the Actual Service Charge incurred by us is more than the Estimated Service Charge paid by you, we will bill you for the shortfall...'*

15. Under the heading *'Our Obligations'*, the Agreement states at Paragraph 9, *'We undertake with you as follows:*

(a) To keep and maintain those parts of the Park which are not your responsibility or of the mobile home park owners of other pitches on the Park in a good state of repair and condition.
(b) ... to use our best endeavours to provide and maintain the facilities available to the Pitch at the date of this agreement including the provision of sewage and water ...This clause will only bind us provided you have paid for all charges in respect of these services and provided always that we shall not be liable for any temporary failure or lack of such facilities and services if attributable to any breakdown or any cause whatsoever outside our control...
(e) Each year, we must give you an account summarising the Actual Service Charge ('the Account') incurred by us for the year...'

The Applicant's submissions

<u>The Service Charge issue</u>

16. The Applicant's first contention was that the Respondent had introduced a service or maintenance fee in 2023 without consultation and that it was not covered by the Agreement. He said that the Particulars of Agreement clearly showed that there was no service charge payable. A Park Homes Running Costs leaflet, presented to him prior to purchase, clearly stated *'service charge £0.00'*. He also referenced Pitch Fee Review documents and said that as recoverable costs and relevant deductions had been left blank, this indicated no change. In summary, the Applicant said that a service charge was never listed or documented in the Agreement and the home was sold and advertised explicitly as having a Nil service charge. There had also never been any consultation about its

introduction or about any recoverable expenses. These were retrospective charges for things about which he knew nothing.

The Water Charge issue

17. The Applicant's second contention was that the Water Charges had increased by almost 70% from £10.88 in 2022 to £18.08 in 2023. He considered this to be unjustified, unfair, and unreasonable. He said that there had been serious historical water leaks at the Park. He and other residents had informed the Respondent, and it told them to contact Welsh Water, which in turn told them it was the Respondent's responsibility. He said a major leak remained in the pond feature and he considered that this was the cause of water usage being disproportionately high. He had understood that £2.00 *'Actual Service Charge'* referenced in the 'welcome letter' of 7 June 2023 from the Respondent was an additional administration charge relating to water.

The Respondent's submissions

18. Mr Sunderland, on behalf of the Respondent, said that whilst the Application didn't comply with Section 54 of the Act, he had re-formulated appropriate questions to reflect the Applicant's allegations, to assist the process so that the issues could be formally determined.

The Service Charge issue

19. Mr Sunderland said that the *'welcome letter'* of 7 June 2023 explained that the Actual Service Charge was £2.00 and was due on the first of each month. He referred to the Express Terms of the Agreement and the Applicant's undertaking to pay the Estimated Service Charge. He said that the service charge was not *'introduced'*, as it existed from inception of the Agreement. The Respondent considered that as there was no change, no consultation was required. As for the Park Homes Running Costs leaflet, the Respondent did not consider that it formed part of the Agreement and was simply a guide for buyers of mobile homes. A disclaimer stated that the costs were estimated or accurate at the time of printing and intended as *'a close guide only'*. Mr Sunderland said that the increase from nil to £2.00 was for the year commencing 1 March 2020 and *'informed at the point of purchase.'* In summary, he said that the Applicant had erred by relating the Pitch Fee review to the separate contractual service charge under the Express Terms of the Agreement.

The Water Charge issue

20. As to the Water Charges, Mr Sunderland explained that the Respondent was a 'Water Reseller' under the relevant OFWAT Regulations and was subject to a 'Maximum Resale Price Provision.' He said that the charges were therefore justified and fair. The Regulations also allowed for a £5.00 per annum service charge, being £0.42 per month. He did not know how the Applicant had arrived at the figure of £2.00. The Respondent had simply taken the

total of the bills from the previous period, divided this by the number of homes and then divided it into monthly payments. The Respondent agreed that the 2023 charge was 66% higher than in 2022. Mr Sunderland said that the Respondent had simply followed the OFWAT Regulations to arrive at these figures. Finally, as to the manner of charging based on a previous year's bills, the Respondent relied on the case of **Wyldecrest Parks (Management) Ltd v Santer and others [2018] UKUT 0030 (LC).**

The Hearing

The Service Charge issue

21. The Applicant referred to the protections afforded by the Act and automatic application of the Implied Terms which could not be overridden by any Express Terms. From his research, the Applicant said that the Agreement followed a standard template, but with notable inclusions and exclusions. He referred to the 'Particulars of the Agreement' and the box which stated; *'The following services are included in the pitch fee'*, and in which the word *'None'* had been inserted, which he said equated to *'nothing'*. He said that the owner nevertheless had obligations regarding services. He also referred to the paragraph headed 'Additional Charges'. Certain matters were included, however there was no mention of any service charge, and he considered this to be an omission. As to the Express Terms, the Applicant said that the template differed hugely from the official standard template. He considered that the provisions regarding payment of an 'Estimated Service Charge' should not have been included and was not permitted under the Implied Terms which could not be overridden. He said that, as a layman, it had taken him many months to appreciate what was being presented, but he now understood that the charges were not a true reflection of the Act.

22. The Applicant said that the Pitch Fee Review Notices for 2023 had been implemented consensually under the Act. He had been given the appropriate statutory timescale to object, the amount was clearly shown, and he had agreed to the increase. He referenced the owner's repairing and maintenance obligations, as set out in the Pitch Fee Review Notice and the Act. These included provision of water, sewerage and other services supplied by the owner to the pitch. The notice provided examples which *'may include repair and maintenance of pipes, conduits, wires, structures, tanks or other equipment provided by the site owner and of the parts of the site that are under the control of the site owner, including access ways, roads, pavements, street furniture and lighting, boundary fences, buildings in common use, drains and the drainage system and any open spaces or facilities in common.'* The Applicant also referred to the Site Licence which had been formally admitted into the bundle. He said that Appendix 2 of the Licence clearly set out the Respondent's responsibilities regarding matters such as roads, gateways, cables, lighting, common areas, water supply and repairs. He said everything being asked for was also included within the Pitch Fee by virtue of the Act.

23. With reference to the Service Charge letter dated 18 January 2023, the Applicant said that it was not correct to refer to the service or management charge as being 'current', as it was a new charge. Referring to it as a 'general maintenance' charge added to the ambiguity and uncertainty, so misleading to the Applicant. He said the Park Homes Running Costs leaflet had also recorded the Service Charge as being £0.00 and gave no indication that this may change and the 'welcome letter', referencing a £2.00 charge was sent nearly a month after the Agreement started. The Applicant was clear that he was not informed of any charge at the point of purchase. He understood the £2.00 to be related to water, and he had never knowingly paid a service charge for general maintenance.

24. In summary, the Applicant said that the Respondent had provided no evidence to support the introduction of a £2.00 service charge in 2020, whether in any document, consultation letters or proposal. He said there was a need for a rationale for such a charge, with invoices. In response to Tribunal questions, the Applicant said that the Park Homes Running Costs leaflet had been received with sales material. The Applicant said he had not received the service charge list prior to the proceedings. He had not been particularly aware of work carried out at the Park, the manager had been largely absent, and there had been no communication about work at any time. In closing, the Applicant said that he felt frustration and not anger. He said that the evidence and documents showed that the service charge was introduced in 2023 and never existed prior to this. He added that the Express Terms contradicted the Act and that the Implied Terms could not be overridden. He had not previously known that there were items in the Express Terms which were not representative of the Act and felt they had been disguised.

25. Mr Sunderland, on behalf of the Respondent, stated that 56 mobile homes represented the total capacity of the Park, that there were approximately 51 homes in 2023, 50 in 2022, 45 in 2021, 40 in 2020 and 17 in 2019 with three residents in the process of moving in at the time. He said that the Service Charge was not a new charge and had always been part of the Agreement. He referenced the Express Terms of the Agreement; *'4. Your obligations – You undertake with us as follows - (c) To pay the Estimated Service Charge for each year of the Term in equal monthly instalments'.* He also referred to the welcome letter to the Applicant of 7 June 2020. He said that the £2.00 charge did not relate to a water charge and the calculations produced for 2022 and 2023 referred to an administration charge of £0.42 per month. This was the maximum charge which could be levied under the Water Resale Order 2001. As to the Estimated Service Charge, he said that this was treated in a similar manner to the Water Charge and that the Respondent could only base it on the details it had for 2022.

26. Mr Sunderland said that the notice of the Service Charge in January 2023 had made it clear that should residents require supplier invoices and the calculation page, then they were invited to contact the Respondent's head office. He said that the Applicant had never asked for this. He also referred to the Applicant's letter which showed that he had written to request invoices and explanations on 31 January 2023. However, he said that the Applicant had sent the e-mail to an incorrect e-mail address. As for the Park Homes Running Costs,

Mr Sunderland said the leaflet was not part of the Agreement, and the Service Charges were clearly set out in the Agreement.

27. The Respondent did not consider that the Application referenced the question of individual charges, and these had not been specifically challenged. He said the Application addressed the principle of whether charging was in accordance with the Agreement. Following questions by the Tribunal, Mr Sunderland accepted that the Applicant had requested an order to declare the charges to be unlawful and also unfair, and to that extent, the individual charges were being challenged. He said that the Applicant had not stated which Service Charges were or were not agreed, and so the Respondent had not had the opportunity to explain its stance, and it would not therefore be equitable to deal with such individual charges.

28. Mr Sunderland stressed that both implied and express terms were contractual terms. He accepted that there were owner obligations. He also accepted that there were Site Licence obligations but said that these were a matter between the Local Authority and the Owner. He said the Respondent's role in that respect was to make sure that duties under the Licence were carried out and that it was not prevented from complying with the Licence.

29. Mr Sunderland said that he had forwarded case law to the Tribunal Office during the hearing, being a First-Tier Tribunal (Property Chamber) case determined in March 2015 relating to **The Willows, Arundel (Case Reference: CHI/45UC/PHC/2014/0009),** which he considered to be pertinent to the point in contention. The Applicant said that the Respondent had complained of being 'ambushed' by his application to admit additional evidence, and yet the Respondent had now submitted case-law which he had no opportunity to consider. The Tribunal said that it was prepared to issue a Direction to allow the Applicant seven working days to respond, however following a brief adjournment, the Applicant indicated that he was content for the matter to proceed without the need for such Direction.

30. In response to questions, Mr Sunderland agreed that no consultation had been carried out on the introduction of a Service Charge, however he considered there was no need for this. He said that this was because there was a contractual term which allowed for it, and the Agreement contained the explanation of charges. He was asked whether the Respondent could theoretically put the charge up to £100 per month. He said it could, however it would have to justify this. Mr Sunderland said that the list of Service Charges, which included speed bumps and lighting cables, did not amount to improvements, and were maintenance items.

31. When asked how the pitch fee at Westover had been made up historically, Mr Sunderland said that this was a global fee which reflected the achievable market price to make the Park viable. He said that no-one had sat down to say how much to include for maintenance, and the question was whether the pitch fee was sustainable as *'we need sales to survive'* and the Respondent needed to work out how much it could get. When asked why the

Particulars of Agreement did not list the matters for which an additional charge would be made, Mr Sunderland said the services would not be listed there. He said that initially, there were very few people on the Park, as it was still being developed and there was no desire at that time to raise Service Charges. He said the Respondent had been shouldering the costs but could no longer absorb them. As to the Estimated Service Charge, this was an estimate based on the information it had, such as purchase orders and estimates, and would then be finalised once invoices were received. As to the date the Service Charge became payable, the Respondent agreed that it would be the date of the Agreement in view of the wording. He agreed that the Actual Service Charge for 2023 was £15.86 for costs incurred in 2022 and that the list of costs produced in the bundle formed the formal Accounts as per paragraph 9(e) of the Express Terms. He agreed that 4(d) of the Express Terms was likely to be an error and should read 9(c).

32. Finally, Mr Sunderland said that he had no idea as to detail of costs of services from March or May 2023 up until 12 December 2023 as he had not investigated this. These costs would be calculated by the accounts team at the same time as the pitch fee. As to the Particulars of the Agreement and the box relating to Additional Charges, he said that this included water, gas and electricity but that this had nothing to do with the Service Charge in question. He said that as the Applicant had not challenged the Express Terms of the Agreement within the statutory timescales, they could no longer be challenged. In summary, he said that where the charges had been justified by bills and calculations, they were now payable under the Express and Implied terms of the Agreement. He said that the way the Respondent had calculated charges was to use the previous year's costs for the next year's charges and the same applied to water and electricity. He said that the Respondent could not know how much it could charge until it received the bills. He said that the method of charging was supported by the Upper Tribunal case, **Wyldecrest Parks (Management) Ltd v Santer and others [2018] UKUT 0030 (LC).** In conclusion, Mr Sunderland agreed in response to questions that the Implied Terms were contractual terms which applied to all agreements and included minimum rights and also that the Express Terms could not override the Implied Terms. He did not believe that the Express Terms were in conflict with the Implied Terms in this instance. He said they were binding on the parties. He confirmed that the Respondent was looking for the Actual Service Charge of £9,516.28 in total for 2023.

<u>The Water Charge issue</u>

33. The Applicant referenced the Respondent's obligations to repair water leaks and said it had allowed leaks to continue. Instead of repairing them properly, it had charged residents for its failure in this respect. He also considered an increase in charges of 66% in one year to be unreasonable. He said that this was not due to an increase in the number of mobile homes or an increase in the unit cost, it was because the Respondent had chosen not to repair leaks. A resident was currently being asked to top up the pond at the Park with a hose due to a leak, and the concern was that the charge could potentially go up even further in future.

34. The Applicant considered such an approach to be unjustified and unfair and the increase in charges quantified what was being lost. He said that, if not millions of gallons, it was a lot, and residents would only have the chance to see current bills in 2025 or 2026. The Applicant said that he became aware of water leaks when talking with other residents at the time that he was notified of the increased water charge. He was aware that the relevant Water Company had been involved as he had seen vans on site and was aware of water pressure issues, but he had not been particularly aware of water leaks prior to 2023.

35. The Applicant accepted, having received the bills used to calculate the 2023 water charge, that the mathematical calculation was correct. The Applicant had not requested bills previously as the welcome letter stated what he thought he was paying for water. He had only realised the need for information when he saw that the bills were so high, and he considered it probable that leaks had been contributing to this. In re-examination, Mr Sunderland asked the Applicant to explain his view that service charges were *'unjustified, unfair and unreasonable'* and what evidence he had to support the argument that market prices were less than £18.08 per month. The Applicant responded that market prices had not gone up by 70% as in this case.

36. Mr Sunderland said that the Respondent had simply acted in accordance with the OFWAT Regulations and residents had not paid any more than the relevant water costs under the terms of the Agreement. He said that repairs would take place where there had been a leak, and this had been evidenced in the list of works for 2022.

37. Mr Sunderland said that the Applicant was exaggerating in stating that the Respondent had on one occasion repaired a leak, but only after millions of gallons of water had gone into the ground. He said that there had certainly been no overcharge and that the Respondent was being as transparent as possible. The Respondent's practice was to follow on from the last bill used for charging purposes and it did not want to skip 2021 in its calculations, and so used these as the basis for its 2023 charges. He did not know the breakdown or totals of the 2022 bills.

38. Mr Sunderland said that any park will have leak problems at times. A brand-new water main had been installed at Westover in about 2017. He said that the Water Company would apply a 'leakage allowance' where appropriate, would quantify the amount of leakage and then this would appear as a credit on the bill, and he explained the leakage allowance procedure. He said that the process starts when the leak is reported, and a baseline of what the usage should be is recorded through meter readings. Excess usage is then worked out and the refund calculated. He said that as an accredited ISO 9002 company this would be diligently pursued by the Respondent and that the Water Company was bound by OFWAT and the relevant Act and Regulations.

39. In response to Tribunal questions, Mr Sunderland said he had only become aware of one leak during the last year, however only difficult problems would be brought to him. He said that the leak in question had been in the road, however the Water Company had said it was the Respondent's responsibility. He had advised that residents would have to go back to the Water Company. He guessed that the issue was resolved as he heard nothing further. He would not usually get involved if there had been a blockage or leak, and the maintenance team did not invariably revert to him. He was aware that, historically, there had been terrible problems at Westover, hence the brand-new water main. He was not clear about the details and number of water meters at the Park, but he thought that they were located next to each other.

40. Mr Sunderland was also asked about the likely reasons for the increase in water costs from approximately £5,600 for the period November 2019 to November 2020 to £10,600 for the same period in 2020 to 2021. Mr Sunderland said that he had no idea and that at other Parks, differences had been caused by a variety of reasons which he could not specify. He did not consider £18.08 to be an excessive charge. When asked, he said it was possible that a leakage allowance rebate might appear for 2022, although he did not know.

41. In summing up, Mr Sunderland said that he could understand the frustration and anger of residents as no one likes to receive additional charges. Where payable under the terms of an Agreement however, he said that they had to be paid. He said that no attempt had been made by the Applicant since the Application to engage or seek to resolve or to allow explanation for the charges. He said he had explained the procedures and the effect of the Implied Terms in his evidence and that the Respondent had shown how the calculations had been carried out. The water bills had also been supplied by the Respondent and he had explained the OFWAT process. He had not seen evidence as to why the costs had been higher in the relevant year, however he said the charge was justified.

The Tribunal's Determination

<u>The Service Charge issue</u>

42. The first issue for the Tribunal to determine is whether the Agreement which was signed by the parties in May 2020 contained a provision allowing the Respondent to levy a Service Charge to cover the cost of Services it provided. The wording of the Express Terms in Part 3 of the Agreement did contain such a provision. It provided for payment by the Applicant of the Estimated Service Charge regarding Services and other matters. This was defined as; *'the charge you must pay us in respect of our anticipated costs as set out in Clause 4(d).'* Clause 4(d) is referenced in error in the document, as it was clearly intended to refer to Clause 4(c). *'Services'* are defined very broadly as *'services to be provided by us under this agreement.'* Whilst Clause 4(c) provides a list of potential costs and expenditure, including matters such as maintenance of roads, sewers and drains, it provides little assistance in explaining what the word *'Services'* might include.

43. The lack of clarity in the Agreement is compounded by the fact that a Service Charge is not referenced in the Particulars of the Agreement, under the heading 'Additional charges'. Apart from gas, electricity, water and sewerage and certain administrative charges, it does not list any other matters or Services for which an additional charge would be made, either generally with reference to the Express Terms or specifically. In addition, the Park Homes Running Costs leaflet, which formed part of the pre-sales literature, made it clear that the Service Charge at the time was £0.00. The Tribunal was satisfied that reference to a £2.00 'Actual Service Charge' was only highlighted in a June 2020 'welcome letter', following the Applicant's purchase of his mobile home at the Park.

44. In the circumstances, the Tribunal understood why the Applicant felt he had been misled and considered the Respondent's arrangements and the Agreement to be unclear and inconsistent in relation to Service Charges. The Tribunal considered that the Particulars of Agreement did not clearly set out the charges that were payable or may in future have become payable under the Agreement. As the information was omitted from this high-level information in the Particulars, a layperson could reasonably have been under the impression that the Express Terms did not include a mechanism to charge for Services. This is also in the light of the Park Homes Running Costs leaflet. Whilst it did not form a part of the Agreement, it would reasonably have led the purchaser to believe that the Service Charge would be £0.00 for the foreseeable future. This was because there was no asterisk against this figure, whilst there was against other figures with an accompanying note stating that those specific costs were accurate at the time of printing and were intended as a 'close' guide only. The Tribunal concluded that the Agreement and sales material was misleading, whether intentionally or otherwise. Even if a purchaser had been legally represented at the time of purchase, the wording of the Agreement would no doubt have led to further enquiries as to whether a Service Charge could be invoked in future.

45. In all the circumstances however, the Tribunal determined that, from reading the Parts of the Agreement together as a whole, the Agreement's Express Terms did in principle include a mechanism to charge for Services, albeit that *'Services'* were not clearly defined. Whilst the Respondent was responsible for providing certain services, the Tribunal concluded that the Respondent could in principle decide to recover certain reasonable costs in the manner described in the Express Terms, subject however to the limitations described in the paragraphs below.

46. The second issue for consideration by the Tribunal is what costs could be recovered in practice under the Service Charge provisions in the Agreement. A key question in this regard is whether the Express Terms conflicted with the Implied Terms and the Act, in which case, the Implied Terms would prevail by virtue of Section 50 of the Act. The Tribunal determined that there was a conflict in Terms in important respects. As to the First Tier (Property Tribunal) case of **The Willows, Arundel (Case Reference: CHI/45UC/PHC/2014/0009)**, the Tribunal noted that on the facts of that case, it had been determined that it was permissible for the Park Owner to recover sewerage charges and costs of maintaining the common areas of the Park under the terms of the relevant

Agreement, in addition to the pitch fee. The Applicants in that case argued that the implied term prevailed, meaning that the cost of maintaining the sewage plant and common areas was included in the pitch fee and could not be charged in addition to the pitch fee. The Tribunal in that case considered that the implied and express terms were complementary rather than in conflict with each other. It considered that the implied term was there to cover the situation where the express terms did not make any reference to the common areas, but where they did, there was provision for recovery.

47. This Tribunal is not bound by and is not persuaded by the first-tier Tribunal reasoning in **The Willows** decision. It considered that the Act itself and the Implied Terms clearly conflicted with the Express Terms regarding items of work being charged for by the Respondent and precluded a separate means of recovery as a Service Charge. To do otherwise would require the clear wording of the Act to be artificially adjusted to suit the Express Terms in relation to service charges. Whilst **The Willows** decision considered that the wording of the relevant express terms would be otiose without this adjustment, this Tribunal nevertheless considers that the ordinary, natural reading of the Act and Implied Terms means that the Pitch Fee specifically includes the costs of maintenance of the common parts. The statutory definition of *'the Pitch Fee'* in Section 62 of the Act is clear, being; *'the amount...for the right to station the mobile home...and for use of the common areas...and their maintenance...'* This is also, in turn, embodied in the Implied Terms of the Agreement. The Tribunal was therefore satisfied that there is a statutory provision that the pitch fee will cover the maintenance of common areas and the Express Terms of the Agreement cannot displace this statutory provision by purporting to provide a charging mechanism in relation to the common areas.

48. It was also recognised in **The Willows** case that; *'It is possible, of course, that the pitch fee...did originally include an element for maintaining the services and the common areas of the Park in which case, if recovery is sought under the express terms, it could be that there is an element of double recovery if the site owner now seeks payment therefore through the service charge...'* Mr Sunderland stressed that the pitch fee was a global figure. The Tribunal considered that a global figure was likely to include an element for the cost of Services for which it was now seeking to also charge under the Express Terms. Whilst it was not necessary to conclude this point for the purposes of the current determination in the light of the above, the Tribunal noted that the Respondent would need to ensure that no element of double charge was applied in its charging mechanisms for any eligible item in future.

49. The Tribunal noted that **The Willows** judgment helpfully referenced the Upper Tribunal (Lands Chamber) case of **Brittaniacrest re Broadfields Park, Morecambe, Lancashire, [2013] UKUT 0521 (LC)**. At Paragraph 61 of the decision, it stated; *'in addition to the right to occupy the pitch the occupier receives in return for the pitch fee the benefit of obligations by the owner to keep the common parts of the Park in a good state of repair, to provide and maintain the facilities and services available to the pitch... Each of these is an example of a service which can only be provided at a cost to the owner, yet for which there is no separate*

entitlement to charge; each must therefore be taken to be included in the pitch fee.' At Paragraph 71, it stated that the Site Owner's representative; *'was inclined to suggest that the charge should be whatever figure the site owner wished it to be, subject to a restriction that it must not exceed a reasonable sum. Such an approach would be very different from the regime of statutory control of pitch fees (which are tied to the retail price index). I think it unlikely that the occupiers of a protected site, who tend to be people of limited means, would willingly submit to being charged a sum for services selected by the site owner without any transparent process of accounting or opportunity for challenge.'*

50. From its own professional experience, the Tribunal was also familiar with the Court of Appeal case of **PR Hardman & Partners v Greenwood & Anr [2017] EWCA Civ 52**. In that case, Sir Terence Etherton MR stated as follows: - '*50. [The representative for the Park Owner] accepted that, pursuant to the provisions of... the agreements, Hardman can recover, through the annually reviewed site fee but only through the site fee, the costs and expense incurred by Hardman in complying with its obligations under paragraph 4(a) (maintenance and repair of communal areas of the Park, such as the lakes, the swimming pool, the laundry, the shower block and the public toilets), paragraph 4(c) (the provision and maintenance of facilities and services, to the extent that there is no right of recovery under paragraph 3(b), as [the representative] conceded would be the case in respect of the communal areas).... The definition of "pitch fee" in paragraph 29 of chapter 2 of Part 1 of Schedule 1 to the MHA states expressly that the pitch fee embraces maintenance of the common areas of the protected site.'* The judgment went on as follows; *'58. ...the provision of the sewerage system is a communal service...nothing can be done in respect of past charges already paid under paragraph...for electricity to operate the sewerage system, and to reimburse Hardman for payment to third party contractors engaged to empty and service the sewerage system and payment of the licence fee to the Environment Agency in respect of the system. In the future, however, all such costs and expenses are recoverable only in the pitch fee.'*

51. In the circumstances, the Tribunal has determined that a Service Charge under an express term cannot override the statutory provision that the Pitch Fee includes the costs of maintenance of 'the common' or 'communal areas' of the Park which includes infrastructure such as the sewerage system. Whilst the Respondent provided limited evidence regarding the items for which it wished to raise a Service Charge in the form of a list of order numbers and order details and which Mr Sunderland also referenced as being 'the Accounts' for the purposes of the Agreement, the Tribunal noted that most of the items appeared to relate to communal services or common areas. For future reference, items relating to maintenance of common areas would be deemed included in the Pitch Fee, and any increase in Pitch Fee would need to be justified in the usual manner by virtue of the process in Part 1, Schedule 2 of the Act.

52. The Tribunal also noted that certain items on the list were likely to consist of improvements rather than items of maintenance as they appeared to consist of additions or alterations rather than repairs or renewals. By virtue of Implied Term 22(1)(e) of the Agreement, there

would, in any event, be a duty to consult with residents about improvements to the Park, and it did not appear that this had occurred regarding the items contained in this list. **The Willows** explained that the difference between recovery of charges through a Pitch Fee and through a separate Service Charge, was that the formula for a Pitch Fee increase will normally lead to a modest increase through annual indexation (by reference to RPI in that case), whilst for a charge under an express term, actual expenditure was recoverable. Mr Sunderland had been candid in his oral evidence, that the Respondent was concerned about ensuring the profitability of the Park and about achieving as much as market forces would allow. Whilst this may have led to a decision by the Respondent to pursue Service Charges where it had previously 'absorbed' the costs of maintenance, the Tribunal was clear that in this case, the appropriate route for ensuring resident engagement and a fair and lawful process to review the items in question, was through the Pitch Fee review process and the Respondent had not availed itself of this opportunity in 2023.

53. In conclusion, the Tribunal determined that, on the balance of probabilities, all items contained in the list in relation to which the Respondent had purported to raise a Service Charge, either consisted of maintenance to the common areas or improvements to which consultation requirements applied under the Agreement. In the circumstances, the Tribunal determined that the 2023 Service Charge was not payable by the Applicant and was not in line with the Act and the terms of the Agreement.

54. The third issue for consideration has become largely academic in the light of the Tribunal's determination on the second issue. Nevertheless, it will briefly address this issue which relates to the mechanism employed by the Respondent to calculate the 'Estimated Service Charge' and for tallying the charges in the following year through the 'Actual Service Charge'. Whereas the Tribunal was satisfied that a Service Charge could, in principle, be raised in addition to the Pitch Fee in relation to items which did not pertain to the common areas, this was subject to the precise mechanism contained in the Agreement. The charges must be reasonable, and the mechanism must operate by calculation of the 'Estimated Service Charge'. This is defined with reference to the anticipated costs for each year of the Term. Mr Sunderland confirmed on behalf of the Respondent that an 'Actual Service Charge' of £2.00 had been charged in 2020, 2021 and 2022. However, it did not appear that a notice of an Estimated Service Charge was provided in each preceding year in accordance with the Agreement. The Respondent had not therefore followed the mechanism provided by the Express Terms in each of these years and it is not clear as to which items the charge of £2.00 related.

55. In the circumstances, the Respondent had purported to charge a £2.00 monthly 'Actual Service Charge' from 2020 through to 2023. In response to Tribunal questions, Mr Sunderland said that the Respondent had reviewed the 'Actual Service Charge' upwards to £15.86 per month in 2023. His evidence was not wholly consistent in this respect as he indicated that the intention was to base the current year's charges on the list of 2022 costs produced by the Respondent's head office, and that these would be reconciled once actual invoices had been received and that this reconciliation would occur over the same

timescale as calculation of the 2024 pitch fee. As Mr Sunderland had also said that an 'Actual Service Charge' of £2.00 per month had been raised in 2022, and the Tribunal considered that it would be illogical if all items in the list of 2022 costs could simultaneously produce an Actual Service Charge of £2.00 per month, whilst at the same time forming the basis of an Estimated Service Charge of £15.86 per month for 2023.

56. In addition, as to the method of calculating Service Charges, Mr Sunderland had likened the principle of using the previous year's costs to that in relation to water, as supported in the Upper Tribunal (Lands Tribunal) decision of **Wyldecrest Parks (Management) Ltd v Santer and others [2018] UKUT 0030 (LC)** as an acceptable way to estimate Service Charges. The Tribunal considered that case to be distinguishable from the present case. A site owner would not have a logical method for anticipating the cost of water and sewerage for a particular period other than using the utility company's bills for the previous period. In the case of general maintenance or service charges however, the site owner would be best placed to anticipate and plan its work schedule for the following year, and to estimate the costs of such work. The definition of the Estimated Service Charge clearly refers to the *'anticipated cost.'* In this case, the Tribunal considered that the Service Charge of £15.86 was not based on reasonably anticipated costs and Mr Sunderland was unaware of the costs incurred for Services during 2023 up to December 2023. As to the timing of billing for Service Charges, whilst it may be pragmatic for this to coincide with the issue of the Pitch Fee, Mr Sunderland agreed that the annual charge referenced each year of the Term, 'The Term' being defined as the date of the Agreement, and in this case, 11 May. Any Service Charge would therefore be payable as from 11 May in each year.

57. Finally, the Tribunal noted the type of work being claimed for in the Service Charge from the list of order numbers and order details, included items from 15 February 2022 to 17 December 2022. The Tribunal noted that the Express Terms made it clear that any costs and expenditure charged would need to be reasonable. Neither the Applicant nor Mr Sunderland on behalf of the Respondent had detailed knowledge or information regarding the works which had been carried out. Due to the Tribunal's findings above, however, it was not necessary for it to make any determination regarding the reasonableness or otherwise of the costs and expenditure.

<u>The Water Charge issue</u>

58. The Tribunal noted that, in increasing the Water Charge for 2023, the Respondent had used details extracted from the Water Company's bills dating from 12 November 2020 to 12 November 2021. There was no dispute between the parties that these bills showed that the water costs increased significantly over that period and amounted to a 66% increase from the previous year. The Applicant agreed that the mathematical calculation of the Water Charge for the period used was correct.

59. The Tribunal considered that the key issues in relation to this part of the Application was whether the Water Charge for 2023 could reasonably be based on bills which were two

years old, and whether the bills related to costs for which the Applicant and other residents should be expected to pay. In relation to the latter issue, whilst the Tribunal accepted the Applicant's oral evidence that there were currently significant leakages at the Park for which he would not reasonably be expected to pay, no relevant evidence was presented to show that any of the 2020/2021 costs which were used to calculate the 2023 Water Charges were unreasonable. The Applicant had agreed that the calculations were mathematically correct and based on specific Water Company bills.

60. No specific evidence was supplied to show that there had been significant water leaks at the Park in 2020/2021 which would account for the significant increase in bills. The Tribunal noted however that the increase in unit costs from the previous year was marginal. It also did not consider that the slight increase in the number of mobile homes at the Park over the relevant period would have accounted for the increase, as the total cost would then have been apportioned between a greater number of residents. In the circumstances, the Tribunal considered that, whilst it was likely that the increase in water bills related to water leakages at the Park, it could not say that this was due to any maintenance or other failure by the Respondent under the Agreement. The Respondent would be expected to diligently attend to leakages of which it was aware at the time, and the increase in water costs in 2020/2021 would certainly have placed the Respondent on notice that any leakages needed to be investigated and resolved. Conversely, paragraph 9(b) of the Express Terms of the Agreement made it clear that the Respondent would not be liable for matters outside its control. In any event, the Tribunal noted that whilst referenced in the Applicant's Witness Statement, the Application did not specifically raise a question about any failure by the Respondent to maintain the water infrastructure or facilities.

61. Whilst the Applicant considered that the increase in charges was due to water leaks which had not been properly addressed by the Respondent over a period of years, he conceded that he had only become aware of historical problems from other residents during the early part of 2023. On behalf of Respondent, Mr Sunderland said that a new water main had been installed around 2017, however he made it clear that water leaks invariably occurred on Parks from time to time, but the list of costs expended in 2022 showed that the Respondent had indeed been tackling the problem.

62. In all the circumstances, the Tribunal considered that it was unable to say that the increased water charges for 2023 were unfair or unreasonable as they were clearly based on 2020/2021 bills from the relevant Water Company and did not seek to recoup more than the total of these bills, plus a modest administration charge permitted by the relevant Regulations. In summary, the Tribunal accepted the Applicant's evidence that there were now significant leak issues and that he had become aware of the issues in early 2023. The Tribunal concluded that whilst it was likely that the increased costs were due to water leaks in 2020/2021, and notwithstanding the lack of specific reference to this point in the Application, there was also insufficient evidence to show that these were due to matters which were within the Respondent's knowledge or control at that time. In the absence of such evidence, and as a 'Re-seller' under the Water Resale Order 2006 ('the 2006 Order')

as amended, the Tribunal further concluded that the Respondent was entitled to re-charge the relevant costs to its residents.

63. As to the case of **Wyldecrest Parks (Management) Ltd v Santer and others [2018] UKUT 0030 (LC)** as submitted by the Respondent in support of the way in which it calculated the increased Water Charge, the Tribunal noted that the facts were not directly applicable to the current case. Firstly, it confirmed that the Tribunal had jurisdiction to deal with disputes about overcharging for water under agreements. Secondly, it considered whether the appellant was in breach of article 6 of the 2006 Order. Thirdly, it considered whether the First Tier Tribunal had been correct to direct payment of the sum over-charged as it had been recouped by the date of the hearing in any event. It also supported the principle of utilising costs incurred in the previous year however to estimate water charges for the following year. Mr Sunderland said that 2021 bills had been used as the basis for the 2023 charge rather than those for 2022, as the Respondent had employed the practice of using successive bills. For the sake of transparency, the Respondent had not wished to have any gaps in the bills referenced from one year to the next.

64. The Tribunal did not consider it to be best practice for bills from two years before to be used as the basis for the 2023 charge, as this would make it more difficult for residents to reasonably scrutinise, challenge and evidence any discrepancies. Nevertheless, the Tribunal could not say that this methodology rendered the 2023 Water Charge wholly unreasonable. Whilst it would encourage use of bills from the year immediately preceding the charge in future, it understood the Respondent's reasoning for the way it charged in this specific instance. It therefore determined that the Water Charge of £18.08 per month would be payable for 2023 with effect from 11 May 2023; 11 May being the date on which the Term commenced.

65. Having determined the issue as above, and whilst these matters do not form part of the Tribunal's formal decision, it would expect the Respondent to diligently pursue any water rebate from the Water Company once repairs have been completed and monitoring carried out to compare the pre-leak and post-leak water usage. Any rebate would then appear in subsequent bills, and if the 2022 or 2023 water bills then resulted in a rebate, the Respondent would be expected to promptly refund the Applicant and other residents as appropriate.

66. Finally, the Tribunal also noted that, notwithstanding that a new water main had been installed in or around 2017, the available evidence showed that the system had needed regular and costly attention in 2022, which suggested that the new water main or the associated system or network of pipes had developed certain faults. Whilst this point again did not form part of the Tribunal's formal decision, for future reference, it considered that residents would not be expected to pay the costs associated with inadequate or faulty infrastructure or maintenance thereof, and this was a matter which would need to be fully investigated by the Respondent in conjunction with the relevant Water Company. The

Tribunal trusted that this issue would be diligently pursued by the Respondent in full consultation with its residents.

Dated this 19th day of January 2024

Tribunal Judge
C Jones