Govt Factsheet Aug 09 Pitch fees & other payments to Park Owner

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LEGAL VIEW

A series of articles compiled by specialist Legal Expert GRAHAM WATTS LL.B (Hons) LL.M, PARK HOME LEGAL SERVICES, reproduced by PHRAA for the benefit of park homeowners, by kind permission of Graham Watts.

No. 3.… New Government FACT SHEETS issued 2009.

No. 3 …..(2) Government Fact Sheet “PITCH FEES AND OTHER PAYMENTS TO THE OWNER”. Grahams Verdict on the possible problem areas concerning the information contained within.

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INTRODUCTION

“ Last Month (Article No. 1) I considered the Department of Communities and Local Government’s (DCLG) fact sheet entitled “Selling a Park Home”, this month I will continue by critically evaluating the fact sheet “Pitch Fees and other payments to the owner” (Site Owner) which is the other of the two largely controversial areas covered.

“The devil will always be in the detail. It is my view that this fact sheet would have been the ideal vehicle within which to highlight these anomalies”.

The reader is reminded that the fact sheets do not represent the law, they are simply the DCLG’s views. Only a court can determine the law. What is not commonly realised is that when the government the new Implied Terms, they fundamentally altered much of the previous structure of annual pitch fee increases. I suspect that it appeared to them a

straight forward exercise; simply take the existing Express Terms and improve them. So they perhaps thought. One thing’s for sure, either the government understood what they were doing or they were oblivious to the net results of their Amendments. We simply do not know.

Clearly, so far as the annual Retail Prices Index (RPI) ‘presumption’ is concerned, they did not work through an example to see if their handiwork was flawless relative to what existed before. It may be that the DCLG have recognised the anomalies they have created making them loathe to go into too much detail in the fact sheet so as not to expose the shortcomings of the legislation, although I doubt it. As it is said, ‘The devil will always be in the detail’. It is my view that this fact sheet would have been the ideal vehicle within which to highlight the anomalies and thus alert those to who this whole issue is very important.

I will take the opportunity while considering this fact sheet, to highlight the various problems that have arisen with the application of the statute law.

In conclusion, this fact sheet leaves a considerable amount to be desired. However the reader will need to obtain a copy of all four of the fact sheets and draw their own overall conclusions, I simply draw their attention to what is patently wrong or capable of being misconstrued.

Grahams Verdict: Possible Problem Areas……..

The introduction to this fact sheet explains that the pitch fee does not include the cost of gas, electricity, water and sewage or other charges. While this is theoretically correct, the reader should note that there are still many park home sites where water and sewage are included in the pitch fee as unidentified sums. This may be the case for you. Routinely, it is normally occupiers with the old style written agreement, which does not specifically state that these services are included in the pitch fee.

Page 4.….

Turning to page 4, ‘Payments for Utilities’, we are told that the charge for the resale of water or sewage services must be no more than the amount the owner is charged by the water company. This is again theoretically correct, however, it can be misleading particularly in relation to sewage disposal services. I hope that many readers of this fact sheet are not prompted to call their local water company to ascertain the cost of sewage disposal when the water company is not responsible for sewage disposal from the park. If they do, they will be given average mains sewage disposal prices for domestic properties in the area. It is highly likely the owner may operate a private on - site sewage system, which might be charged at a higher rate than the mains service with the local water company as a result of the cost of operating the system. Be warned, a private sewage system may well be more expensive to operate on an annual basis than the local water company’s sewage disposal service.

Page 5.…

Page 5 tells us that the pitch fee ‘…can only be reviewed at most once a year’. ‘At most’. Why not say, ’the pitch can only be reviewed once a year and that is on the review date.’ The legislation states that the pitch fee, ’….shall be reviewed annually as at the review date’. I think this is clear enough without using this vague alternative language. We are then told with equally vague language: ’The agreement and written statement will usually state the review date’. ‘Usually‘? Neither am I comfortable with ‘usually’. Again, the law is quite clear that the pitch fee review date is to be identified in the written agreement. Moreover, since when was there an ‘agreement’ and ’written statement’? The latter being the only document the law insists the occupier is entitled to.

Page 6.…

Page 6 is interesting. There is apparently a ’general rule’ that the pitch fee will only rise (or fall) by a percentage equivalent to RPI. (Retail Prices Index) This general rule referred to can only be the ’presumption’ stated in Paragraph 20 of Schedule 1 of the Mobile Homes Act 1983 (The Act). It seems incomprehensible to me that a part of an Act of Parliament can be referred to in such a vague manner. Either there is a presumption or there isn’t. It seems to me that use of such reference as a ’general rule’ shows no courage of conviction and, indeed, a retreat from use of the word ’presumption’. Indeed, if one reaches for ones dictionary and looks up ‘presumption’ interpretations include, ‘ a thing that is or may be presumed to be true; a belief based on reasonable evidence’. Perhaps then, a ‘general rule’ is more appropriate than is ‘presumption’?

I suspect that the DCLG has realised there is a problem with the legislation they drafted and are again loathe to bring it to the attention of the public for fear of yet more criticism of badly drafted legislation.

Let us start by remembering that Paragraph 20 of Schedule 1 of the Mobile Homes Act 1983 (The Act states: “There is a presumption that the3 pitch fee will increase or decrease by a percentage which is no more than any percentage increase or decrease in the Retail Prices Index since the last review date….” (my underlining) There have been two important county court cases in different parts of the country, in which the so-called, ‘presumption’ played a small but significant part. Both Judges, it seems to me, avoided questioning whether there actually was a ‘presumption’. The fact is, the pitch fee cannot be increased without,’….the agreement of the occupier…’ (Paragraph 16 of Schedule 1 to the Act). The site owner cannot have a genuine presumptive right to levy an RPI increase irrespective when the person subject to the burden of the increase clearly has the option to say, ‘no’. It has to be said that some advocates involved with the two county court cases referred to, believe that were the issue to reach the Court of Appeal for a definitive judgement, the ‘presumption’ (or should we refer to it as a, ‘general rule’?) might vanish.

Lets take a look at the other underlined passages in Paragraph 20. Under the pitch fee increase regime in the old Express Terms, it was commonly acknowledged that the site owner was entitled to increase the pitch fees every year on

the review date by RPI. Remember that the RPI is defined in the legislation as the ‘…general index (for all items)…’

Up until the new Implied Terms came into effect, most occupiers received their RPI proposed increase letter on or about the review date, indeed, many just after. The site owner would apply the most recent RPI figure as published by the Government Office for National Statistics (ONS). The ONS normally publish the RPI figure for a particular month by the mid part of the following month and previously, this has meant that the figure taken by the site owner was the month prior to the review date. A few written statements actually identify the month the owner will use for the purpose of applying the RPI figure. One further important factor is that any given ‘RPI’ is actually the change from the same month 12 months before. I emphasise this because the DCLG has altered this the upshot being that to take the common monthly published RPI figure and apply same to the pitch fee would result in an incorrect increase figure being applied to the existing pitch fee. Let us consider why by taking a simple example.

Let us say hypothetically the review date is April 1st of each year. The owner intending levying a RPI increase is now required to serve a written notice on the occupier setting out their proposals for the next 12 months pitch fee. He/she must do this, ’at least 28 clear days before the review date…’ Where the review date is the 1st April, he/she must do this late February of that year. The latest regular published RPI figure available to him will be January. Now reconsidering the quoted legislation above, it is very clear that the RPI can only be any ’….increase or decrease (in RPI) since the last review date’. The previously readily taken RPI , remember is the change over a year not the shorter period of 10 months required to satisfy the legislation. For the purposes of this example, to be technically and legally correct, the owner can only calculate the RPI on the previous ten months I.e. back to April of the previous year. Is this possible? Yes, it is.

The ONS publish a number of tables the particular one the owner needs to work off the ‘RPO2’ table. It is not uncommon for a person or organisation to have need to calculate the percentage change in prices between two periods in time other than 12 months indeed, the ONS publish on their website the simple calculation to be applied to obtain the change in terms of RPI between two dates. I will reproduce it here for the sake of clarity.

Taking two monthly RPI indices’ from table RPO2, (later date RPI minus earlier date RPI divided by earlier date then times 100) : In the knowledge that most site owners will continue to use the general 12 monthly change in RPI and most occupiers will accept increases based on same, it is likely nothing will change. I merely bring these points to the readers attention to demonstrate, how the DCLG has failed to pay attention to detail with the legislation or, indeed, fill the pages of this Fact Sheet with, forgive me, ’fact’. My personal view is that the DCLG did not intend the outcome outlined above. That said, perhaps they did. Whatever, there will always be different interpretations of the law but where a particular wording as is the case with Paragraph 20, is so clear, it is difficult to believe the DCLG intended otherwise.

I do welcome the DCLG emphasising that the pitch fee review notice is not a demand. Most owners have always treated it as such even to the extent of issuing ‘Arrears’ notices where the increase is rejected. This invariably ends up as a pitch fee increase by attrition.

I am further critical of the use of the word ’amenity’. It is unfortunate that the DCLG introduced this nebulous word, which has never been legally defined by the appeal courts. Fortunately, the two county court cases referred to above did. However, what is clear, is that ‘amenity’ means different things to different people And it is all a matter of fact and degree in each case, so the ‘amenity’ argument may very well rumble on for the foreseeable future until a definitive interpretation is finally obtained.

Page 8.….

It is noted on page 8 that it is for the owner to ‘….seek a ruling in the county court’ if a particular pitch fee increase cannot be agreed. The legislation actually provides that it is for the court, on the application of ‘….the owner or the occupier…’ Not just the owner.

In practice, it will normally be the owner who applies to the court but where the owner demands ‘arrears’ where a particular pitch fee is not agreed, it is just as likely to be the occupier. Graham Watts. LL.B (Hons) LL.M. PARK HOME LEGAL SERVICES. August 2009

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