UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – ELECTRICITY CHARGES – written statement requiring occupiers to pay for electricity supplied by park owner – no term fixing price of supply – disagreement over price – maximum resale price – whether charge to include contribution to climate change levy – section 4, Mobile Homes Act 1983 – section 44, Electricity Act 1989 – appeal allowed

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

BETWEEN:

MR AND MRS KING and others
(members of the Port Werburgh Park Residents' Association)

Appellants

-and-

RESIDENTIAL MARINE LIMITED

Respondent

Re: Peninsula Crescent,
Port Werburgh Park,
Hoo St. Werburgh,
Kent

Martin Rodger QC, Deputy Chamber President

7 December 2021

Royal Courts of Justice, London WC2A

Ian M Dunkley, the eighth appellant, in person and for the other appellants
Mrs Victoria Osler, instructed by Apps Legal Limited for the respondent

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The following cases are referred to in this decision:

East Tower Apartments Ltd v No.1 West India Quay (Residential) Ltd [2016] UKUT 553 (LC)

King -v- King (1980) 41 P&CR 311

MacGregor v BM Samuels Finance Group plc [2013] UKUT 471 (LC)

PR Hardman & Partners v Greenwood [2017] EWCA Civ 52

Introduction

1. Port Werburgh Marina is a residential and leisure marina on the north bank of the River Medway in Kent. Part of the Marina complex comprises a mobile home park (the Park) which is a protected site to which the Mobile Homes Act 1983 applies. This appeal concerns charges for electricity supplied by the owner of the Marina to the permanent residents of the Park. As is often the case with such appeals, the sums of money involved are relatively small, but the issues are of continuing significance to the parties and to the owners and occupiers of other protected sites.

2. A list of the appellants' names appears at the end of this decision. They are all members of the Port Werburgh Residents' Association and between them they own 13 permanent mobile homes situated on pitches on the Park. Each appellant occupies their pitch under an agreement made between them and the respondent, Residential Marine Limited, which owns the Marina. The Mobile Homes Act 1983 (the 1983 Act) applies to each of the agreements. Mr Ian M Dunkley is the Chairman of the Residents' Association and the joint owner, together with his wife, of the home situated on pitch 14.

3. The Park was developed as an extension to the Marina in 2016 and Mr and Mrs Dunkley first came to occupy their pitch in June 2018.

4. In June 2020 the appellants applied to the First-tier Tribunal (Property Chamber) (the FTT) under section 4 of the 1983 Act for the determination of a number of questions concerning charges for water, sewerage and electricity and about the exercise of various rights under their agreements. By the time the application came before the FTT in December 2020 all of the issues had been resolved by agreement except those concerning charges for electricity supplied to the appellants by the respondent.

5. After the application was made the respondent recalculated some of the disputed electricity charges and the FTT approved those revised calculations in its decision issued on 23 March 2021 (later amended on 28 April, without any change of substance).

6. The appellants were granted permission to appeal the FTT's decision by this Tribunal. At the hearing of the appeal they were represented by Mr Dunkley and the respondent was represented by Mrs Victoria Osler. I am grateful to them both for their helpful submissions.

The facts

7. The Marina is used for a variety of purposes including the mooring of boats along pontoons, the storage of boats on dry land on the wharf, and the renting of shipping containers for storage. There are Marina offices and six permanent homes, as well as the mobile home on the Park. There is space for up to 270 moorings which are used for a mixture of residential house boats and leisure vessels. The Marina is run by Mr Dennis Swann, a director of the respondent, who lives on a boat moored at one of the pontoons. In his evidence to the FTT Mr Swann described the Marina as like a small village of approximately 400 people.

8. The Park is at the eastern end of the Marina on a peninsula or island projecting into the River Medway and connected to the rest of the site by a causeway. There are 30 pitches on the Park, 25 of which are currently occupied by mobile homes. Seven of the homes belong to the respondent while the remainder are owner occupied by the appellants and other residents.

9. Each pitch has its own individually metered mains supply of electricity. Their electricity is supplied to the Marina by British Gas under a contract with the respondent which then resells the supply to the appellants and other users. The appellants' individual meters do not record the time at which electricity is consumed so cannot be used to determine the cost of the electricity supplied to them at different tariffs.

10. The Marina has more than one electricity supply. Mr Swann explained to the FTT that the electricity supply for the Park also serves the area used for leisure moorings but that the residential moorings are connected to a different supply.

11. When the appellants asked how their electricity charges were calculated the respondent provided a copy of a single month's bill from British Gas for the supply which serves the Park. The bill, dated 3 October 2019, was for the month of September 2019 and shows a total charge of £2,659.99. That total was the aggregate of electricity charges of £2,163.03, a capacity charge of £66.46, a standing charge of £18.52, and a climate change levy of £121.36, less a discount of £152.71 applied because the respondent paid by direct debit.

12. The bill showed that the electricity charge of £2,163.03 was calculated on three different tariffs: a weekday rate of 17.44p per kilowatt hour (kWh) applied from 7am to midnight Monday-Friday; a weekend rate of 13.17p per kWh applied during the same hours on Saturdays and Sundays; and a night rate of 11.55p per kWh applied from midnight to 7am. The total billed consumption of 14,328.7 kw included 54% at the weekday rate, 23% at the weekend rate and 23% at the night rate.

The written statement

13. The agreements under which the appellants occupy their pitches at the Park are in the form of a written statement of terms as required by the 1983 Act. The statements are in a standard form and I was shown the one signed by Mr and Mrs Dunkley for pitch 14.

14. The agreement is in five parts. Part One comprises introductory provisions and identifies the date of commencement of 26 June 2018 and the pitch fee of £175 payable four weekly. A section where services included in the pitch fee should be recorded has been completed with the words "water N/A" and "sewerage N/A" indicating that the pitch fee does not include charges for those services.

15. Part One also includes space to record matters for which an additional charge would be made, but that section has been left blank. In *PR Hardman & Partners v Greenwood* [2017] EWCA Civ 52 the Court of Appeal held that, in the absence of any express provision for a separate charge, charges for utilities in an agreement to which the 1983 Act applied were to be taken to be included in the pitch fee. Mr Dunkley nevertheless told me that before he signed the written statement it was explained to him that there would be additional charges,

including for electricity. It was not the appellants' case that those matters were covered by the pitch fee.

16. Part Two of the agreement contains a general explanation of the occupier's rights and Part Three comprises terms which are automatically implied into the agreement as a matter of law and which the parties cannot agree to exclude. Those terms include obligations relating to utilities. Paragraph 21(b) requires that:

> "The occupier shall … pay to the owner all sums due under the agreement in respect of gas, electricity, water, sewerage or other services supplied by the owner"

Paragraph 22(b) obliges the owner to provide, on request and free of charge, an explanation and documentary evidence in support of utility charges payable by the occupier to the owner under the agreement, including for electricity.

17. Part Four includes supplementary provisions which are not relevant to this appeal. Part Five contains further express terms of the agreement which make no reference to payment for utilities or services.

18. When the implied and express terms of the agreement are read together it becomes apparent that something is missing. Although paragraph 21(b) of Part Three requires the occupier to pay "all sums due under the agreement" in respect of utility charges, nothing in the agreement explains what those charges are to be, or how or by whom they are to be determined. That omission gives rise to one of the issues in this appeal.

The application to the FTT

19. The appellant's application was made under section 4 of the 1983 Act which gives the FTT jurisdiction to determine any question arising under an agreement to which the Act applies or any question under the Act itself.

20. In the application Mr Dunkley suggested that the appropriate way to calculate the price per unit for electricity supplied should be by taking the average price per unit paid by the respondent. He invited the FTT to direct the respondent to provide a proper explanation of how its charges were calculated, to order it to calculate and refund any excess payments made by the appellants, and to direct it to provide meter readings with all future electricity bills.

21. The matter came before the FTT for hearing on 15 December when the parties indicated that they had agreed most of the matters in dispute except the electricity charges. The FTT gave them time to discuss that issue and set a timetable for submissions to be made in writing if a complete agreement could not be achieved. The parties did not reach agreement on the electricity charges and exchanged submissions as directed by the FTT. With the benefit of hindsight it can now be seen that there were a number of gaps in the evidence which might readily have been explored by the FTT if it had pressed on with the hearing while the parties were in front of it.

22. In the first of two witness statements for the FTT Mr Swann said that residents were charged 20p per unit consumed for their own pitch. In his second statement Mr Swann acknowledged that the rate of 20p per unit exceeded the maximum amount which could have been charged. The correct amount, by his calculations, should have been 19.43p per unit, including VAT at 5%. The starting point for the revised calculation was the weekday rate of 17.44p to which a pro-rata share of the capacity charge, standing charge and climate change levy, totalling 1.44p, was added to give a total of 18.88p per unit. Mr Swann then rounded this rate down by 0.38p per unit to reflect a discount for night use, leaving a rate per unit of 18.5p to which VAT at 5% was added to produce the total of 19.43p.

23. The British Gas bill showed that 23% of the electricity consumed on the account was charged at the night-time rate. Mr Swann did not explain why a discount of only 0.38p per unit (equivalent to 2% of the total charged) was considered appropriate to reflect the night-time tariff although in his first witness statement he did say usage by residents of the Park at night "would be minimal compared with the owners moored on the Marina."

24. The respondent's solicitors argued in submissions to the FTT that the climate change levy was payable by the respondent and ought therefore to be taken into account. As for the unit rate, they submitted that because the residents of the Park were "all over the age of 50 and most are retired, more energy is used during the weekdays by the residents than at any other time". To calculate the charge by dividing the total number of units by the total cost "would result in a skewed price in favour of the residents and is not reasonable".

25. In his submissions to the FTT Mr Dunkley identified three flaws in the methodology adopted by the respondent: the flat rate charge of 20p per unit plus VAT made no allowance for the weekend tariff; it improperly included the climate change levy; and it made no allowance for the discount which the respondent received for making payment by direct debit. The appellants considered that the starting point for the calculation should be the average unit rate of 15.1p per kWh (arrived at by dividing the total energy charge across all three tariffs, £2,163.03, by the total amount consumed, 14,328.07 kw). With the addition of a contribution of 0.6p per unit for the standing charge and capacity charge Mr Dunkley's calculation produced a unit rate of 15.7p which he suggested should be discounted by 1p per unit to reflect the direct debit discount received by the respondent. The proposed discount was not pursued on the appeal but the appellants case to the FTT at that stage was that they should be charged at the rate of 14.7p per unit plus 5% VAT.

26. Mr Dunkley relied on guidance on the resale of gas and electricity published by the energy regulator OFGEM in January 2002 and updated in October 2005, which establishes the principle that a reseller of electricity is not permitted to make a profit. For the proposition that domestic consumers should not contribute towards the climate change levy he referred to Excise Notice CCL1/3: Climate Change Levy Reliefs and Special Treatment for Taxable Commodities published by HMRC.

27. The respondent argued that the FTT should not calculate a rate of its own and that it would not be just to determine a price per unit from one electricity bill. The FTT should determine only whether the direct debit discount and climate change levy should be taken into account

in the calculation and should resolve, in principle, whether the unit price should be arrived at by taking the day-time rate or average price per unit.

The FTT's decision

28. In paragraph 41 of its decision the FTT described the electricity supply to the Site as "primarily commercial". It did not explain what it meant by that statement, or what evidence it relied on to support it, and it was challenged by Mr Dunkley on the appeal.

29. The FTT then explained how the respondent had calculated its rate of 18.5p per unit, taking as its starting point a rate of 17.44p per unit. Somewhat surprisingly the FTT thought that the respondent had not explained how it calculated that initial rate. In fact, Mr Swann had explained in his first witness statement that the charge was based on the weekday rate which the FTT had itself recorded only a few paragraphs earlier in its decision.

30. The FTT explained the respondent's preferred calculation which produced a unit price of 15.1p, which the FTT correctly described as "an average charge per unit for the billing period". The FTT then commented, at paragraph 50:

> "The [appellants'] calculation takes no account of the fact that, based on the single bill disclosed, 77% of the electricity was consumed between the hours of 0700-2400 at the higher charging rates of 17.44p and 13.17p per unit. These are weekday and weekend rates not "daytime" rates."

I find this paragraph difficult to understand. Far from failing to take account of the proportions in which electricity was consumed at the different rates, the appellants' calculation was based entirely on those proportions.

31. In paragraph 52 of its decision the FTT made two significant findings:

> "The Tribunal accepts that the calculation of the electricity recharge will be difficult for a mixed used site such as this site. It also finds that it is reasonable to assume that much of the night and weekend use of electricity may be consumed by occupiers of the moorings."

32. The FTT stated its conclusion on the unit rate in paragraph 56, as follows:

> "The tribunal determines that it is not reasonable for the respondent to recharge electricity to the appellants using the average unit rate for each billing period. Averaging the rate does not take account of the mixed use of the site. Furthermore, if the applicants are correct, the rate would have to be recalculated in every billing period making it impossible to charge a consistent rate for electricity, which cannot be reasonable. The electricity bill disclosed shows that 51% of the electricity consumed is charged at the weekday rates, 29% is charged at the night rates and 20% is charged at the weekend rates. However, no evidence has been provided by either party to demonstrate whether the split between the three rates itemised on that bill is typical of the split between the charging rates on other monthly bills."

(The FTT's arithmetic had gone wrong in this paragraph; the sum of weekday and weekend charges it had calculated in paragraph 50 was correct and the true percentages for each tariff are as stated in paragraph 12 above.)

33. Having reached that decision the FTT added that the respondent could explain more clearly (presumably for the future) how it calculated the rate per unit and any allowance made either for a night rate or a weekend rate. Continuing on the same theme the FTT added:

> "If it [the respondent] has evidence that electricity usage is disproportionately consumed on other parts of the Site at weekends this should be disclosed. It will not be possible for the respondent to produce a perfectly accurate calculation."

The FTT did not undertake any calculation of its own or say anything about overpayments (although Mr Swann had acknowledged that the respondent had charged at too high a rate). Apart from encouraging the respondent to provide more information in future, it did not disagree with its approach to the calculation of electricity charges.

34. The FTT also decided that the respondent was entitled to pass on a share of the climate change levy to the appellants. It said that Ofgem's published Guidance to the opposite effect was "not definitive" and that Mr Dunkley's reliance on HMRC's Excise Notice was "both out of context and misleading". The Excise Notice was "for energy consumers in the business and public sectors … [and] it was clearly not intended to relate to the [appellants] who purchase electricity from the respondent as a reseller".

The appeal

35. When introducing the appeal Mr Dunkley confirmed that there were only two areas of disagreement between the parties, namely the calculation of the unit rate for electricity supplied and the climate change levy. Although the sums involved might appear insignificant, or even trivial, it was important, he submitted, not to focus only on the unit price. A reduction of 15% or thereabouts in charges for electricity was not an insignificant sum for appellants, many of whom were on pensions or other fixed incomes.

36. It is convenient to deal with the issues in reverse order, taking the climate change levy first.

The climate change levy

37. Mr Dunkley submitted that the climate change levy was a charge on business consumers and should not be passed on to domestic customers. He supported his submission by referring to the Ofgem Guidance, HMRC's Excise Note CCL1/3 and the decision of the Tribunal (Mr AJ Trott FRICS) in *MacGregor v BM Samuels Finance Group plc* [2013] UKUT 471 (LC) at [46]-[50] which held that a contribution towards the climate change levy which had been paid by a landlord could not be passed on to a residential tenant through a service charge because the levy was a charge which had not been properly incurred. Mrs Osler's position was that only a supply which was wholly domestic was exempt from the levy and the supply to the marina was not wholly domestic. She supported the FTT's interpretation that the Ofgem Guidance was not intended to be definitive. The Tribunal's decision in *MacGregor*

was distinguishable because it did not concern a wholly domestic building and not a supply to a site which was partly domestic and partly commercial.

38. The position in relation to the climate change levy is absolutely clear. It is not payable by domestic consumers and should not be passed on to them by resellers.

39. The FTT thought that Excise Note CCL1/3 was "quite clearly not applicable to the Site" because it applied only to "energy consumers in the business and public sectors" (CCL1/3, paragraph 1.2). The latter statement is true, but not the former. The consequence of the levy applying to business consumers is that it applies to the respondent, and it is the respondent's liability to pay the climate change levy (and thus to be in a position to pass it on to its own customers) which is in issue.

40. CCL1/3 contains the clearest possible statement at paragraph 2.1:

> "A supply is excluded from the main rate of CCL if it is for domestic use or use by a charity for its non-business activities. The domestic and charitable exclusions are based on the VAT fuel and power "qualifying use" provisions contained in Fuel and Power VAT Notice 701/19."

41. That statement is reflected in Ofgem's Guidance, which states: "Even if the reseller has to pay Climate Change Levy he cannot pass it on to purchasers who only pay lower rate VAT." The FTT described Ofgem's position as "not definitive"; in saying that it obviously had in mind the further statement in the Guidance that "for definitive advice on VAT and Climate Change Levy, readers must consult the VAT National Advice Service". The FTT seems to have interpreted that sensible advice as a reason for doubting the correctness of Ofgem's statement that climate change levy cannot be passed on to consumers who pay the lower rate of VAT (i.e. domestic consumers). It was nothing of the sort.

42. The FTT was not referred to the Tribunal's decision in *MacGregor* in which the Tribunal determined that the climate change levy should not have been passed on to residential leaseholders. Contrary to Mrs Osler's submission, the Tribunal's reasoning did not depend on the limitations in the Housing Act 1985 or on the fact that the building in question was wholly domestic. On the contrary, the reason why the charge had not been reasonably incurred was that the levy is not payable by residential consumers.

43. The treatment of the climate change levy where electricity is supplied to a purchaser who then resells it to a number of consumers, some domestic and some commercial, did not arise in *MacGregor*. It could have been an issue in *East Tower Apartments Ltd v No.1 West India Quay (Residential) Ltd* [2016] UKUT 553 (LC) which concerned a large mixed use building (part hotel, part residential apartments) but, at [38], the Tribunal recorded that the experts agreed that the levy should not have been included in bills payable by the residential leaseholders.

44. The issue is also covered in Excise Note CCL1/3 where, under the heading "Mixed use" paragraph 2.8 explains that where supplies are made to a customer whose premises are put partly to domestic use, the whole supply can be treated as domestic if the domestic use is at

least 60% of the total. If the domestic use is less than 60% of the total "the main rate of CCL must be applied to that portion that does not qualify for relief". Section 6 of the Excise Note explains how a purchaser can claim a relief against climate change levy (paragraph 6.6.1 explains that unclaimed reliefs may be backdated for up to 4 years).

45. The position is, therefore, that climate change levy ought not to have been taken into account in determining the charges for electricity supplied by the respondent to the appellants. I will allow the appeal on that issue.

The unit rate

46. In opening the appeal Mr Dunkley explained that he no longer pursued the appellants' original argument that electricity charges should be based strictly on the average charge taking account of all three tariffs. He acknowledged that, between the hours of midnight and 7am, electricity usage on the Park was likely to be low, whereas charges would be incurred for lighting the roads, wharfs and pontoons around the Marina. Mr Dunkley's position was that a rate which took account of the lower tariff applicable at weekends should be adopted. He asked the Tribunal to determine the charges for the month for which a sample bill was available and to give guidance on the proper approach to the calculation of charges for other periods.

47. Mr Dunkley criticised the FTT's acceptance of the respondent's assertion that taking account of different tariffs when calculating the electricity charge would be difficult for a mixed-use site such as this. There was no evidence for, or logic in, its assumption "that much of the night and weekend use of electricity may be consumed by occupiers of the moorings", nor was the FTT's right when it said that the single bill relied on was referable to a "complex mixed use/industrial site". The FTT had simply been wrong when it described the electricity supply to the site provided by British Gas as "primarily commercial". None of these assumptions was supported by evidence, and each was contradicted by the respondent's own evidence. The FTT appeared to have overlooked the explanation given by Mr Swann in his first witness statement that there was more than one electricity supply to the Marina. His evidence was that the supply to the Park also served the leisure moorings but that those on residential moorings were connected to a different electricity supply. Mr Swann had not suggested that the appellants shared their supply with other permanent residents or with commercial or industrial users.

48. The FTT had been provided with all of the invoices in respect of the supply of electricity to Mr Dunkley's pitch for a calendar year (13 invoices each covering a period of four weeks). In paragraph 55 of its decision it had suggested that the average monthly consumption for that pitch represented 0.03% of the total of the units consumed in September 2019 shown on the British Gas bill. Mr Dunkley pointed out that that was arithmetically incorrect. The FTT had correctly recorded in the very next sentence of the same paragraph that the average consumption for Mr Dunkley's pitch was 369 units per month, which represents 2.57% of the total consumption shown on the British Gas bill and not 0.03% (which would be 43 units per month).

49. On the assumption that electricity consumption by each of the 18 occupied pitches on the Park was comparable to his own consumption, Mr Dunkley submitted that the average monthly consumption on the Park would represent 46% of the total billed in September 2019. That statistical check further demonstrated that the FTT was wrong to accept the respondent's submission that the British Gas charge covered a great variety of users with the appellants' usage making only a relatively small contribution. The contrary was the case, and the appellants appeared to represent a little under half of the total consumption recorded in the only bill which had ever been produced by the respondent.

50. Mr Dunkley then addressed the suggestion that weekend consumption by other consumers was significantly higher than weekday consumption by the appellants, which was the basis of the respondent's argument that the Park charges should be based only on the weekday tariff. From the evidence of Mr Swann, the other significant consumers whose usage was recorded on the British Gas bill were the leisure moorings. Mr Dunkley suggested that when leisure consumers were using their boats the amount of electricity which they consumed was unlikely to be different from that consumed by the occupiers of the fixed mobile homes who were permanent residents. The September 2019 bill represented 9 weekend days and 21 weekday days. The weekday consumption was at the rate of 366.9 units per day while the weekend consumption was only slightly more, at rate of 371.8 units per day. That did not suggest that there was significantly increased consumption at the weekend. The proposition that giving the appellants the benefit of a weekend rate would be unreasonable was not justified.

51. Responding to the appeal Mrs Osler referred to the Ofgem Guidance which laid down the principle that the maximum price at which gas or electricity could be resold is the same price as was paid by the reseller, including any standing charges. Gas and electricity are sold at a variety of prices and charges may be spread over a number of tariff bands. The Guidance acknowledges that there are no hard and fast rules about the way in which a reseller should estimate the bill for each individual purchaser, but two points were emphasised. First, whatever methodology the reseller chose it must be explained to the purchaser on request; and, secondly, the reseller must use "reasonable endeavours" to make an estimate of the applicable unit price

52. Mrs Osler submitted that the respondent's only obligation was to use reasonable endeavours to estimate the applicable unit price and that it had done so, basing its calculation on the weekday rate of 17.44p. There was obviously more than one way in which electricity charges could be calculated but provided the respondent, as reseller, used reasonable endeavours to estimate the charge its approach should be adopted and alternative approaches should be disregarded.

53. Mrs Osler suggested that the Marina was not a typical consumer of energy and submitted that the respondent's method of calculating charges to the Park was reasonable. She told me on instructions that the supply to the Park was share with residential houseboats, up to 100 non-residential boats, various offices (the Marina office, a security office, and a brokerage), the Marina café, an amenity block, the Marina flood lights, and the Marina car charging point.

54. I am not persuaded that the Ofgem Guidance has the decisive role Mrs Osler suggested. The relationship between the appellants, as occupiers of their pitches, and the respondent is a contractual one. The contract between them is the written statement which includes the terms implied into every such agreement by the 1983 Act. The Ofgem Guidance is not part of that contract, although it is relevant to the parties' relationship.

55. Paragraph 21(b) of the implied terms, which are found in Part Three of the parties' agreement, requires the occupier to pay "all sums due under the agreement" for electricity supplied by the owner of the protected site. As I have already pointed out, nothing in the agreement explains what those charges are to be, or how or by whom they are to be determined. That omission is not overcome by the Ofgem Guidance. In particular the Guidance does not say that the price payable by the appellants is to be the charge decided by the respondent.

56. Ofgem's function in relation to resale pricing is determined by section 44(1) of the Electricity Act 1989:

> "44(1) The Authority may from time to time direct that the maximum prices at which electricity supplied by authorised suppliers may be resold –
>
> (a) shall be such as may be specified in the direction; or
>
> (b) shall be calculated by such method and by reference to such matters as may be specified …"

57. The Ofgem Guidance is a user-friendly summary of a direction under section 44(1) issued by Ofgem on 29 January 2002. That direction states that the maximum price at which electricity may be resold shall be the same price as paid by the authorised supplier. Where metering equipment is not available the maximum price is to be estimated with the objective that each person to whom electricity is being resold will pay "a fair proportion of the overall cost incurred by the reseller, including any standing charge".

58. The Ofgem direction, and the Guidance based on it, fix a ceiling, the maximum resale price, which a reseller of electricity or gas is not entitled to exceed. This limits but does not define the amount which a reseller like the respondent can charge. It is part of the background to the agreement between the appellants and the respondent but it is not incorporated into that agreement.

59. There is nothing in the written statement about how the charge for electricity is to be calculated. Where parties agree that one will buy some commodity from the other, and from no one else, if they do not agree what the price is to be English law will imply that the commodity will be sold at a reasonable price (*King -v- King* [1980] 41 P&CR 311). That common law solution is reflected in section 8 of the Sale of Goods Act 1979, which provides:

> "8(1) A price in a contract to sell may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

60. Mrs Osler did not disagree when I put it to her that on these normal contractual principles there must be implied into the agreement between the parties a term that the price at which electricity will be resold by the respondent to the appellants will be a reasonable price. A reasonable price does not mean a price set by the respondent. What the reasonable price is is a question which arises under the parties' agreement and if the parties cannot agree what that price is, it can be considered and determined by the FTT under section 4, 1983 Act.

61. Accordingly, I reject Mrs Osler's argument that, provided the respondent has used reasonable endeavours to estimate the price in accordance with the Ofgem Guidance, its method of calculating the price cannot be challenged. The true position, as it seems to me, is that the price is to be a reasonable price, which will either be agreed between the parties or, if they cannot agree, will be determined by the FTT under section 4.

62. In this case the FTT did not determine the price, as the appellants had requested it to do. It accepted the respondent's price but in doing so it accepted assertions by the respondent that were not based on evidence. In particular, it approached the application on the basis that the supply to the Park was "primarily commercial". It may have derived that impression from Mr Swann's description of the Marina as a whole as "mixed commercial/industrial site and residential/leisure", but the character of the Marina as a whole was not in issue. What mattered was the supply of electricity to the Park, and to the other consumers who shared the same supply. There was no evidence that those consumers were primarily commercial. Mr Swann's evidence to the FTT ought to have led it to the conclusion that the relevant supply was predominantly residential (the Park) and leisure (the moorings for leisure vessels rather than houseboats) . The FTT was also mistaken in its calculation that the consumption by an individual occupier on the Park was only 0.03% of the total consumption shown in the British Gas bill; as Mr Dunkley demonstrated, his average monthly usage was 2.57% of the total consumption shown on the British Gas bill. There is nothing in the evidence to suggest that Mr Dunkley usage is unrepresentative of the appellants' generally and on that basis it would appear that the appellants' combined consumption is likely to be around half the total, or a little under.

63. The FTT gave two reasons in paragraph 56 of its decision why it would not be reasonable for electricity to be recharged to the appellants at the average unit rate for each billing period. The first was that the average rate would not take account of the mixed use of the Site. That would be a powerful point if, as the FTT mistakenly believed, the appellants usage was an insignificant part of the total, or if there was evidence that usage by the appellants was spread over the three tariffs in significantly different proportions to usage by others whose charges were also shown n the same bill. The appellants accept that that is likely to be the case as far as the night tariff is concerned, but there is no evidence, and no reason to assume, that that there is a significant disparity in usage at the weekday and weekend tariffs between different groups of consumers. The single bill which has been produced does not suggest that electricity is consumed at a significantly different rate at the weekend than during the

week. The FTT noted that no evidence had been provided to it "by either party" to demonstrate usage patterns on other monthly bills, but the only party in a position to provide that evidence was the respondent, and its failure to do so was not a reason to prefer its methodology.

64. The FTT's second objection was that appellant's suggested approach would require the rate to be recalculated every month. That is not a fair criticism. The appellants were asking the FTT to determine the charges retrospectively, which could have been done if bills for the whole period of their occupation had been produced. As it was, only a single bill was produced. For the future an appropriate rate could be fixed in advance, based on the pattern of the previous year's usage at the different tariffs, but using the latest unit rate. If that resulted in over or under payments the rate for the following year could be adjusted, or a top up charge or credit could be applied.

65. Neither of the FTT's reasons for rejecting an average unit charge (or at least one reflecting the average of the weekday and the weekend tariffs) seems to me to have been justified on the evidence before it. That evidence suggests that the appellants are significant consumers of electricity relative to others served by the same supply; it does not suggest that their usage follows a different pattern from other consumers. To calculate the charge payable by the appellants on the basis of the highest tariff is unreasonable and should be avoided if possible. It is possible, based on the information supplied by British Gas, fairly to calculate a charge which reflects usage at both the weekday and the lower weekend rate.

66. I will therefore allow the appeal on the issue of the unit rate. In principle, the unit rate should be an average rate based on the weekday and the weekend tariffs in proportions reflecting the usage shown on bills covering the relevant billing period.

67. If it is assumed that no significant part of the electricity consumed by the appellants is charged at the night rate, the necessary calculation can be illustrated using the proportions shown in the September 2019 bill. An average charge based on the weekday and weekend consumption evidenced by that bill would reflect those tariffs in the proportions 7,705:3346 (or 54:23), which would mean a blended charge comprising 70% of the weekday rate plus 30% of the weekend rate. That would result in a base unit charge of 16.16p to which 0.59p would be added as a pro rata contribution to the capacity charge and the standing charge, producing a figure of 16.75p per kWh. With the addition of VAT at 5% the unit rate would be 17.59p per kWh, rather than the figure of 20p actually charged or the reduced figure of 19.43p proposed by the respondent. That is the reasonable rate which should be used to calculate charges for September 2019.

68. That calculation represents a 12% reduction on the sum actually charged by the respondent for September 2019 and a reduction of 9.5% on the respondent's proposed charge. It has the disadvantage that it is based on a single month's bill. For that reason, and because there is no evidence of charges for other periods, I am not prepared to quantify the appropriate charges for electricity for other periods or to direct a repayment of money overpaid at this stage. That remains to be done.

69. The appellant's original application to the FTT sought a determination of the charges payable by them since the start of their agreements. I am satisfied that the appellants are entitled to that relief under section 4, 1983 Act. It will be for the respondent then to repay or give credit for any sums found to have been overpaid.

70. The necessary first step in quantifying the charges is for the parties to agree the period in issue and for the respondent to provide copies to the appellants of the monthly British Gas bills. The respondent must provide the required documents within one month of the date of this decision. Appropriate charging rates can then be determined based on the weekday and weekend rates shown on the bills in proportions derived from actual usage. That may be a laborious exercise, and given the modest sums involved it may be preferable for the parties to agree to adopt a broader brush approach, or to take a number of sample months.

71. The simplest approach might be calculate a blended rate comprising five sevenths at the weekday tariff and two sevenths at the weekend tariff plus a contribution towards the standing charges, with an annual review. For September 2019 that would result in a base unit charge of 16.22p to which 0.59p would be added as a pro rata contribution to the capacity charge and the standing charge, producing a figure of 16.81p per kWh. With the addition of VAT at 5% the unit rate would be 17.65p per kWh (a fraction more than the rate calculated for that month using actual consumption).

72. If the parties cannot now agree appropriate charges they will have to seek the assistance of the FTT. To enable them to do so I will remit the appellants' original application to the FTT for further consideration. I hope it will not be necessary for the FTT to be involved again, but I will direct that if the parties cannot agree they should write to the FTT within three months of the date of this decision asking it to give further directions.

Martin Rodger QC,

Deputy Chamber President

21 December 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appellants

(1) Mr Ian Dunkley

(2) Mr and Mrs King

(3) Mr and Mrs Poad

(4) Mr and Mrs Daws

(5) Mr and Mrs Tebbutt

(6) Mr and Mrs Martin

(7) Mr and Mrs Alexander

(8) Mr and Mrs Dunkley

(9) Mr and Mrs Johnson

(10) Mr and Mrs Merry and Quinn-Merry

(11) Ms Brierly

(12) Mr Moore

(13) Mr and Mrs Gurney