

UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

PARK HOMES – SALE – payment of commission to site owner by buyer – claim against seller for reimbursement of overpaid commission – whether commission payable out of agreed sale price or in addition to it – Mobile Homes (Selling and Gifting) (England) Regulations 2013 – appeal dismissed

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

BETWEEN:

MISS KAREN ELLERAY

Appellant

and

**(1) FRANCES SHIRLEY BOURNE
(2) JANET BARBARA HANNING
(AS EXECUTRICES OF FRANK GERARD)**

Respondents

**Re: 6 North End,
Lakeview Park,
Cummings Hall Lane,
Romford,
Essex RM3 7TW**

Martin Rodger QC, Deputy Chamber President

The Royal Courts of Justice

21 November 2017

*David Sunderland, of Wildcrest Parks Management Limited, for the Appellant
Ian Beeby, instructed by Mansfield Solicitors, for the Respondents*

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The following cases are referred to in this decision:

RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Company KG (UK Production)
[2010] UKSC 14

Yeoman's Row Management Ltd v Cobbe [2006] 1 WLR 2964

Introduction

1. This appeal concerns the sale of a mobile home which occupies a pitch at 6 North End on the Lake View Park at Cummings Hall Lane in Romford ("the Park"). The Park is a protected site under the Mobile Homes Act 1983 and the pitch is the subject of an agreement to which the Act applies. Miss Karen Elleray, the appellant, is now the owner of the mobile home and the person with the right under the agreement to station it on the pitch. In September 2016 Mrs Frances Bourne and Mrs Janet Hanning, the respondents, sold the home to Miss Elleray, together with the benefit of the agreement. This appeal concerns the purchase price agreed between the parties and, in particular, that part of the price which was to be paid as a commission to the owner of the Park, Wildcrest Parks Management Limited ("Wildcrest").

2. Shortly before completion of the sale Miss Elleray handed over the agreed purchase price plus a 10% commission to a firm of licensed conveyancer which was representing both parties in the transaction, Miss Elleray herself, as buyer, and the respondents as sellers. On completion, the commission was paid by the licensed conveyancers to Wildcrest.

3. After completion of the sale Miss Elleray was advised by Wildcrest that she should not have paid the commission to the sellers in addition to the agreed purchase price, but that she or her representative should instead have withheld 10% of the agreed purchase price on completion which should then have been paid it to Wildcrest. On that basis Miss Elleray understood she had paid 10% more, in total, than she ought to have done and applied to the First-tier Tribunal (Property Chamber) ("the FTT") for an order for repayment.

4. In a decision issued on 19 May 2017 the FTT decided that Miss Elleray had not paid more than she had agreed to. It found that the agreement had been that Miss Elleray would be responsible for the commission and would pay it in addition to the agreed price. The FTT refused permission to appeal on 15 June 2017 but Miss Elleray was subsequently granted permission by this Tribunal.

5. At the hearing of the appeal Miss Elleray was represented, as she had been before the FTT, by Mr David Sunderland, the Estates Director of Wildcrest. Mrs Bourne and Mrs Hanning were represented by Mr Ian Beeby of counsel. I am grateful to both representatives for their assistance.

The statutory implied terms

6. The terms of an agreement entitling the owner of a mobile home to station it on land forming part of a protected site is governed by statute. Schedule 1 to the Mobile Homes Act

1983 (as amended) (“the 1983 Act”) contains a series of implied terms which, by section 2(1), “shall have effect notwithstanding any express term of the agreement.” The implied terms therefore take precedence over any inconsistent express term which the parties may have agreed.

7. Substantial changes were made to the implied terms by the Mobile Homes Act 2013. This is the first occasion on which the Tribunal has had to consider those changes, so far as they relate to sales and assignments.

8. Before 2013 pitch agreements generally stipulated that the consent of the site owner would be required before the agreement could be assigned to a third party. By paragraphs 7A and 7B of Chapter 2, in Part 1 of Schedule 1 to the 1983 Act (which were inserted by section 10, Mobile Homes Act 2013) that requirement was removed for both old and new agreements.

9. Where the agreement is a “new agreement” (meaning one first entered into or assigned after 26 May 2013) the relevant implied term is now found in paragraph 7A, and for agreements which are not new agreements it is in paragraph 7B.

10. This appeal is concerned with an agreement which is not a new agreement. In such a case the occupier is entitled by virtue of implied term 7B(1), to sell the mobile home and assign the agreement without the approval of the park owner if two conditions are satisfied. The first is that the occupier must serve on the owner a “notice of proposed sale” informing the owner that he or she intends to sell the mobile home and assign the agreement to the proposed new occupier. The second condition may be satisfied in either of two ways: first, if the occupier does not receive notice from the owner within a 21 day period that the owner has applied to a tribunal for an order preventing the sale and assignment, or, secondly, where such an application is made, if the relevant tribunal rejects it.

11. By implied term 7B(5) a notice of proposed sale must include such information as may be prescribed in regulations made by the Secretary of State.

12. Where a mobile home held under an old agreement is sold, implied terms 7B(8) and 7B(9) limit the payments which the owner may require the new occupier to make. The first of these provisions imposes an obligation on the buyer to pay a commission, but couples that obligation a limit, as follows:

“(8) The person to whom the mobile home is sold (“the new occupier”) is required to pay the owner a commission on the sale of the mobile home at a rate not exceeding such rate as may be prescribed by regulations made by the Secretary of State.”

This obligation to pay a commission is then supplemented by a prohibition on the requirement of any other payment:

“(9) Except to the extent mentioned in sub-paragraph (8), the owner may not require any payment to be made (whether to the owner or otherwise) in connection with the sale of the mobile home and the assignment of the agreement.”

13. By implied term 7B(10) the Secretary of State is given power to prescribe “procedural requirements” to be complied with by the owner, the occupier, a proposed occupier, or a new occupier in connection with the sale of a mobile home and the assignment of an agreement, and in connection with the payment of commission.

14. Section 10(4) of the 2013 Act also introduced new implied terms concerning the provision of information in connection with sales and assignments. By implied term A1(2) an occupier who proposes to sell a mobile home and assign the pitch agreement must “not later than 28 days before the completion of the sale of the mobile home and assignment of the agreement” provide the proposed occupier with such documents and other information as may be prescribed in regulations, which may include details of the commission payable. By implied term A1(3), if the proposed occupier consents in writing to this material being provided less than 28 days before completion, the occupier must provide them not later than the agreed date.

15. By implied term A1(6) a person who has broken the duty to provide the documents and information prescribed “may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.”

The Selling and Gifting Regulations

16. Regulations have been made to supplement the new implied terms. Unfortunately, as has occurred in the drafting of other regulations in this field, the Mobile Homes (Selling and Gifting) (England) Regulations 2013 (“the 2013 Regulations”) and the forms which they prescribe are in some respects both unclear and contradictory.

17. The 2013 Regulations include prescribed forms which must be used in connection with the sale or gift of a mobile home. The buyer’s information form required by implied term A1(2) is to be in the form prescribed in Schedule 1; the notice of proposed sale to be given to the site owner under implied term 7B(5) is to be in the form in Schedule 2; an assignment is to be in the form in Schedule 4; and the notice of assignment to be given by a new occupier to the site owner is to be in the form in Schedule 5.

18. Use of the prescribed forms (or something very similar) is compulsory. In the case of the assignment itself, regulation 9 of the 2013 Regulations provides that:

“9(1) An assignment of an agreement pursuant to paragraph 7A(2), 7B(1), 8A(2) or 8B(1) of Chapter 2 of Part 1 of Schedule 1 to the 1983 Act (as the case may be) must be made –

- (1) in writing; and
- (2) in the form prescribed in Schedule 4 (or in a form to substantially the like effect).”

It is clear from this provision that an agreement may not be assigned orally.

19. The 2013 Regulations also deal with the payment of commission, treating this as one of the “procedural requirements” within the scope of implied term 7B(10). Regulation 10 provides as follows:

“10(1) As soon as practicable after receipt of the notice of assignment, the owner must provide details of the bank account into which the owner wishes the assignee to pay the commission which the assignee is required to pay to the owner under paragraph 7A(5) or 7B(8) of Chapter 2 of Part 1 of Schedule 1 to the 1983 Act (as the case may be).

(2) Within 7 days of receipt of those details, the assignee must pay the commission into the bank account.”

The expectation is therefore that the commission will be paid to the owner by the buyer of the mobile home after completion of the assignment.

20. The prescribed forms are detailed and lengthy. It is necessary to refer to three of them.

21. By regulation 3 the information which is to be provided by the seller to the buyer includes the proposed sale price of the mobile home, and details of the commission which will become payable by the buyer by virtue of implied term 7B(8). The form in which this information is to be provided is prescribed in Schedule 1. The prescribed buyer’s information form tells the buyer that:

“If you purchase the mobile home, you will be required to deduct the amount of £... [*Insert amount*] from the sale price and pay this amount directly to the site owner’s bank account following the completion of the sale and assignment of the agreement (see note (i)).”

Note (i) informs the buyer that under the 1983 Act the maximum amount of commission that the site owner can require is 10% of the purchase price and that under regulation 10 of the 2013 Regulations the buyer is required to pay the commission to the site owner within 7 days of receipt of the owner’s bank details.

22. The form of assignment prescribed by Schedule 4 of the 2013 Regulations also requires that the purchase price and the commission be stated. Section 2 of the assignment records that “the assignee has paid the assignor a purchase price of £... (*Insert sale price*)”. It continues under the heading “payment of commission”:

“From the purchase price of £... the assignee agrees to pay to the site owner the amount of £... in respect of the commission due to the site owner under the Mobile Homes Act 1983 [see note (ii)].”

The reference to note (ii) is once again to a statement that the maximum amount of commission that the site owner can require the assignee to pay is 10% of the purchase price which the assignee is required to pay within 7 days of receiving the site owner’s bank details.

23. Finally, the notice of assignment prescribed in Schedule 5, which is required to be given to the site owner by the buyer to inform the owner of the details of the transaction, is in the following terms:

“I purchased the mobile home for £ (*insert total purchase price*) of which the amount of £.... (*insert amount*) is the commission due to the site owner under the Mobile Homes Act 1983).”

24. It is apparent that section 2 of the prescribed form of assignment contains a contradiction. It begins by recording that the assignee has already paid the purchase price; it then records an agreement by the assignee to pay “from the purchase price” the commission due under the 1983 Act. Something has gone wrong in the drafting as it is obviously not possible for the assignee to pay commission to the site owner out of money which has already been handed over to the assignor.

25. Section 2 of the prescribed form of assignment reflects a further ambiguity which is repeated throughout the prescribed documents and in the implied terms dealing with the payment of commission on sales. Nowhere do the forms or the implied terms specify the rate at which the commission is to be paid. The assignment refers instead to “the commission due to the site owner under the Mobile Homes Act 1983” which suggests that a prescribed rate is to be found in the statute or its implied terms. But there is no such rate. The 1983 Act, and the implied terms for which it provides, do no more than specify a *maximum* amount of commission which is to be fixed by regulation. That maximum is currently 10% of the purchase price, which has been set since 1983 by the Mobile Homes (Commission) Order 1983. In practice the prescribed rate is taken to be a fixed rate rather than a limit on what may be agreed.

26. Mr Sunderland also referred to a leaflet produced in June 2013 by the Department for Communities and Local Government entitled “Factsheet – Selling or gifting a park home” which includes at paragraph 2.28 a statement addressed to the seller of a mobile home that “you are entitled to 90% of the sale price when the sale is completed. The buyer must hold the remaining 10% as commission which has to be paid to the site owner later.” Although the leaflet suggests that a commission of 10% of the sale price is always payable, that is not what the implied terms and the 1983 Order provide for, nor can the leaflet change the meaning of the implied terms (although it may indicate the intention of the government department responsible for drafting the 2013 Regulations and the explanatory leaflet).

Jurisdiction

27. Section 4(1) of the 1983 Act confers jurisdiction on the FTT (in England):

- (1) to determine any question arising under the 1983 Act or any agreement to which it applies; and
- (2) to entertain any proceedings brought under the 1983 Act or any such agreement.

This power is subject to sub-sections (2) to (6) which deal with arbitration agreements and the power of the court to determine any question concerning the determination of a site agreement

by the owner. With those exceptions section 4(1) appears to give the FTT a very broad power to determine “any question” or entertain “any proceedings” under the 1983 Act or an agreement to which it applies.

28. The powers of the FTT (and of this Tribunal) when exercising its jurisdiction under section 4 of the 1983 Act are enhanced by provisions introduced into the Housing Act 2004 by the Transfer of Tribunal Functions (Mobile Homes Act 2013 and Miscellaneous Amendments) Order 2014. So far as is relevant, section 231A, Housing Act 2004 now provides as follows:

“231A. Additional powers of First-tier Tribunal and Upper Tribunal

- (1) The First-tier Tribunal and Upper Tribunal exercising any jurisdiction conferred by or under the Caravan Sites and Control of Development Act 1960, the Mobile Homes Act 1983, the Housing Act 1985 or this Act has, in addition to any specific powers exercisable by them in exercising that jurisdiction, the general power mentioned in subsection (2).
- (2) A Tribunal’s general power is a power to give such directions as the tribunal considers necessary or desirable for securing the just, expeditious and economical disposal of the proceedings or any issue in or in connection with them.
- (3) ...
- (4) When exercising jurisdiction under the Mobile Homes Act 1983, the directions which may be given by the tribunal under its general power include (where appropriate –
 - (1) directions requiring the payment of money by one party to the proceedings to another by way of compensation, damages or otherwise;
 - (b) directions requiring the arrears of pitch fees or the recovery of overpayments of pitch fees to be paid in such manner and by such date as may be specified in the directions;
 - (c) directions requiring cleaning, repairs, restoration, re-positioning or other works to be carried out in connection with a mobile home, pitch or protected site in such manner as may be specified in the directions;
 - (d) directions requiring the establishment, provision or maintenance of any service or amenity in connection with a mobile home, pitch or protected site in such manner as may be specified in the directions.”

29. Despite the apparent breadth of section 4, a power to determine questions or entertain proceedings is not the same as a power to grant specific remedies. The FTT has no inherent jurisdiction and may only make such orders or grant such remedies as Parliament has given it specific powers to make or grant. Although it is rather strangely described as part of a “general power” to “give directions”, in section 231A(4)(a) of the Housing Act 2004 Parliament has given the FTT a specific power to require the payment of money by one party to the proceedings to another. Such “directions” may be given where the FTT considers it

necessary or desirable for securing “the just, expeditious and economical disposal of the proceeding.” The use of the word “directions” in this context might give the impression that section 231A(2) is concerned only with procedural matters. It is clear from section 231A(4), however, that the power to give directions is a power to make substantive orders, including for the payment of money, the carrying out of works, and the provision of services.

30. Finally, by section 231C(1) of the Housing Act 2004 a person aggrieved by a decision of the FTT made under or in connection with the 1983 Act may appeal to the Upper Tribunal. This right of appeal is in addition to the right to appeal such a decision on a point of law under section 11 of the Tribunals, Courts and Enforcement Act 2007 and allows for appeals on wider grounds.

The Agreement

31. The agreement under which the pitch is occupied is comprised in a written statement under the 1983 Act prepared on 5 June 1998 to record the terms agreed between a Mr and Mrs Knight, the intended occupiers of the pitch, and Haulfryn Park Homes Limited, the owner of the park at that time (“the Agreement”).

32. The Agreement was in a standard form including all of the statutory implied terms. It is only necessary to refer to implied term 8 in Part III, which recorded that the occupier was entitled to sell the mobile home and to assign the Agreement to a person approved of by the owner, whose approval was not to be unreasonably withheld. Implied term 8(2) recorded that where such a sale and assignment took place:

“the owner shall be entitled to receive a commission on the sale at a rate not exceeding such rate as may be specified by an order made by the Secretary of State.”

A note then recorded that the maximum rate fixed at that time by the Mobile Homes (Commissions) Order 1983 was 10%.

33. The terms of the Agreement were modified with effect from 26 May 2013 on the commencement of the 2013 Act. In particular, section 10 of the 2013 Act abolished the requirement that the approval of the site owner must be obtained before the sale of a mobile home and assignment of a pitch agreement could take place and introduced implied term 7B, referred to above.

The facts

34. The following facts were found by the FTT or are taken from the documents which were provided in evidence to it.

35. In 2004 the Agreement was assigned to the respondent’s father, Mr Frank Gerard, who remained the owner of the home and the person entitled to the benefit of the Agreement until his death on 20 April 2016.

36. In March 2016 the mobile home was offered for sale by Steps Estate Agents, on the instructions of the respondents who were then acting on behalf of their father (they were later granted probate of Mr Gerard's estate). The sales particulars, which included a statement that they did not constitute or form part of any contract, indicated a guide price of £160,000 to £170,000 but made no mention of any commission payable to the park owner. .

37. Shortly after the home was marketed the respondents received an offer of £160,000 from a prospective purchaser who was dependent on the completion of a chain of transactions to sell their own property.

38. At about the same time Miss Elleray was shown the home by Mr Jon Good of Steps, the estate agent. Miss Elleray told the FTT that Mr Good had mentioned that there was a commission to pay to the Park owner, but she had found him "quite vague" on exactly how the commission arrangement worked.

39. A few days after her visit Miss Elleray telephoned Mr Good and made an offer to purchase the home. In her witness statement she said that her offer was £145,000, which was significantly lower than the guide price, but which she had justified by telling Mr Good that the home was not in top condition and needed work to be done to it.

40. On 6 April Mr Good wrote to acknowledge Miss Elleray's offer, saying this:

"In response to your offer of £145,000 plus 10% to Wildcrest Homes upon completion, subject to contract and survey for the above property, we are writing to confirm that the vendors are considering your offer."

41. The respondents and their father decided to accept Miss Elleray's offer. They explained in their evidence that although they had received a higher offer, they had preferred Miss Elleray's because it was not conditional on other sales being completed. Miss Elleray was delighted because, as she told the FTT, she had expected that the respondents would try to push the price up. She said that she was surprised, however, when Mr Good told her that, in addition to the price of £145,000, a commission of 10% would have to be paid to Wildcrest. Miss Elleray told the FTT that she was "quite taken aback by this" but did not question it at the time because she trusted the estate agents as a reputable firm and "thought that this must be the case". At this stage, therefore, the understanding of both parties was that the commission to be paid was in addition to the purchase price of £145,000.

42. On 13 April 2016 Mr Good wrote to Mrs Webb of Nairnsey Fisher & Lewis ("NFL"), a firm of licensed conveyancers whom he had recommended to Miss Elleray as competent to handle the transaction on her behalf. NFL were also the firm acting for the respondents, but Mr Good appears not to have informed Miss Elleray of that fact. In his letter Mr Good told Mrs Webb that he had arranged the sale of the home to Miss Elleray "for the figure of £145,000, subject to contract."

43. Mr Good also enclosed a memorandum of the proposed sale which recorded that the price agreed was £145,000, subject to contract, but added the following:

“Special remarks: purchaser is to pay 10% to Wildcrest on completion”

The memorandum did not make clear whether the 10% payable to Wildcrest on completion was part of the agreed price of £145,000 or was in addition to it.

44. On 19 April Miss Elleray attended NFL’s office and met Mrs Webb to complete money laundering checks and to provide evidence of the source of her funds. Mrs Webb’s notes of that meeting record that Miss Elleray had access to £160,000 as an inheritance. Mrs Webb also completed a *pro forma* purchase questionnaire in which she recorded that the agreed purchase price was £145,000 and that a completion date of 4 May had been discussed with the seller.

45. During her meeting with Mrs Webb Miss Elleray also raised the subject of the commission payable to Wildcrest. Mrs Webb’s file note recorded the discussion, as follows:

“We discussed the fact that Steps Estate Agents had indicated to her that she would be responsible for paying the 10% commission to Wildcrest. I explained to Miss Elleray that I did not consider this is indeed correct and my understanding is that it is down to the sellers to do so.

Miss Elleray is more than happy that I dispute this especially in the fact that I explained should she sell the property again I consider it to be her legal responsibility to pay the 10% to Wildcrest at that time.

In the meantime I confirmed to her that I would contact my colleague and request all the necessary forms. Mrs Elleray is currently living with her friend and therefore would like this to complete asap.”

46. The advice received by Miss Elleray from Mrs Webb seems therefore to have been that the law requires that the commission be paid by the seller of a mobile home, rather than by the buyer.

47. On 22 April Mrs Webb wrote to her colleague, Miss Willis, informing her that she was instructed to act on behalf of Miss Elleray. She requested confirmation that it had been agreed that the 10% commission would be payable by the sellers. No response appears to have been received to this letter and on 9 June Mrs Webb sent an email to Miss Willis again seeking clarity on who was to be responsible for the commission. The letter and email are referred to in a statement prepared by Mrs Webb and tendered to the FTT on behalf of the respondents. No copies of the documents she refers to are attached to that statement.

48. The transaction did not proceed as rapidly as had originally been intended, possibly because of the death of Mr Gerrard. Miss Elleray, who was living in temporary accommodation, became anxious about the slow rate of progress. On 17 August she signed the Notice of Proposed Sale Form prescribed by the 2013 Regulations. In her witness statement

Miss Elleray says that when she signed the notice she was told once again by Mrs Webb that she was not responsible for the commission payable to Wildcrest.

49. On 22 August Mrs Webb went on holiday. In her witness statement she refers to a letter dated 18 August which she wrote to Miss Elleray sending her copies of relevant documents and informing her that Mr Cottrell, a colleague, would now be acting for the respondents. No copy of that letter is available and Miss Elleray's evidence to the FTT was that she had been unaware that Mr Cottrell was acting for the sellers and understood, incorrectly, that he was acting for her in Mrs Webb's absence on holiday.

50. On 24 August a letter was sent to Miss Elleray, apparently prepared by Mrs Webb, (presumably before she went on holiday), enclosing a completion statement which recorded that the funds required to complete the transaction on 9 September were £159,950. The statement showed that this sum included the purchase price of £145,000 and a 10% commission payable to Wildcrest of £14,500.

51. In Mrs Webb's absence Miss Elleray was asked to attend at the offices of NFL where she met Mr Cottrell on 26 August. According to her account she arrived at that meeting understanding that he was to act for her and was not disabused of that notion during her visit. She queried once again who was to be responsible for paying the commission, explaining that Mrs Webb had informed her that it would be paid by the respondents. Mr Cottrell told Miss Elleray that Mrs Webb was wrong. He was, according to Miss Elleray "quite assertive and forceful" and she did not feel in a position to argue, believing that Mr Cottrell "was looking after my interests". She had been anxious to complete her purchase and so had handed over the required funds at the same meeting.

52. At their meeting Mr Cottrell gave Miss Elleray a completed copy of the buyer's information form prescribed by Schedule 1 of the 2013 Regulations. This form should be completed by the seller and provided to the purchaser not less than 28 days before the intended date of completion. The completed Form had been signed by Mrs Bourne and Mrs Hanning but the required information had been inserted by Mr Cottrell in manuscript (as shown in italics below):

"Section 1 – Financial information

(i) Proposed sale price

The sale price of the mobile home is *£145,000*

(ii) Amount of commission payable to the site owner

If you purchase the mobile home, you will be required to deduct the amount of *£14,500* from the sale price and pay this amount directly to the site owner's bank account following the completion of the sale and assignment of the agreement (see note (i))."

53. In his witness statement Mr Cottrell said that when he had asked the respondents to sign the Buyer's Information Form they had queried the sale price of £145,000 and had suggested that the true figure should be £159,500. Mr Cottrell apparently informed the respondents that

he was required to complete the form showing the price in the memorandum of sale prepared by the estate agent. Mr Cottrell described this advice as an error and said that he had also made a mistake by completing the form as he did.

54. The 2013 Regulations allow a park owner a period of 21 days from being given notice of a proposed sale within which to lodge an objection with the FTT. It was therefore decided that completion of the transaction should take place on 9 September, the day after the expiry of 21 days from the date notice of the proposed sale was sent to Wildcrest. In his witness statement Mr Cottrell says simply that completion took place on that date. NFL sent a notice of the assignment in the prescribed form to Wildcrest and informed it that £14,500 had been transferred to its account in respect of the commission due. That letter was sent under Mrs Webb's reference. The notice of assignment is dated 9 September.

55. The other document which had been signed by both sellers and buyer at their meetings with Mr Cottrell was a form of assignment prescribed by Schedule 4 of the 2013 Regulations ("the Assignment Form"). Section 1 of the Assignment Form identified the respondents as the assignor and Miss Elleray as the assignee and then recorded that:

"The assignor assigns the agreement to the assignee along with all the rights and responsibilities under it."

56. Section 2 of the Assignment Form was completed as follows (with manuscript insertions on the printed form shown in italics):

"The assignee has paid the assignor a purchase price of £145,000 (insert sale price)
for (a) the mobile home sited at *6 North End, Lakeview Park ...*
and (b) for the assignment of the agreement."

57. There then followed, under the heading "Payment of commission":

"From the purchase price of £145,000 the assignee agrees to pay to the site owner the amount of £14,500 in respect of the commission due to the site owner under the Mobile Homes Act 1983."

58. When Mr Sunderland of Wildcrest received the notice of assignment and payment of £14,500 he wrote to Miss Elleray informing her that if she had paid £145,000 to the sellers the commission payable to Wildcrest was £16,111.11. That was because to deduct a commission of 10% and to leave a balance of £145,000 the sale price would have had to be £161,111.11. Mr Sunderland then contacted Miss Elleray and offered to assist her in recovering the sum which he considered she had overpaid on the basis that she should have paid 90% of the agreed price of £145,000 to the respondents, with 10%, or £14,500, to be paid to Wildcrest.

59. Mr Sunderland's attempts to obtain repayment from the respondents were unsuccessful and on 2 March 2017 he assisted Miss Elleray in completing an application to the FTT seeking,

amongst other things, a determination that she had overpaid £14,500 which should be returned to her forthwith with interest. The application contended that the commission was payable out of the sale price and not in addition to it, and that as the sale price recorded on the completed Buyer's Information Form and the Assignment Form had been £145,000, that was the total amount Miss Elleray was obliged to pay.

The FTT's decision

60. In its decision of 19 May 2017 the FTT said that its task was to determine the sale price and the commission, if any, payable as part of the sale of the home and assignment of the Agreement on 9 September 2016.

61. After referring to the letter written by Mr Good to Miss Elleray on 6 April purporting to record her offer as being £145,000 plus 10% commission to be paid to the site owner, and noting that Miss Elleray could not say why she had not questioned this, the FTT found in paragraph 27 of its decision that:

“At the end of that day – presumably 6 April – she had a call from Mr Good saying that her offer had been accepted. Thus, the terms of the contract had been concluded before she met anyone from Nairnsey Fisher & Lewis.”

62. On the basis that terms had been agreed on 6 April the FTT went on to reach the following conclusions at paragraphs 42 and 43 of its decision:

“42. Neither Steps Estate Agent nor Nairnsey Fisher & Lewis appeared to have much knowledge of park homes sales or the 1983 Act. The printed part of the documentation was not altered and therefore did not reflect what this Tribunal finds was the contract price which was both agreed by the parties and paid over on completion. The Tribunal believes the Respondents when they said that they had always been told and had understood that the price was £145,000 plus the commission of £14,500. The Tribunal finds that Miss Elleray knew full well from the outset that this was being offered on her behalf, that this was the offer that had been accepted, that this was the approximate market value of the park home and that this was the money to be paid on completion.

43. Unlike the sales of freehold or long leasehold titles in England and Wales, there is no “magic” about what is set out in the contract document. That is merely evidence of terms. It is usually conclusive but in the unusual circumstances that occurred in this case, it is not, as far as this Tribunal is concerned. The other surrounding evidence is more persuasive.”

Those were the FTT's reasons for deciding that the agreed price was £145,000 plus the site owners commission of £14,500, and that there had therefore been no overpayment. It made the further point that no additional sum was payable in commission because under the 2013 Regulations the park owner was entitled to “a maximum of 10%” (rather than 10% in every case) so that even if it was right to regard the sale price as £159,500 Wildcrest was not entitled to any more than the £14,500 which it had received because that figure was “within the 10% threshold”. It added that if Wildcrest wanted 10% it should ensure that its occupational agreements said so.

63. Further light is shed on the FTT's decision by the terms in which it refused permission to appeal. Mr Sunderland had drawn attention to the fact that the letter of 6 April and the memorandum of sale which the FTT had taken as recording terms already agreed before the instruction of NFL had been clearly marked "subject to contract." In refusing permission to appeal the FTT said this:

"The words "subject to contract" are always stated by selling agents because land law dictates that contracts for the sale of a freehold or leasehold interest have to be in writing and state the parties, the price, the property and any other terms after all the usual searches and enquiries are raised. This transaction involved the sale of a chattel i.e. the park home, and the transfer of an occupation agreement which is, in effect, a licence to occupy. Thus, if a contract was entered into on the 6 April 2016, as was found by the Tribunal, the terms were binding as a matter of law unless changed by agreement."

The basis of the FTT's decision, was therefore that a binding contract had been entered into on 6 April.

Issues

64. The following issues arise in the appeal:

- (1) Whether the FTT was correct to find that the parties had reached a legally binding agreement on 6 April 2016.
- (2) If a binding agreement had not been reached on 6 April, whether the true agreement was as recorded in the Buyer's Information Form, the Assignment Form and the Notice of Assignment, each of which stated that the commission was to be paid out of the purchase price of £145,000 rather than in addition to it.
- (3) If so, whether Miss Elleray is entitled to recover the sum she had paid in excess of the contractually agreed commission.

65. Submissions were also received on the general question whether the sum which a park owner is entitled to receive as a commission is always 10% of the total sum payable or whether a commission of less than 10% is permissible, and, if it is, who is entitled to decide in any individual case what that commission should be.

Issue 1: Was the agreement reached by Miss Elleray and Mr Good on 6 April 2016 legally binding?

66. The basis of the FTT's decision was that an agreement had been reached for Miss Elleray to pay £145,000 plus a commission of 10% on 6 April 2016. There is no challenge to the FTT's findings of primary fact, including that Miss Elleray did not contradict Mr Good when he informed her by letter on 6 April that he had communicated her offer of £145,000 plus 10% commission to his clients. Although Miss Elleray said that Mr Good had not made the commission arrangements clear in her conversation with him when she inspected the mobile home, there is no suggestion that she did not understand his letter or appreciate that, as far as the sellers were concerned, she would be the one responsible for payment of the commission and that it would be in addition to the agreed purchase price.

67. The FTT was entitled to find on the evidence that Mr Good had telephoned Miss Elleray on 6 April to inform her that the respondents had accepted her offer, and there is no challenge to that finding. The parties had therefore reached a consensus that the commission of 10% would be payable by Miss Elleray to Wildcrest in addition to the purchase price of £145,000.

68. The FTT was also correct to distinguish between a contract for the sale of an interest in land (which by section 2, Law of Property (Miscellaneous Provisions) Act 1989, may only be made in writing, in a document signed by both parties and containing all of the terms agreed between them) and a contract for the sale of a mobile home. A mobile home is a chattel, and an agreement to station it on a protected site is (usually) a contractual licence which creates no interest in land. There is therefore no reason why an agreement to sell a mobile home and assign a site agreement should not be made orally (although the assignment itself is required by regulation 9(1) of the 2013 Regulations to be made in writing).

69. Despite these matters now being common ground, the FTT was clearly wrong to find that the parties had reached a legally binding agreement on 6 April. In its refusal of permission to appeal the FTT described the events of 6 April as creating a contract the terms of which “were binding as a matter of law unless changed by agreement.” In reaching that conclusion it failed to appreciate the effect of the use by Mr Good of the words “subject to contract” in his letter to Miss Elleray recording his understanding of her offer. He used the same words in the memorandum of sale which he sent to Mrs Webb on 13 April.

70. Where a party makes an offer “subject to contract” it indicates that it has no intention to enter into legal relations unless and until a formal contract is drawn up and executed. The effect of the expression was explained by Mummery LJ in *Yeoman’s Row Management Ltd v Cobbe* [2006] 1 WLR 2964 at [57]:

“Where that well understood expression is used an intention has been expressed to reserve the right for either party to withdraw from the negotiations at any time prior to the exchange of formal contracts. It is made clear that there are no legally enforceable rights before that happens.”

Thus the addition of the words “subject to contract” imposes a condition or reservation which prevents either party becoming bound by the terms which have been agreed until the condition is satisfied.

71. The practice of conducting negotiations “subject to contract” is almost universal in relation to contracts for the sale and purchase of interests in land. But the words have the same effect in the context of other types of contract, as the Supreme Court made clear in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Company KG (UK Production)* [2010] UKSC 14, which concerned a draft contract for the supply of goods. The FTT appears to have considered that a subject to contract reservation could not prevent the coming into existence of a binding contract for the sale of a chattel (the mobile home) and the assignment of the benefit of a contract (the Agreement). It gave no reason for that view and I am satisfied that it is wrong. Although a contract for the sale of a mobile home and the assignment of a pitch agreement could, in principle, be made orally, by introducing the “subject to contract”

condition Mr Good had signified that neither his clients nor Miss Elleray were to be bound until a formal document was executed.

72. Nor does it make any difference that the subject to contract reservation was introduced by Mr Good, rather than by Miss Elleray. I very much doubt that Miss Elleray had used that expression when making her offer on the telephone to Mr Good; nor did the FTT find that, during that conversation, she had offered to pay the commission in addition to the purchase price of £145,000 which she proposed. If Miss Elleray's own offer said nothing about the commission, Mr Good's letter in which he specified an additional term was a counter-offer on the basis of which the parties then proceeded. If Mr Good was simply recording the offer Miss Elleray had made, without adding to it, then by stipulating that the offer was subject to contract he was imposing that reservation for the benefit of both parties.

73. For these reasons the FTT was wrong to find that the parties reached a legally binding agreement on 6 April 2016. They had reached only a non-binding consensus, from which they were each entitled to withdraw until formal contracts were executed. On the evidence, that did not occur until they authorised NFL to complete the sale (on 9 September).

Issue 2: What were the terms of the contract?

74. The consensus between the parties therefore remained conditional until 9 September. On that date the documents in the prescribed form were completed and released, and only at that point did the parties become legally bound to the terms of their contract.

75. For the purpose of determining the parties' contractual rights it does not matter that their prior consensus (including when Miss Elleray handed over the purchase money plus the commission to Mr Cottrell) was that the commission would be paid in addition to the purchase price. Evidence of the parties' negotiations and subjective intentions is inadmissible as an aid to understanding the meaning of their agreement. Nor, at this stage, does it matter that Mr Cottrell made a mistake in completing the documents. What matters is the meaning which an informed observer would attribute to the documents in which the parties recorded their agreement. As those documents are in a standard form, their meaning is of wider importance than simply to the parties in this case.

76. What then was the effect of the agreement contained in the documents? Unfortunately because they follow the forms prescribed by the 2013 Regulations without any attempt to resolve the contradictions which those documents contain, the contractual documents are themselves ambiguous and contradictory.

77. The Buyer's Information Form was a preliminary notice rather than a document with contractual effect in its own right, but it recorded that the agreed sale price was to be £145,000 and informed Miss Elleray that: "if you purchase the mobile home, you will be required to deduct the amount of £14,500 from the sale price and pay this amount directly to the site owner's bank account following the completion of the sale and assignment of the agreement itself."

78. The Notice of Assignment is also intended to provide information (this time to the site owner) rather than to make the contract itself, but it too gives the clear impression that the commission was to be part of the purchase price of £145,000.

79. The effective terms of the agreement between the parties were contained in the Assignment Form, section 1 of which includes the operative provision transferring the benefit of the Agreement from the seller to the buyer (“the assignor assigns the agreement to the assignee ...”). Section 2 of the Form then recorded that the “purchase price of £145,000” had already been paid by the assignee, before stating unequivocally that “from the purchase price of £145,000 the assignee agrees to pay to the site owner the amount of £14,500 in respect of the commission.”

80. As I have already noted, the sequence of events provided for by section 2 of the prescribed Assignment Form is incapable of being achieved. The assignee cannot both have handed over the purchase price to the assignee while simultaneously retaining part of the same purchase price so that it can be paid over to the site owner. It is clear that there has been a mistake in the way in which the agreement has been recorded even without any knowledge of the prior negotiations between the parties (which are inadmissible as evidence of their intention). The mistake is not in the manner in which the form has been completed, but is in the form itself, which is incapable of being completed in an intelligible way.

81. Nevertheless, three things are clear from the Assignment Form and from the way in which the parties and their licensed conveyancers dealt with the funds on 9 September. The first is that it was their intention that Miss Elleray was to pay Mrs Bourne and Mrs Hanning £145,000 for the mobile home. The Assignment Form records that that sum had already been paid to the assignors and, as it imposes no obligation on them to pay the commission, there can no doubt that the assignors were intended to keep the whole of the £145,000. The second intention which is clear from the Assignment Form is that it was Miss Elleray as assignee who was to pay the commission to the site owner. The form deals incoherently with the source of the funds to be used to pay the commission, but it is quite clear about the identity of the party who is to make the payment. Finally, it is clear that the commission itself was to be £14,500. Those intentions are certain both from the language used and because, despite the ambiguity created by the printed form, the way in which it was filled in by the licensed conveyancers, and the way in which the funds themselves were dealt with (without complaint by Miss Elleray at the time of completion) are inconsistent with any other intention.

82. The mistake in recording the transaction was in the printed form, and in particular in the statement that the commission was to be paid “from the purchase price”. That was not the parties’ intention, determined objectively from the completed document, nor is it what happened in practice. In order for the Form of Assignment to make sense it is therefore necessary to disregard those words.

83. Mr Sunderland’s argument based on the DCLG Factsheet referred to in paragraph 26 above was that, as a matter of law, the commission is 10% of the agreed purchase price in every case and the buyer is obliged to pay it out of the agreed purchase price, rather than in addition to the agreed purchase price.

84. The Mobile Homes (Commissions) Order 1983 provides that the maximum sum that a buyer may be required to pay to a site owner is 10% of the agreed purchase price (before 1983 the maximum rate was 15%). In the case of an agreement which is not a new agreement, and is therefore subject to implied term 7B(8), the commission is to be paid by the buyer to the site owner, but there is nothing in the implied term (nor in the comparable term 7A(5) applying to new agreements) to prevent the site owner and the occupier from agreeing that the commission will be less than 10%. Neither the 1983 Order nor the implied terms say what figure the commission rate is to be applied to, but, in the normal case at least, it must be taken that the commission rate is to be applied to the sum which has been agreed as the price payable for the sale of the home and the assignment of the benefit of the Agreement. Other sums may be payable in addition to the purchase price (such as for utilities or contents) but one would not expect those to be included in the calculation of the commission.

85. The difficulty which is created by implied term 8(2) and by the 1983 Order is that the prescribed rate is a maximum, rather than a rate payable in every case; nor is the rate expressly said to be a default rate, which applies unless the parties agree something different. It is unsatisfactory that such a significant element of the bargain between the site owner and the original occupier is left unclear, especially as no machinery is provided to resolve a disagreement over the amount of a commission speedily, where the site owner has no right to refuse consent to an assignment on the grounds that the commission has not been agreed.

86. It is likely that, in practice, the commission rate paid is always 10% of the sum paid by the buyer to the seller. In the absence of an agreement on a lower rate the site owner and the original occupier may be taken to have intended that that would be the rate on each sale. If there is such a practice it would not prevent the site owner and the occupier from agreeing a lower figure, which would be consistent with the implied term and the 1983 Order. Such a practice would fill the gap left by the drafting of the implied term, but it would not be a satisfactory position in which to leave site owners and mobile home occupiers, who would rather have certainty and avoid disputes such as this one.

87. The better solution is therefore likely to be that implied term 8(2) and the 1983 Order must be understood as requiring payment of a commission at the rate stipulated as the maximum permissible in the Order unless a lower rate is agreed. That is not a perfect resolution of the uncertainty created by the statutory drafting, since it takes away the occupier's negotiating position and requires the interpolation of words which Parliament could easily have included, but having received only limited argument on the issue it seems to me to represent a more satisfactory approach than one which provides no clear outcome if the parties cannot agree on a commission rate.

88. It is not for the buyer and seller of the mobile home to agree the rate at which the commission is to be paid. That is a matter for the site owner and the seller, although the statutory scheme provides for the payment to be made by the buyer. But there is no reason why, as between themselves, the buyer and seller may not agree to express the purchase price as a sum plus the commission, or as a sum including the commission. So long as they are clear what amount is to be paid to the seller and what sum is to be paid to the site owner, the buyer and seller may express their bargain in any way they choose. In particular, I do not see how the prescribed terms of the Assignment Form, with its inept reference to the commission being

paid “from the purchase price”, can impose an obligation on parties to express the financial terms of their transaction in a particular way. In practice it is much more likely that parties will think of, and express, the commission as a sum payable in addition to the purchase price, for example as being 10% of the sum receivable by the seller, rather than as 9.0909% of the gross price (including the commission) payable by the buyer.

89. Wildcrest is not a party to this appeal, and Mr Sunderland made it clear that he had no intention of seeking any additional commission from Miss Elleray. The issue of what the appropriate rate of commission under the Agreement should have been therefore does not arise directly in the appeal, and I reach no final conclusion on it. It is to be hoped that the ambiguities revealed by this appeal can be resolved by a revision to the implied terms and the prescribed forms so that the default rate of commission and arrangements for its payment are made certain.

Conclusion

90. In this case the parties negotiated for a purchase price of £145,000 and understood that a commission of £14,500 was payable by Miss Elleray in addition to that price. I am satisfied that, properly understood, the Assignment Form gave effect to those terms. I am also satisfied that there was no restriction on the parties’ freedom to contract on that basis. For those reasons the appeal is dismissed.

91. In view of my conclusions on the first and second issues, the third issue does not arise. Nevertheless, as the issue was debated during the hearing, I add some brief observations on the jurisdiction of the FTT in mobile homes cases.

92. There was some discussion about the consequences if the proper meaning of the Assignment Form was that the commission was payable out of the £145,000 purchase price. In that event, subject to any defences available to the respondents, the FTT would in principle have had a discretion under section 231A(4) Housing Act 2004 to require repayment of part of the purchase price.

93. It may be that whether such an order would have been made would depend, amongst other things, on whether it was “necessary or desirable for securing the just, expeditious and economical disposal of the proceedings or any issue in or in connection with them.” The language of section 231A(2) is discretionary, and the FTT would not have been compelled to make an order which it clearly considered to be unjust.

94. On the facts of this case there would have been a strong claim for rectification of the Assignment Form to bring it into line with parties’ shared subjective intention. Despite the breadth of section 4 of the 1983 Act, I am satisfied that the FTT does not have power to grant the remedy of rectification so as to correct a defective instrument and make it accord with the true bargain reached between contracting parties; section 231A(4) does not give it such a power in the case of claims in relation to agreements to which the 1983 Act applies. Nevertheless, if it was satisfied that the Assignment Form did not accurately record the parties’

true intentions, it would have been possible for the FTT to achieve justice in this case by refusing to make an order for repayment under section 231A(2).

Martin Rodger QC
Deputy Chamber President
12 January 2018