LRX/41/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – section 24 Landlord and Tenant Act 1987 – breadth of LVT's power to appoint manager –reliance on decision of earlier LVT – whether application raised issue estoppel and/or abuse of process –Cawsand Fort decision – effect of change of law – exercise of power to dismiss under Regulation 11 of Leasehold Valuation Tribunals (Procedure) (England) Regs 2003 – whether also an inherent power)

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN DR C. J. AND MRS J. M. SCHILLING Applicants

and

CANARY RIVERSIDE ESTATE MANAGEMENT LTD Respondent

Re: Mixed Use Residential / Commercial Estate 32,36,38 & 48 Westferry Circus London E14

Before: His Honour Judge Mole QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL on 19 May 2008

Dr C.J. and Mrs J.M. Schilling Appellants (in person)
Mr Timothy Fancourt QC and *Mr Oliver Radley-Gardner* instructed by Eversheds for the Respondent Landlord

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The following cases are referred to in this decision:

Arnold v National Westminster Bank PLC [1991] 2 WLR 1177
Johnson v Gore Wood [2001] 2WLR 72
Mean Fiddler Holdings v London Borough of Islington (Lands Tribunal, 9th of September 2003.)
Volosinovici v Corvan Properties Ltd **(**Lands Tribunal**,** 16th July 2007.)
Connolly v DPP [1964.] AC 1254
Carl Zeiss [1967] 1 AC 853, 947
Mills v Cooper [1967] 2 QB 459
Property and Reversionary Investment Corporation Ltd v Templar [1977] 1WLR 1223
Johnson v Gore Wood and Company [2001] 2WLR 72.
Bradford and Bingley Building Society v Seddon [1999] 1WLR 1482.
Cawsand Fort Management Company v Stafford [2008] 1WLR 371
Donnelly V. DPP [1964] AC 1254

DECISION

1. In this matter Dr and Mrs Schilling appeal, with the permission of the Lands Tribunal, from the decision of the Leasehold Valuation Tribunal, given on the 5th of February 2007, refusing their application under section 24 of the Landlord and Tenant Act 1987 for the appointment of a manager in respect of premises at the Canary Riverside Estate. Dr and Mrs Schilling are leaseholders of flat 131, Eaton House .The respondent, Canary Riverside Estate Management Ltd, is the head leaseholder of the estate. The Leasehold Valuation Tribunal was chaired by Mr P. Leighton LLB and I shall refer to it hereafter as "the Leighton LVT" to distinguish it from an earlier LVT, chaired by Mr A. Dutton, to which I shall refer as "the Dutton LVT".

2. The estate in question consists of four residential tower blocks, of which Eaton House is one, containing a total of 322 flats, restaurants and offices. There is an hotel with 142 rooms, and a building comprising a health club, swimming pool and restaurant. There are car parks on two levels, one of which contains a car washing area. There are plant rooms providing services to both residential and commercial premises in the basements of the residential blocks. The buildings are surrounded by gardens and walkways. It will be evident from that brief description that the estate has substantial elements of both residential and commercial use and that they intermingle.

3. To understand the issues in this case it is necessary to look at the history in a little detail. There have been a number of applications relating to the management of the residential premises by Dr and Mrs Schilling, acting on their own behalf and on behalf of other tenants in the estate. On the first of December 2003 an application for the appointment of a manager under section 24 came before the Dutton LVT. The grounds of the application were wide and made a number of detailed allegations alleging breaches of obligations under the leases, unreasonable service charge demands, and failures by the various managers of the estate. The initial position of the applicants, who were legally represented, was that they sought an order for the management of the whole estate. In response to this, counsel for the respondent landlord, Mr Fancourt QC, took the point that the wording of section 21 (2) of the Act precluded the LVT from making a management order which included purely commercial premises.

4. The Dutton LVT referred to the wording of section 24 (2) (b) which require the tribunal to be satisfied "that other circumstances exist which make it just and convenient for the order to be made." Given that the law seemed to be that section 21 (2) precluded the LVT from making an order in respect of any commercial elements, the Dutton LVT decided to proceed on the basis that the real issue was whether or not it could be "just and convenient" for an order to be made where one manager would deal with the residential premises, together with such appurtenances as might be appropriate, whilst another manager would deal with the commercial elements . The Dutton LVT inspected the premises and heard evidence from Mr Rendall, a prospective manager, about the management of the estate and the potential for splitting it. There was consideration about what would constitute appurtenances to the residential premises.

5. The Dutton LVT set out their conclusions and the reasons for them thus:

28. "As a result of the Applicant's concession that they would not be entitled to manage the whole of the estate, the issue, in our finding, came down to whether or not it would be "just and convenient" to remove the management of the whole of the estate from the Landlord's manager and to place part of the management, namely the Residential Premises and Appurtenances in the hands of Mr Rendell of Rendell Rittner Limited.

29. The original application related purely to the Residential Premises. The proposals and draft Order appeared to seek management of the whole of the estate. Initially Mr Fairweather continued to support this suggestion, subsequently conceding that the management should be limited to the Residential Premises and those parts of the estate which were appurtenant thereto and which were not, even at the time the matter was put to us, agreed. There was in our finding, no agreement as to whether the whole of the car-park all part of the car-park should be included within the management order. There was debate as to whether the garden and walkway should be included. There was also some doubt as to whether the plant rooms situated under the residential blocks would fall within the management of the commercial manager or the residential manager.

30. The real nub of this matter is whether or not it would be appropriate, that is to say "just and convenient" to appoint a manager to deal with part of the development, as opposed to the whole, bearing in mind the accepted position in this case that we had no power to order management of wholly commercial premises. We considered each of the most important services provided, to consider which parts of the estate benefited, and whether their allocation to one or other of the separate managers would be possible and, if so, whether or not it would be "just and convenient"."

Security. The responsibilities of the security personnel relate in the main to the Residential Premises, the grounds and the car parks. There is a control room adjacent to the main entrance gate within Hanover House. However, as a service that includes all the common parts it is enjoyed by commercial and residential lessees alike and it would not in our finding, be feasible to employ separate security arrangements with split responsibilities.

Porters. The porters are responsible only for services to the blocks of flats and could be managed entirely by a manager of the residential blocks without an impact on the commercial users. However, it was suggested that the porters' skill be enhanced to take on some maintenance responsibilities which could confuse this present clear demarcation.

Utilities. Electricity, gas and water services enter the estate at various points, mostly in the basement areas of the Residential Premises. The electrical power comes to the estate at high voltage and is then converted at a number of transformer stations to serve the individual buildings.

The incoming supply is bought for the whole estate and resold to the lessees and it is the role of (the) purchaser that has to be considered. Mr Rendell's ability and knowledge of the tasks involved was challenged by the Respondent. The real question is whether the role can be split. It is our finding that it would not be just and convenient so to do. One manager would have to buy the supply and recharge either the other manager, or all the individual to lessees in the other management adding a further layer of administration. The other utilities, being metered at the point of usage or allocated individually may be capable of separation.

Cleaning buildings. Separation of this service would present no apparent problems, although there may be an impact on "economy of scale" charges if separate contractors were used.

Cleaning grounds and gardening. The gardens and walkways are enjoyed by all lessees, and splitting personnel would be, in our finding, impracticable. The allocation of costings would in our finding be a potential bone of contention.

Building maintenance and reserves. In so far as this service relates to the individual buildings from the ground floor up there is, on the face of it, no reason why repairs cannot be carried out by separate managers. The question of reserve funds could prove problematic especially with regard to those elements of the buildings that lie below the ground level (and) are not, in our finding, so easily divisible. The lower level car park is effectively the basement and foundations for the whole of the main estate. It contains a mix of residential and commercial user. Including the public car park. The upper level car park spans parts of the lower level that are in commercial use. The loading bay, serving the whole estate also needs to be considered. Plant rooms below the Circus Apartments contain equipment serving the Residential Premises and, for example, Health Club and Hotel services are to be found in plant rooms within the basements of the Residential Premises. It is not possible to extend a notional vertical boundary of the residential buildings down through the two basement levels to create a meaningful division. In addition there are matters such as pest control and signage, CCTV and the maintenance of paths and estate fences that do not lend themselves to division.

Health and safety. In so far as this concerns occupation of buildings responsibility could be split but there are sure to be issues concerning the common parts shared by both residential and commercial users where division is impracticable.

Insurance. Whilst the residential blocks appear above ground level to be self contained and capable of separate insurance, the overlapping in the car parks/basement areas would make this at least complicated. Mr Rendell acknowledged that cover for the whole estate would be needed

to achieve the lowest premium and splitting is not considered a feasible option.

Management fees. Splitting management fees would appear to present no problem.

Upper level car park. This is entirely in residential use and any costs associated with it could be managed as part of the management of the residential blocks.

Lower level car park and separately the loading bay. Some residents have spaces in a discreet section of the lower level Park but the remainder is used: partly as commercial "pay and display" car park, with supervisory staff and barriers, partly by the hotel, the Circus Apartments and the car hire company; and partly for deliveries. In addition it is a thoroughfare for loading and unloading for the whole estate, including the collection of rescues and service access to the restaurants. It gives access to many of the plant rooms, service ducts and stores. It would be in our finding impracticable to allocate responsibility for this area to either the residential or the commercial elements.

32. We have considered the possibility of separate managers having distinct responsibilities for individual services on a recharge basis when services are shared. In order to avoid this becoming management of the other part it would mean recharging the other manager of the total of the appropriate portions provided in the lease. Each one, in receipt of a service charge would then recharge of the individual lessees their share of the total. This would insert a layer of administration and a cost that is not presently incurred.

33. It is possible that the two managers could amicably agree the apportionment of those charges that have to be allocated to one management but shared with the other. However the opportunity for disagreement is great, as is the likelihood that lessees in one management would complain about the quality of service provided by the other, and lines of communication would become frustrating.

34. We have concluded that the estate was built as one unit, intended to be managed as one and could not conveniently be split between the residential and the commercial elements.

35. We find that even if, on evidence still to be adduced, we were to consider that the tests on breaches of the lease, unreasonable service charges or breaches of the Code had been satisfied, we would have concluded that the application would not pass the final test both in relation to those specific matters, and generally, of it being "just and convenient" to make the order."

6. An application for leave to appeal against the decision of the Dutton LVT was refused by the Lands Tribunal. There followed further proceedings, including further proceedings in the LVT and Lands Tribunal, which are not directly relevant to this matter.

7. On the 7th of September 2006 Dr and Mrs Schilling made a further application under section 24 of the 1987 Act. At a directions hearing held on the 27th of September 2006 the tribunal directed that certain preliminary issues should be heard. They were:

> "(1) Whether the Tribunal had any jurisdiction to make an order for the appointment of a manager over the property which extend beyond the "building" as defined in the Applicants' lease and properly apurtenant thereto (including the gardens and lower car park as sought by the Applicants).
>
> (2) Whether the tribunal is precluded from appointing a manager because the issue is res judicata by reason of the decision of the Tribunal on the first application and/or is an abuse of process in view of the reasons given by the Tribunal on the previous application by the Applicants and determined on the 5 January 2004.
>
> (3) (This issue was no longer live by the time of the preliminary hearing.)
>
> (4) A determination on whether the Applicants were entitled to seek an order under section 20C of the Landlord and Tenant act 1985 preventing the landlords from adding the costs of the application to the service charge account."

8. These issues were heard by the Leighton LVT on the 18th and 19th of December 2006. The Leighton LVT quoted paragraph 31 of the Dutton LVT' s decision, noted how it had reviewed the services and reached a view on each one of them, and set out the Dutton LVT's conclusion in paragraph 34. The Leighton LVT considered the respondent's submissions about issue estoppel, which it dealt with in this way:

> 42. "The action of the Tribunal in finding an estoppel however, would be a significant restriction upon any residential leaseholder commencing proceedings for an application because of the nature and layout of the estate.
>
> 43. The Tribunal noted that the Dutton Tribunal had considered that it was not necessary to consider these specific allegations in the Section 22 notice in that case as even if they were all proved, it would still not be just and convenient to make an order.
>
> 44. The Tribunal is always reluctant to prevent a party having the full opportunity of putting its case but it is also conscious that the doctrine of estoppel exists for the purpose of putting an end to litigation and preventing issues being constantly relitigated.
>
> 45. The finding made by the Dutton Tribunal that the nature of the estate rendered the appointment of a manager not "just and convenient" is as Mr Fancourt submits a powerful finding and on grounds which the Lands Tribunal found "cogent and compelling".
>
> 46. The Tribunal is satisfied on the evidence and from its own inspection of the estate that the structures and uses of the buildings and facilities are virtually identical to what existed in 2004 and that any minor alterations would not be sufficient to vary the findings of the Dutton Tribunal.

47. The Tribunal was informed that if it were to find against an estoppel there would need to be a further hearing to determine the issue of “just and convenient” which would almost certainly involve a further inspection, a further detailed analysis of the evidence which was before the Dutton Tribunal and any changes (if any) which could be established.

48 As the terms of the original directions did not require the Tribunal to undertake that exercise it is very likely that if it had to do so it would have come to the same conclusion as the Dutton Tribunal because there were so many striking similarities.

49. Whilst the question of estoppel is a legal technical question on which the Tribunal has expressed its opinion in the light of the legal submissions, it is in no doubt that little useful purpose would be served and much cost, time and expense would be incurred in relitigating these issues further.there has already been more than sufficient litigation between these parties most of which will have to be paid by the residents of the estate.

50. It seems almost inevitable to the Tribunal that this estate will continue under a single management and in the Tribunal's view the best course would be for constructive dialogue between the parties to try to make that work in the best interests of the tenants. Perhaps the most encouraging feature of this litigation was the fact that the Applicants were able to have some constructive discussions with Mr Short at the hearing and the Tribunal considers that the that may be a more fruitful path to follow then the present litigation.

9. The LVT's conclusions were:

57. Accordingly the Tribunal finds that it has no jurisdiction to make an order in relation to the lower car park and the gardens.

58. The Tribunal further finds that there is an issue estoppel in this case which binds the Tribunal based on the findings of the Dutton tribunal that it is not “just and convenient” to make an order appointing a manager to manage the residential parts of the estate separately from the commercial sections.”

The Law

10. The Landlord and Tenant Act 1987, section 24, reads, so far as relevant, as follows:

“24(1) a leasehold valuation tribunal may, on an application for an order under this section, by order... appoint a manager to carry out in relation to any premises to which this Part applies-

(a) such functions in connection with the management of the premises, or
(b) such functions of a receiver,

or both, as the tribunal thinks fit.

(2) a leasehold valuation tribunal may only make an order under this section in the following circumstances, namely --

(ab) where the tribunal is satisfied –

(i) that unreasonable service charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;"

There are a number of sub paragraphs covering various eventualities, each one of which is subject to the requirement that it should be just and convenient to make the order in all the circumstances of the case.

11. The Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, regulation 11, provides-

"11(1) subject to paragraph (2) where-

(a) it appears to a tribunal that an application is a frivolous or vexatious or otherwise an abuse of process of the tribunal: or

(b) the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal

the tribunal may dismiss the application, in whole or in part.

(2) Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).

(3) Any notice under paragraph (2) shall state –

(a) that the tribunal is minded to dismiss the application;

(b) the grounds on which it is minded to dismiss the application;

(c) the date (being not less than 21 days after the date that the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.

(4) An application may not be dismissed unless –

(a) the applicant makes no request to the tribunal before the date mentioned in paragraph (3) (c); or

(b) where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application.

The Appellants' Case

12. Dr and Mrs Schilling put in a full skeleton and, with my permission, they both made clear and helpful oral submissions. Their first ground addressed the issue of abuse of process, noting, as HHJ Huskinson had done when granting leave on 13 July 2007, the fact that the Leighton LVT gave a heading to issue 2 of "res judicata/issue estoppel or abuse of process". I observe, as did HHJ Huskinson, that the Leighton LVT does not appear to have reached any conclusion on abuse of process, either under regulation 11 or some inherent power. Nonetheless, conscious that the respondents were arguing for the existence of an inherent power to dismiss, Dr Schilling addressed this point. He submitted that Regulation 14(7) (a) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 expressly provides in respect of the LVT hearing -- the Tribunal shall determine the procedure (subject to these Regulations)..."

13. The procedure in respect of dismissal as an abuse of the process of the Tribunal is set out in Regulation 11. In particular, Regulation 11(4) says an application "may not be dismissed" as an abuse unless, after a notice from the Tribunal setting out that it is minded to dismiss the application on that basis and why and inviting the applicant to appear and be heard on that question, either the applicant has failed to respond or the LVT has actually heard the appellant on that point. Although the Leighton LVT directions of 27 September 2006 did mention as an issue, or part of one, the possibility of abuse of process, none of the requirements of Regulation 11 were satisfied. In particular, the Applicants had not been heard on the issue of dismissal. An issue estoppel was to be equated with an abuse of process for the purposes of these regulations.

14. Regulation 14(7) (a) precluded the LVT from bypassing the procedural protections of regulation 11, relying on a claimed inherent power to dismiss for abuse. The case of *Mean Fiddler Holdings v London Borough of Islington* (9th of September 2003) HHJ Michael Rich QC and N. J. Rose Esq. FRICS, which found that there was such an inherent power in relation to the Lands Tribunal, was nothing to the point.

15. Dr and Mrs Schilling's second ground related to the question of jurisdiction. Since it was conceded by the Respondents that the Leighton LVT did err in law it was not necessary to say more about that.

16. The Applicants' third ground is to the effect that the Leighton LVT failed to take into account several issues raised in the Applicants' Statement of Fact dated 26th October 2006. Those issues were the Applicants' underlease of part of the building and the upper car park and the lease provisions in respect of management, which did not preclude the Building Landlord using the same manager as the Head Landlord, and thus had a bearing on whether it was almost inevitable that the estate should be under single management.

17. The Applicants addressed issue estoppel under their ground 4. It was submitted that the doctrine of issue estoppel was not inflexible. In the case of *Arnold v National Westminster*

Bank PLC [1991] 2 WLR 1177 Lord Keith said that the operation of issue estoppel could be prevented in “special” circumstances or, per Lord Lowry (at 1191G), “exceptional” circumstances. If an issue estoppel arose in the terms argued for by the Respondents, it would arguably bind the tenants for the remaining 990 years of their leases.

18. The *Cawsand* decision in respect of the LVT's jurisdiction represented a change in the law that was significant to the decision of the Dutton LVT. It was evident that a view of their jurisdiction, a view that has turned out to be wrong, “coloured” as Dr Schilling put it, the Dutton LVT's conclusions in paragraphs 31 to 34 of their decision.

19. A number of factual points were made. The Leighton LVT did not take into account that the Dutton LVT had not ordered a full disclosure of the Estate head leases and under leases and other documentation relating to the provision of services on the estate. There were errors in the Leighton LVT's decision: the head leases were not all vested in Canary Riverside Estate Management, as the head lease of the hotel was vested in Yannis Hotels Ltd; Octagon Overseas, as freeholder of the estate was, all might be, liable to play some part in the management of the estate; some lower car park spaces were demised as part of the apartment demises; the “committee room”, referred to by the Leighton LVT, had been a residents' community room at the time of the Dutton LVT but was now used as offices; the control room in Hanover House does not serve more than the residential premises. Other matters were not fully appreciated by the LVT: although the Estate was managed by a single manager it was not managed as a single entity; the provision of services was in several respects different from the impression given to either or both the Dutton LVT and the Leighton LVT.

The Respondent’s Case

20. The respondent put in a helpful skeleton for this hearing and incorporated the reply and statement of case as well as the skeleton before the LVT, so far as it was still relevant.

21. The LVT decided that they had no jurisdiction to appoint a manager to carry out functions in respect of the lower car park and gardens. This point was argued before the decision of the Court of Appeal in *Cawsand* and the respondent concedes that in the light of that decision, there is jurisdiction under Part II of the Act of 1987 to confer management functions in respect of all property over of which tenants have rights, even though it is not physically part of the building nor within its curtilage, so long as there is a causal link or nexus between the functions to be carried out by the manager and the premises defined in section 21 (1), and that those functions are ones which the tenants are entitled to enjoy “in relation to the premises of which their flats are part.”

22. For that reason Mr Fancourt made it clear that he could not uphold the decision of the LVT on that point. He does, however, argue that it should be upheld on the basis that the LVT was right to dismiss the application on the basis of *res judicata*. He also seeks to maintain the point that the appeal should be dismissed on the basis that the renewed application for management of parts of the estate was, in all the circumstances, an abuse of process. If it could

not be brought within Regulation 11, then it falls within the LVT 's residual jurisdiction to protect its procedures and process from abuse.

23. Mr Fancourt expanded his *res judicata* point by first setting out the relevant law. He submitted that the basic principle underlying the doctrine of *res judicata* is that a person is not entitled to litigate a matter again if the same matter has already been formally determined between the parties. He distinguished cause of action estoppel and issue estoppel. The latter arises where a factual or legal issue (or an issue of mixed fact and law) has already been determined between the parties, even though the claim may be different. He accepted that cause of action estoppel could not be evoked because part II of the 1987 Act permitted the making of more than one application for a manager and, with the possible reservation that there had to be some materially different circumstances, the making of a new application could not be regarded as the relitigation of the previous application.

24. Issue estoppel, however, is directly to the point, he said. The Dutton LVT, after a full investigation of the facts and a view came to the conclusion that, assuming every allegation made by the Applicants was true, it was impracticable because of the way the Estate was designed to split the management of it between the residential and commercial elements. Therefore, it could not be "just and convenient" to appoint a manager. This clear finding (paragraphs 10 -- 11 of the Dutton Tribunal) was endorsed by the Lands Tribunal.

25. I was taken to the speech of Lord Keith in *Arnold v National Westminster Bank* [1991] 2 AC 93, starting at 1187A. Mr Fancourt particularly stressed the passage at 1187F, which I shall set out below. I was also shown the speech of Lord Bingham in *Johnson v Gore Wood* [2001] 2WLR 72, at 88. Mr Fancourt summarised his submissions on the law as being that, where the Tribunal has reached a clear and final decision on a particular issue, an issue estoppel arises unless it is arguable that new or different circumstances arise that could credibly make a difference to the determination of that issue at a new hearing. Mr Fancourt then turned to a careful and thorough analysis of the material and arguments before the Dutton LVT in order to see whether there were any facts that might have a significant bearing on the correctness of the decision and which were unknown at the time or could not reasonably have been known. He reminded me of the circumstances of the Dutton LVT's consideration of the 'just and convenient point.'

26. As for the claimed material changes, such as the car wash on the lower level of the car park instead of spaces or the change in status of the "committee room", these were immaterial to the decision of the Dutton LVT. The complaints now being advanced, said Mr Fancourt, though not trivial, are, by comparison with those before the Dutton LVT, less numerous and less serious. There were no factors which could have a significant bearing on the correctness of the Dutton LVT's conclusions that were unknown at the time or not reasonably available. The important provisions of the leases were available to and understood by the Dutton LVT. Commercial head leases had not been provided, but neither were they available to the Leighton LVT and were of no significance. The Management Proposal of 2003 was not a demonstration that the applicants' contentions were right, so much as intelligent contingency planning in case "the worst", in the view of the respondent, happened and the LVT ordered a split management.

As for the alleged errors, there was a slip in respect of names but it was of no consequence and the points in relation to Octagon, the position of the lower car park and the central control room, were either not errors at all or were conclusions open to the Leighton LVT on the evidence before them.

27. To Dr Schilling's submissions on the relevance of the *Cawsand* decision , Mr Fancourt replied that the Dutton LVT did not make any decision on jurisdiction. Nor was there anything that would have or might have changed so far as the basis for the Dutton LVT's decision was concerned. The Dutton LVT proceeded on the basis that a broader category of appurtenances might be included, which amounted to the same approach as was taken in *Cawsand*. In short, Mr Fancourt submitted that the central facts of the nature of the estate have not changed in any way that matters. No special nor exceptional circumstances have been made out that would justify not applying the principle of issue estoppel to this matter.

28. The respondent's final submission was that although it is accepted that the Leighton LVT did not expressly find that the new application was an abuse, it is tolerably clear that it regarded the renewed application as pointless and a waste of time and money because the applicants would have "insuperable difficulties, as the Leighton LVT said in refusing permission to appeal, in establishing that it would be just and convenient to appoint a manager. This was a clear indication that if the Leighton LVT had felt themselves unable to dismiss the application on the basis of res judicata or issue estoppel, they would have decided against it on the basis that it amounted to an abuse of the process of the LVT. On that basis, he said, in exercise of the Lands Tribunal's inherent powers, I should dismiss the application as an abuse of process at this stage.

29. Alternatively, Mr Fancourt made submissions about Regulation 11, questioning whether the detailed requirements of that regulation could have any part to play, particularly where a hearing had actually taken place at which a point was, to a degree, canvassed. Further, Regulation 11 gave an additional jurisdiction and did not supplant the LVT's inherent jurisdiction to protect its process. He drew an analogy with the powers of the Lands Tribunal in the case of *Mean Fiddler Holdings v London Borough of Islington*.

30. After the hearing was concluded, Mr Fancourt very properly and helpfully wrote to me to draw my attention to the decision of HHJ Huskinson in *Volosinovici v Corvan Properties Ltd*, decided on the 16th July 2007. He pointed out in his covering letter dated 22nd of May 2008 that HHJ Huskinson does not appear to have been referred to the decisions of *Mean Fiddler* nor to *Connolly v DPP* [1964.] AC 1254, per Lord Morris at 1301, nor were the arguments about the inherent jurisdiction and the "supplementary" nature of Regulation 11 rehearsed before the tribunal. (I record that Mr Fancourt said that copies of this decision had been sent to Dr and Mrs Schilling but I have not received any further submissions from them on it.)

Discussion and Conclusions

31. The limits of issue estoppel, so far as relevant to this case, have been authoritatively drawn in *Arnold v National Westminster Bank.* At page 1187A, Lord Keith said:

> "It is to be noted that there appears to be no decided case where issue estoppel has been held not to apply by reason that in the later proceedings a party has brought forward further relevant material which he could not buy reasonable diligence have adduced in the earlier. There is, however, an impressive array of dicta of higher authority in favour of the possibility of this. It was argued for the defendants that exceptions to the rule of issue estoppel should be admitted only in the case of the earlier judgment being a default or a foreign judgment and further that an exception should not be recognised where the point at issue had actually, as here, been raised and decided in the earlier proceedings, but only where the point might have been but was not so raised and decided. The later dicta are, however, adverse to these arguments. It was argued that there was no logical distinction between cause of action estoppel and issue estoppel and that, if the rule was absolute in the one case as regards points actually decided, so it should be in the other case. But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl Zeiss* case [1967] 1 AC 853, 947.
>
> It is next for consideration whether the further relevant material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact, or whether what may not entirely inappositely be described as a change in the law may result in, or be an element in special circumstances enabling an issue to be re-opened. Counsel for the plaintiffs argued that the passage quoted above from the judgment of Diplock LJ in *Mills v Cooper* [1967] 2 QB 459, 468 -- 469, specifically recognised the possibility of a change in the law having this effect, by its references to "an assertion, whether of fact or of the legal consequences of facts" and to "further material which is relevant to the correctness or incorrectness of the assertion." A

change in the law, so it was contended, must clearly be further material which was relevant to the correctness or in correctness of an assertion of the legal consequences of facts. I do not, for myself, feel able to accept that Diplock LJ had a change in the law in mind when he wrote the passage in question. If he had done so, I consider that he would have expressed himself more specifically. Your Lordships should appropriately in my opinion, regard the matter as entire and approach it from the point of view of principle. If a judge has made a mistake, perhaps a very egregious mistake, as is said of Walton J.'s judgment here, and a later judgment of a higher court overrules his decision in another case, to considerations of justice require that the party who suffered from the mistake should be shut out when the same issue arises in later proceedings with a different subject matter, from re-opening that issue?"

32. Having posed the question, Lord Keith turned to the case of *Property and Reversionary Investment Corporation Ltd v Templar* [1977] 1WLR 1223, which actually concerned an application for leave to appeal out of time. Two and a half years after the determination of the case the Court of Appeal had reversed two decisions that had proceeded on the same basis. The Court of Appeal granted leave. Lord Keith quoted Cumming-Bruce LJ, who put the point pithily when he said (pages 1225 -- 1226):

> "Now that the House of Lords has decided that the proper construction of the contract is other than that decided by the judge, I agree that there are special circumstances here because it does not seem just that future obligations between the parties to the lease should depend upon the construction now shown to be wrong."

33. Lord Keith continued:

> "In the instant case there was no right of appeal against the judgment of Walton J. because he refused to grant a certificate that the case included a question of law of general public importance. There can be little doubt that he was wrong in this refusal, as is shown by the large volume of litigation on the construction of rent review clauses and the decisions in that field which I have mentioned earlier. I consider that anyone not possessed of a strictly legalistic turn of mind would think it most unjust that a tenant should be faced with a succession of rent reviews over a period of over 20 years all proceeding upon a construction of his lease which is highly unfavourable to him and is generally regarded as erroneous."

And then, at page 1189B:

> "The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to reopen the disputed issue."

34. Lord Keith agreed with Sir Nicolas Browne-Wilkinson V-C that:

> "In my judgement a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of the new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess."

35. The relationship between issue estoppel and abuse of process was examined further by the House of Lords in *Johnson v Gore Wood and Company* [2001] 2WLR 72. Lord Bingham quoted Auld LJ in the case of *Bradford and Bingley Building Society v Seddon* [1999] 1WLR 1482. He went on to say (at page 90A):

> "But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

36. This passage, in my judgment, serves to reinforce the point made by Lord Keith in *Arnold* that the issue for a judge considering a claim of issue estoppel is whether, in the circumstances of the particular case, considerations of justice require that a party be shut out from reopening an issue previously determined. The judgement must be a broad merits-based judgement, taking account of public and private interests and focusing on the crucial question whether the party seeking to reopen the matter is abusing the process of the Court. In the present case it is important not to lose sight of the fact that this application arises in the context of statutory provisions intended to benefit tenants and which do not seek to limit the number of applications a tenant may make. As Lord Bingham said, the public interest in seeing an end to litigation is of little weight in circumstances where (whether in connection with rent reviews or

applications for a manager under the Landlord and Tenant Act 1987 seems to me to make little difference) the lease or the statute contemplates that there may be repeated examination of the same issues. As Auld LJ said (in *Bradford & Bingley*, above at 1492) "mere re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process." In my judgement, in the circumstances of applications to the LVT under section 24, justice is more likely to be served by considering the broad question whether repeated applications amount to an abuse of the process of the tribunal, rather than in analysing the principles of issue estoppel. Examination of the question whether an application amounts to an abuse will require consideration of all the facts and circumstances, including previous applications, and will be decided on the merits at the time. It seems to me that this would be in accordance with the intentions underlying the 1987 Act. By contrast application of the principles of issue estoppel would amount to a complete bar to relitigation, absent materially different or special circumstances. In the circumstances of applications under the 1987 Act, possibly, as in the present case, in respect of very long leases, it seems to me to be fairer to take a cautious approach to issue estoppel and focus upon abuse of process.

37. It is also clear from the decision of the House of Lords in Arnold that a change in the law is capable of bringing a case within an exception to issue estoppel. In the decision in *Cawsand Fort Management Company v Stafford* [2008] 1WLR 371, at paragraphs 31 -- 34 the Court of Appeal said this:

> "30. (Counsel for the company) correctly pointed to the fact that the opening words of section 24(1) contain the expression "premises to which this Part applies". He submitted that the manager can only be validly appointed of, over or in respect of a building (together with its curtilage) to which the 1987 Act applies, and not of, over or in respect of other premises such as, for instance, the amenity land.
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> 31. As David Richards J. observed during argument, this submission which concentrates on "the premises", does not give full effect to the language of section 24 (1), which refers to the appointment of a manager to carry out functions "in relation to" any premises to which Part II applies. This clearly requires a causal link or nexus between the functions to be carried out by the manager and the premises defined in section 21 (1), but it does not confine the manager's functions to buildings and their curtilages. The power of the tribunal is broader than simply appointing a manager of or over the premises as a building or part of a building. For example, the recreational rights were granted by the company over the amenity land. Although they were not granted over the buildings containing the flats, it is an accurate use of language to describe the rights granted over the amenity land as being "in relation to" the premises consisting of the building which contains the lessees' flats. In those circumstances and order appointing a manager to carry out functions "in relation to" the premises may extend to the amenity land and other land not within the buildings or their curtilages.
>
> 32. The section goes on to provide what functions the manager may be appointed to carry out, i.e. functions "in connection with the management of the premises" which may include repair, improvements and maintenance under section 24(11). This fourth step involves a decision by the tribunal as to what management functions in

> connection with the premises the manager should carry out "in relation to" the premises.
>
> 33. In my judgment, the flaw in the company's submissions on the construction of section 24 stems from narrowly concentrating on the definition of "the premises to which the Act applies" and neglecting the self evident purpose of the provision and the width of the language in which the power of the tribunal is expressed.
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> 34. The practical purpose of Part II is to protect the interests of lessees of the premises, which form part of a building, by enabling them to secure, through the flexible discretionary machinery of the appointment of a manager, the carrying out of the management functions which they are entitled to enjoy "in relation to" the premises of which their flats are part. There is nothing in the language of Part II or in its aim to justify limiting a manager's functions to those which must be carried out on "the premises to which the Act applies" in section 24 (1) in the way suggested by the company by reference to Parts I and II of the 1987 act. Both the tribunal and the Lands Tribunal rightly rejected the company's submissions on construction.

38. The test is "a causal link or nexus between the functions to be carried out by the manager and the defined premises." The causal link between the residential premises at Cawsand Fort and the amenity land was clear. The tenants had the rights of access over common roadways, footpaths, common land, and parking spaces. As the President of the Lands Tribunal spelt out, the tenants' rights were incorporeal but in order to enable the tenants to enjoy such rights, it was inevitable that the manager would have to carry out physical works to the servient tenement, which is the property of others, outside the curtilage of the leased buildings. The President noted that there was some question whether the notice went too far in including some land over which the lessees had no rights and residential land in other ownerships, but what parts of the servient tenement it was appropriate to include was for the LVT to judge. In my view, paragraph 34 of the judgment of Mummery LJ makes it clear that the words "in relation to" premises in section 24 are intended to permit the tribunal to confirm very wide powers on a manager. It is evident that a causal link or nexus can be established where land serves both the residential premises of the applicant tenants and other land, possibly in a non-residential or commercial use. A plant room or car parking, to take two examples, which serve both the relevant residential elements and separate commercial elements would have an evident nexus with the relevant residential premises and a manager could, if the LVT thought it appropriate, be appointed to carry out functions of managing the boiler room or car parking "in relation to" the residential premises. The existence of another functional connection with commercial premises, which would also fall under his management, would be no impediment to that, in my judgment.

39. Examination of what the Dutton LVT said suggests they had a more rigid division in mind. Under the heading of 'security' (Paragraph 31) the Dutton LVT said "however, as a service that includes all the common parts it is enjoyed by commercial and residential lessees alike it would not in our finding, be feasible to employ separate security arrangements with split responsibilities." Although the word "feasible" is used, which suggests ideas of practicality rather than law, the Dutton LVT appears to take it as given that there must be "separate security arrangements with split responsibilities." But they do not appear to

contemplate unified security arrangements and responsibility. To my mind, the inescapable inference is that they do not do so because they think that as a matter of law they cannot do so because they had "no power to order management of wholly commercial premises" (paragraph 31). Under the heading of "utilities" they say "the real question is whether the role can be split". On the basis of the *Cawsand* case that is not the real question. The real question is whether there is a causal link or nexus between the purchase and distribution of the electrical power to which the tenants of the residential premises, amongst others, are entitled and the residential premises themselves, so that it can be said that the purchase and distribution is "in relation to" those residential premises. If the question is a thus understood, it is readily answered. It is at once clear that no "split" need be necessary. The LVT could, if they thought it practicable in all the circumstances, appoint a manager to have charge of such a function for both residential and commercial premises. The same point arises again under "cleaning"; it is implicit that "separation" is necessary. Under the heading "cleaning grounds and gardening" the LVT says "splitting personnel would be, in our finding, impracticable." That may be so but the underlying and erroneous assumption is that personnel need to be "split". The result is that the LVT never considered whether one body of personnel under an appointed manager , would be practicable, and if not, why not. The same mistaken assumptions can be seen to have been woven into the discussion of "building maintenance and reserves", "health and safety", "insurance" and the "lower level car park". The idea that a split of some sort is a necessity also flows through paragraphs 32 to 34.

40. Thus on a careful analysis it is clear that the Dutton LVT's conclusions were, or may have been, based on a view of the law that is now acknowledged to be mistaken and which could have made a difference. It is not possible to say what view the Dutton LVT would have reached if it had properly understood the law. It might have still come to the same view. But it might not.

41. Those conclusions were, in turn, relied upon by the Leighton LVT. That being so it would be wrong for those conclusions to found a claim of *res judicata* or issue estoppel, in my view. The Leighton LVT erred in law in so finding (at paragraph 58).

42. Given my rejection of the objection of *res judicata* or issue estoppel, it seems to me impossible to say that Dr and Mrs Schilling's application is doomed to failure to such an extent that it should be dismissed by this tribunal, or indeed the LVT, as an abuse of process. (If I am wrong about that, and issue estoppel were held to apply, then there would be no need to reach any decision about dismissal as an abuse.) Anything I say about the LVT's power to dismiss will thus be *obiter dicta*, but out of respect for the arguments addressed to me, I make the following brief observations.

43. Had it been necessary, I would have held that given the specific statutory provisions of the Commonhold and Leasehold Reform Act 2002, Schedule 12, paragraph 7 and the 2003 regulations, there is no parallel inherent jurisdiction in the LVT to dismiss applications that are frivolous, vexatious or an abuse of process. The statutory provisions rule it out. The position of the Lands Tribunal, as set out in *Mean Fiddler* is different, as the statutory provisions that

govern the process of the Lands Tribunal are different. What Lord Morris said in *Donnelly V. DPP* [1964] AC 1254 at 1301 was:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. The court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

44. I take that as meaning what it says - where it is necessary to call upon an inherent jurisdiction because a tribunal would otherwise not be able to protect its process from abuse, such powers are inherent. But by the same reasoning where Parliament has conferred an express power to protect a tribunal's process, subject to specified conditions, it would be unnecessary and contrary to the intention of Parliament to call upon an inherent power to evade or modify those conditions.

45. Alternatively, if I am wrong in that, and such an inherent power subsists, it seems to me that no LVT could lawfully rely upon it without expressly addressing its powers and, in particular, Regulation 11, the protection and safeguards that regulation provides, and then going on to explain carefully why, although Regulation 11 is not complied with, it is just in all the circumstances to rely upon an inherent power. This was not done by the Leighton LVT. I would further add that I am in full agreement with what HHJ Huskinson said in paragraph 26 of the *Volosinovici* decision about the proper approach the LVT should take to such questions.

46. For those reasons I allow this appeal and remit the matter to a differently constituted LVT.

47. I emphasise that this does not mean that Dr and Mrs Schilling will ultimately succeed. It may well be that after a full consideration of the circumstances of the estate and the relevant law the LVT reaches the same conclusion as the Dutton and Leighton LVTs about whether it is just and convenient to make an order. Accordingly I would not wish anything in this judgement to be taken as diminishing the wise comments of the Leighton LVT about the desirability of constructive discussions between the Landlord and tenants.

48. It was agreed at the hearing that the parties should have the liberty to make representations to me in writing about costs in the light of my judgement. They may do so within 28 days of the date of this decision.

Dated 8 September 2008

His Honour Judge Mole QC