ACQ/29/2001

LANDS TRIBUNAL ACT 1949

COMPENSATION – Compulsory Purchase - Agreed statement of facts for preliminary issue – Whether binding in further hearing – Issue estoppel – Abuse of process – Tribunal's implicit power to prevent abuse of process – Failure to raise issue at appropriate time – No impropriety or harassment – Whether raising matter after preliminary issue determined necessarily an abuse

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN **MEAN FIDDLER HOLDINGS LIMITED** **Claimant**

and

LONDON BOROUGH OF ISLINGTON **Acquiring Authority**

Re: 1A and 1-5 Parkfield Street
Islington
London N1

Before: His Honour Judge Michael Rich QC and N J Rose FRICS

Sitting at 48/49 Chancery Lane, London WC2A 1JR
on 30 and 31 July 2003

The following cases are referred to in this decision:

Arnold v National Westminster Bank plc [1991] 2AC 93
Aviagents Limited v Balstravest Investments Limited [1996] 1WLR 150
Burgess v Stafford Hotel Limited [1990] 1WLR 1215.
Cobbold v L.B. Greenwich (CA 9 August 1999)
Connelly v DPP [1964] AC1254
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1QB630
Finsbury Business Centre Ltd v Mercury Communications (1994) 34 RVR 108
Henderson v Henderson (1843) 3 Hare 100
Johnson v Gore Wood & Co [2002] 2AC1
Taylor v Lawrence [2003] QB 528
Techno Ltd v Allied Dunbar Assurance plc [1983] 1 EGLR 29
Turner v London Transport Executive [1977] ICR 952

Paul Morgan QC and *Barry Denyer-Green*, instructed by Hodders, for the Claimant.
Michael Barnes QC and *Joanne Wicks*, instructed by Nabarro Nathanson, for the Acquiring Authority.

DECISION ON FURTHER PRELIMINARY ISSUE

Procedural History

1. On 12th January 2000, the Acquiring Authority made a vesting declaration under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981, which had the effect of vesting the premises held by the Claimant under a lease dated 6th March 1984 in themselves on 10th February 2000. The Claimant gave notice of this reference on 23rd February 2001. The principal head of claim was and remains for the total extinguishment of the business of operating a night club which was carried on upon the premises.

2. The Acquiring Authority contended that that business was carried on in breach of the covenants of the lease. On 19th February 2002 the Tribunal accordingly ordered the trial of a preliminary issue as to "Whether the Claimant's occupation and/or use of the subject property was in breach of its lease". Such preliminary issue was determined by His Honour Judge Michael Rich QC in a decision dated 31st May 2002. He concluded on the facts agreed and upon the true construction of the lease, that the arrangements made by the Claimant with the so-called promoters for running the night club did not involve any breach of the covenants of the lease. That decision was upheld by the Court of Appeal by a decision dated 24th January 2003. Questions which would otherwise have arisen as to whether any breach had been waived were not therefore pursued.

3. Following the dismissal of the Acquiring Authority's appeal, the Tribunal (N J Rose FRICS) therefore gave directions on 6th March 2003, intended to lead to the trial of the outstanding valuation issues for three days beginning 30th July 2003. The Tribunal set a short programme because the delay arising from the preliminary issue was causing the Claimant difficulty. Expert evidence as to compensation due on the extinguishment of the business which the accounts showed had been carried on upon the premises was, in spite of some further delays on the Authority's part, exchanged and lodged ready for such hearing.

4. Those accounts, which had been disclosed to the Authority before the direction for the preliminary issue, indicated, however, that the business carried on upon the premises was the business not of the Claimant but of its wholly owned subsidiary MF Clubs and Live Ltd, to which we will refer as "Clubs". On 18th July 2003, that is less than a fortnight before the date fixed for hearing, therefore, solicitors for the Acquiring Authority wrote to the Claimant's solicitors pointing this out, and asking the Claimant to accept that the claim for the total extinguishment of its business was "misconceived".

5. For the purposes of the first preliminary issue the parties had, in the course of the hearing, and after oral evidence had been given, agreed a statement of facts, which is attached to the Decision dated 31st May 2002. In paragraph 6 of that Decision, Judge Rich made the following finding as to that agreed statement:

> "... the agreed statement appears to me sufficiently to set out the effect of the evidence given in witness statements and in cross-examination, for it to be unnecessary for me to find other facts."

The agreed statement, at each point where it described the running of the night club or the carrying on of the business at the premises, referred to its being operated by the Claimant. The Claimant has accordingly denied that the Acquiring Authority is now entitled to prove that, on the contrary the business was carried on by Clubs.

6. In these circumstances, the parties have agreed that the time set aside for the trial of the valuation issues should be used to determine the question whether the Acquiring Authority should be entitled to raise this issue, which we will refer to as "the Clubs issue". For the purpose of deciding the issue of entitlement to raise the Clubs issue, the President has re-appointed Judge Rich to sit jointly with Mr Rose. If it is decided that the Acquiring Authority should be so entitled, directions as to the further determination of the Clubs issue and of the reference will then fall to be made. Mr Michael Barnes QC, in a skeleton argument prepared on behalf of the Authority, has indicated a number of matters which will need to be considered, but it is to be hoped that appropriate directions can be the subject of discussion and agreement between the parties, in the circumstances that arise following this Decision.

The Present Issue

7. The parties both submitted full and helpful skeleton arguments, with a view to being able to complete submissions within two days, as Judge Rich was not conveniently available for the third day which had been set aside for the hearing of the valuation dispute. It became apparent, however, as argument developed, that the time available for preparation of argument had been less than was required. Issues were crystallised in the course of argument and many of the submissions which had been made in the skeleton arguments were discarded.

8. Mr Paul Morgan QC for the Claimant had submitted that the Tribunal was bound by its finding to the effect that the business operated from the premises was the business of the Claimant. Mr Barnes for the Acquiring Authority treated such question as depending upon whether there had been an agreement by which the Claimant was to be taken as running the business from the premises when in fact that business was run by a different corporate entity, Clubs. Issue was therefore joined as to the status of the agreed statement of facts and whether the Authority should be released from such agreement.

9. The only authority discovered by the researches of counsel in which the effect of an agreed statement of facts has fallen to be considered is *Techno Ltd v Allied Dunbar Assurance plc* [1993] 1 EGLR 29. As argument developed, however, both counsel accepted that this case was of little assistance in determining the issue before the Tribunal. The reason for that conclusion needs, none the less, to be, at least shortly, stated.

10. In that case Mr Gavin Lightman QC, sitting as a Deputy High Court Judge, was asked to set aside the award of an arbitrator who, in making his award on a rent review, departed

from the terms of an agreed statement of facts on the ground that it did not conform with the assumptions required by the rent review clause. He remitted the arbitrator's decision for reconsideration in circumstances where the departure from the agreed facts was made without notice to the parties of the arbitrator's intention to do so. That decision is not one that we would consider to be the least bit controversial. But the judge thought it necessary in order to assist the arbitrator on such remission, to undertake an analysis of the nature of an agreed statement of facts. He said at p.31G:

> "The statement of facts on the evidence before me was a package deal: both parties negotiated and agreed its terms in an endeavour to secure the more expeditious ... and ... advantageous determination of the arbitration. Each party agreed the facts ... in consideration of the like agreement by the other party and, as I see it (for I see nothing to indicate the contrary), intended it to be legally binding. The agreement accordingly does constitute a binding contract. But since it is a contract intended only to be a tool in the conduct and determination of the existing arbitration, it is a contract of a special character. It is a contract which can be enforced or given effect to only in the arbitration, and it seems to me on principle and as a matter of common sense that the very nature of the contract requires as a special incident of such contract that the arbitrator should be entitled either to enforce it or to release the parties from it as the demands of justice require."

He went on to consider how such discretion should be exercised and drew analogy with the approach adopted in the Courts to the amendment or withdrawal of formal admissions.

11. Since an arbitration is itself a process which arises contractually, the agreement of the terms upon which the arbitrator proceeds may appropriately be analysed in contractual terms. In exercise, however, of its powers to determine statutory compensation the Tribunal must proceed on the evidence adduced before it. The question which would arise in respect of proceedings before the Tribunal, at least unless sitting by agreement as an arbitrator, is whether the parties have reached an enforceable agreement that the Authority may not rely on the fact (if it be proved) that the business was operated by Clubs. Unless such agreement created an estoppel, it is hard to see how it can be part of the function or jurisdiction of the Tribunal either to enforce such agreement or to release the parties from it. We do not therefore accept that a statement of agreed facts arrived at for the purpose of a hearing before the Lands Tribunal is normally to be construed as a contractual agreement at all.

12. Quite apart, however, from any consideration as to the difference between an arbitration and the position of the Tribunal, the particular agreement made in this case was in belated compliance with a direction of the Tribunal to lodge a statement of facts in relation to the preliminary issue, and clearly by its own words was made exclusively for the purposes of the preliminary issue: it is, indeed, recorded in the agreement, that the Authority declined to discuss facts not related to that issue. Accordingly we have derived no assistance from this case.

13. The true issue is, therefore, whether, as contended by Mr Morgan in his skeleton, the finding made in the Decision dated 31st May 2002, as opposed to the agreement upon which that finding was based, determines the fact as to whether the Claimant was operating the

business. This is a plea of estoppel *per rem judicatam*, which was developed only in the course of oral argument. If such plea cannot be relied upon, the Authority must, at the least be entitled to apply to the Tribunal for directions as to lodging of evidence and necessary revision of expert evidence in order to enable the Clubs issue to be determined. Mr Barnes for the Authority accepts that such further directions would be necessary and that the Authority should pay wasted costs on an indemnity basis if such directions are made.

14. It would we think be less than fair to the helpfulness with which counsel developed their oral arguments, which began very far apart, to trace the extent to which their submissions drew together in response to each other and to questioning from the Tribunal. We will, accordingly, merely state shortly some propositions of law which we understand not to be disputed between the parties:

(1) Cause of action estoppel arises where the cause of action in later proceedings is identical to that in earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar to re-opening the matter is absolute in relation to all points decided, unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment: see per Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2AC 93 at p. 104 D. Such bar cannot arise in this case because the cause of action, namely the award of compensation on the acquisition of the claimant's interest in the subject premises, has yet to be determined.

(2) Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open the issue. In such case exceptional circumstances may justify permitting the re-opening of the decided issue: this was the decision of the House of Lords in the *Arnold case*. But where such issue is determined as a preliminary issue in the same proceedings the parties cannot subsequently advance argument or adduce further evidence directed to showing that the issue was wrongly determined. The remedy is by way of appeal: see per Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1QB630 at p642 C.

(3) The rule of public policy enshrined in these estoppels was expressed concisely and in English by Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2AC1 at p31A as having two aspects: "that there should be finality in litigation and that a party should not be twice vexed in the same matter".

(4) It is the first of these aspects which has been applied in wider circumstances in what has become known as the rule in *Henderson v Henderson* (1843) 3 Hare 100 in which Sir James Wigram V-C said at pp114-115:

> "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been

brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

Although that was a case of cause of action estoppel the statement applies also to issue estoppel: see per Lord Keith of Kinkel in *Arnold* at page 107C.

(5) The rule as enunciated by Wigram V-C referred to cases where the matter had been "the subject of … adjudication". It has been applied, however, where there has been no adjudication precisely because the matter was not raised when it might have been. It is thus quite distinct from estoppels arising from a decision of the Court. It is concerned with matters which the Court has not decided, but which the rule prevents the litigant from raising because he failed to raise it when he might have done so (see per Lord Millett in *Johnson v Gore Wood* at p.58H –59B)

(6) For that reason what may be referred to as the rule in *Henderson's case* is not an absolute bar as (subject to fraud) cause of action estoppel is, nor even a bar subject to special circumstances as is an issue estoppel. It raises the question whether to allow the issue to be raised involves an abuse of process: see per Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* at page 30 H- 31 A. If it does so, then a Court has jurisdiction to prevent such abuse.

15. For issue estoppel to arise there must, in our judgment, be an exact identity of issue: see for example *Turner v London Transport Executive* [1977] ICR 952; and facts divorced from their legal consequences do not amount to "issues" in the sense used by Diplock LJ in *Fidelitas* (see at p242 A). The sole issue raised in the first preliminary issue was whether involvement of the promoters in the night club business carried on upon the premises involved a breach of the covenants of the lease. It was left to be contended at a further hearing for the assessment of compensation, that in so far as the profits of the business arose from breach of the covenants of the lease they should be disregarded. That, in our judgment, is a different issue from that now proposed to be raised, namely whether the business carried on upon the premises is the business of the Claimant at all. The finding of fact in the Decision of 31st May 2002 could not therefore give rise to an issue estoppel, but only to a case of abuse of process if it was re-opened. Mr Morgan has, nonetheless, sought to maintain that an issue estoppel does arise. Nevertheless since the issues arising in the first preliminary issue did not raise the question of the Claimant's ownership of the business, we cannot accept that contention. By contrast, if the Authority sought to contend that the operation of the business by Clubs itself involved a breach of the covenants relied upon in the first preliminary issue, an issue estoppel would arise. Mr Barnes disclaims any intention to rely on such argument.

16. Once the question which had been raised as an estoppel, is thus identified as properly being whether the Tribunal should prevent an abuse of process, the question arises as to the extent of the Tribunal's power to prevent such abuse. Mr Morgan had very properly, in accordance with his duty to the Tribunal drawn attention to a decision of HH Judge Marder QC sitting as a Member of the Tribunal in *Finsbury Business Centre Ltd v Mercury Communications* (1994) 34 RVR 108. In that case he dismissed a claim which he held to be misconceived but, in doing so said at p34:

> "The Lands Tribunal is wholly a creature of statute and can only exercise the jurisdiction conferred upon it by the Lands Tribunal Act 1949. The tribunal does not in my view have an inherent jurisdiction, such as is exercised by the High Court and County Court to strike out a claim which discloses no cause of action. Thus the tribunal is not entitled to refuse to entertain a reference properly made in accordance with the Lands Tribunal Rules. It is for that reason that I did not accede to Mercury's original application to strike out this reference. I have, however, treated that application as a preliminary point of law to be determined on facts, which although disputed, I have assumed in favour of the claimant company."

Judge Marder, in this way sensibly got round a difficulty which, in our judgment, means, if he is right, that the Tribunal has no jurisdiction to prevent an abuse of its process, even if we conclude that to allow the Authority to raise the Clubs issue would involve such abuse. Mr Morgan suggested that the provision found in Rule 48 of the Lands Tribunal Rules 1996 that "the procedure at the hearing of any proceedings shall be such as the Tribunal may direct" is sufficient to found such jurisdiction. But Mr Barnes, although initially willing to concede that the Tribunal did have such jurisdiction felt unable to make a formal concession without further research. Accordingly, before determining whether we should follow the decision of Judge Marder and refuse to assume a jurisdiction which he denied, we invited the parties to undertake further research, which we have received in the form of written submissions after the conclusion of the oral hearing.

The Tribunal's Jurisdiction

17. We are grateful to counsel on both sides for their full and careful submissions, which have lightened our task, because both are agreed that the Tribunal does, indeed, have jurisdiction to prevent an abuse of process. Mr Barnes however added to the submissions which had been invited on the topic of the Tribunal's jurisdiction, further submissions as to whether the jurisdiction arose, and, if it did, how it should be exercised. These have led to the Tribunal's inviting yet further submissions from Mr Morgan, for whose expeditious preparation we are grateful. These further submissions have been taken into account in the following paragraphs of this Decision.

18. Mr Morgan had suggested, as one reason for the agreed conclusion, that the rule in Henderson's Case is a matter of substantive law in the same way as issue estoppel, and is not merely procedural. Lord Millett in *Johnson v Gore Wood* at p59 E however distinguished the rule from the doctrine of res judicata as follows:

> "while ... the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration [i.e. the rule in *Henderson's case*] can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

We do not therefore found our assumption of jurisdiction upon that submission.

19. Both counsel however submit that the Lands Tribunal does have jurisdiction to apply procedural rules necessary to protect its process from abuse. Mr Barnes draws a helpful

distinction between, on the one hand, the "inherent jurisdiction" of the Courts, which appertains only to the House of Lords and the Privy Council as successors of the Curia Regis, and to the High Court, whose judges, in administering justice represent the Sovereign, and, on the other hand, the implied power of every court and tribunal to prevent abuses of the process which it is established to administer. He points out that the Court of Appeal is itself a statutory creation, but has held in cases to which Mr Morgan also referred us, that it has power to strike out appeals which are an abuse of process: see *Aviagents Limited v Balstravest Investments Limited* [1996] 1WLR 150 and *Burgess v Stafford Hotel Limited* [1990] 1WLR 1215. In *Taylor v Lawrence* [2003] QB 528 Lord Woolf, giving the judgment of a five judge Court at p.538 (para. 17), made the distinction between what may be called the "inherent jurisdiction" in the historical sense and the "implicit jurisdiction" of a Court or tribunal to determine its own procedure in order, we would add amongst other things, to protect it from abuse. We do not think it necessary to refer to the authorities concerning the jurisdiction of Magistrates', Crown and County Courts to which we have been referred. We accept on these authorities the joint submission of both parties that what Lord Morris of Borth-y-Gest said in the course of his speech in *Connelly v DPP* [1964] AC1254 at p. 1301 applies to the Lands Tribunal:

> "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" (our underlining).

20. We therefore conclude that the Tribunal does have jurisdiction to refuse to allow the Authority to raise the Clubs issue, if to do so would, in all the circumstances amount to an abuse of process. There is no doubt that the Clubs issue is one that might have been brought forward when the terms of the preliminary issue, which has already been determined, were agreed. Indeed, as we have already observed, it could have been relied upon as itself constituting a breach of covenant such as was alleged in that preliminary issue. It is admitted on behalf of the Authority that it can only not have been brought forward by reason of negligence or inadvertence. Even if, properly viewed, raising the Clubs issue now does not involve vexing the Claimant twice in the same matter, it does offend against the public interest to have finality in litigation. It is in the public interest that where a preliminary issue is heard, the Tribunal should determine whatever can appropriately be determined in that way at that time, in order that its determination may finally dispose of all such issues. For these reasons we reject Mr Barnes' submission that the rule in *Henderson's case* is irrelevant to what we now have to decide, namely whether the failure to bring the matter forward at that time means that to bring it forward now would, in all the circumstances, amount to an abuse of process, which the Tribunal should not allow.

21. It is on the basis of the answer to that question that we must then determine the question how the Tribunal should exercise its discretion either to prevent an abuse of its process or to permit the Authority to lodge such further or amended expert reports or witness statements as will allow it to rely on the Clubs issue. In so far as we have a discretion to exercise, we will exercise it on the basis which we have already recorded, that any costs thrown away will be paid by the Authority on an indemnity basis, and further that, as offered in the course of the hearing, the Authority will agree to pay interest at the commercial rate at which the Claimant

is having to borrow rather than at the statutory rate for such period of delay as results from permitting this issue to be raised at this stage. By the same token, the Claimant undertook to obtain from its wholly owned subsidiary, Clubs, an undertaking not to make a claim separate from the present claim if we refuse the Authority permission to raise the Clubs issue. We will issue our Decision, if necessary before such cross-undertakings are reduced to an enforceable form, which, since the Tribunal has no power to enforce undertakings, may require the execution of deeds. No order will, however, be drawn up until this agreed basis for exercising our discretion has been formalised to the satisfaction of the parties, or if they cannot agree, to our satisfaction.

Whether the Clubs issue should be excluded

22. The conclusion that a particular matter could or even might conveniently have been raised at an earlier stage of proceedings is not the same as to conclude that it should have been so raised or, still less, that to raise it subsequently involves an abuse of process. It is necessary in addressing that question to keep in mind what Lord Bingham of Cornhill said in *Johnson v Gore Wood* in a passage with which Lords Goff of Chieveley, Cooke of Thorndon and Hutton all expressly agreed. He said at p.31:

> "... *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 an issue which could have been raised before."

23. Although, undoubtedly and understandably, the Claimant feels aggrieved at the delay to the determination of its claim, and at the Authority's perseverance in raising another preliminary objection to such claim, after having already raised and taken the first preliminary issue to unsuccessful appeal (involving an oral application for permission to appeal after an initial refusal on paper), it is not suggested that the Authority is guilty of any dishonesty or dishonest motive and it is hard to categorise its conduct as involving unjust

harassment of the claimant. Nevertheless, there can be no doubt in our minds that the efficient conduct of the Tribunal's business means that if the Clubs issue was to be raised it ought to have been raised when the first preliminary issue was formulated. The question which we feel called upon to determine is whether that failure renders its later raising a misuse or abuse of the process of the Court.

24. The passage in Lord Bingham's speech concerned with abuse of process begins at p22 with a reminder that "Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the Court". The Authority's proposed reliance on the Clubs issue is not merely to ensure that compensation is awarded to the correct party and to avoid the risk of a second claim from the Claimant's subsidiary. Such concerns could be met by the undertaking already proposed from Clubs not to bring any second claim, given no doubt in return for an acknowledgement by the Claimant, if Clubs claims that the business did indeed belong to Clubs, that, if that was established between them, the Claimant would receive any compensation in trust for Clubs. Rather, it will be the Authority's case that if the business is operated other than by a party with an interest under the lease, the compensation for disturbance, to which such party would be entitled, will be less than if the claim can properly be brought by the Claimant. Without deciding the matter, that result is at least arguable, although it may depend on yet further issues of fact as well as law. Although a reduction in compensation by reason of what Mr Morgan characterises as a technical point may be unattractive, if it is the correct position in law, it is one which the Authority administering public funds is under a duty to take, and the issue must therefore be regarded as a genuine subject of litigation.

25. Lord Millett, in a speech on this aspect of the issues in *Johnson v Gore Wood*, separate from the majority of the House, expressed at least doubt as to whether such a subject of litigation can properly be excluded from being heard. He said at p.59C:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953)."

Mr Barnes relies upon the incorporation of that Convention into English law by the Human Rights Act 1998. We recognise the burden placed by Article 6 on the Court and this Tribunal not to deny a fair hearing, but providing the considerations set out by the majority in *Johnson v Gore Wood* are scrupulously considered we do not think that Article 6 precludes us from refusing to allow a matter to be raised, if in all the circumstances we conclude that to do so would involve an abuse of the Tribunal's process.

26. Mr Barnes has also laid great stress on the statutory basis of compensation for compulsory acquisition and the limitation of the Tribunal's jurisdiction to award compensation only in accordance with statute. Having satisfied ourselves, however, that we do have jurisdiction to prevent abuse of our process, we are satisfied that such consideration should not constrain us to permit abuses. It must always be the case that if an issue is shut out because raising it involves an abuse of a Court's process, the Court may arrive at a

decision different from that at which it would otherwise arrive, and in that sense contrary to law. That is not a reason to permit what the court concludes is an abuse; it merely reinforces the need to focus on "the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court". In our judgment, the special position of an authority vested with compulsory powers of acquisition, if anything, tells the other way. Such authority has a duty to offer fair compensation promptly. If there are circumstances limiting the amount of compensation payable which are known to the authority, it has a duty, as part of its obligation to act fairly, to raise such matter promptly.

27. Although no amendment of pleadings, in the sense of statements of case for a court, is involved, Mr Barnes invites the Tribunal to treat the issue as analogous to an application for amendment. Mr Morgan does not dispute that amendments of pleadings will, however late, usually be permitted unless there is some irremediable prejudice to the other party, which cannot be overcome by the imposition of appropriate terms. We do not think it necessary to refer to the authorities cited by Mr Barnes in support of this statement of practice, save to note that, as Mr Morgan points out, Peter Gibson LJ said in *Cobbold v L.B. Greenwich* (CA 9th August 1999) that such rule operates only if "the public interest in the efficient administration of justice is not significantly harmed". An amendment which has the effect of rendering the hearing of a preliminary issue which has been determined wholly nugatory is hardly consistent with the efficient administration of justice. Nevertheless, we accept that in this case the only irremediable prejudice which the Claimant will suffer from the raising of the Clubs issue at this stage is delay, for which it will be compensated if the issue is allowed to be raised, but not otherwise. The Claimant's fear of prejudice is that the Authority is right and its compensation should be less than would be awarded if the Clubs issue were excluded. That on a merits-based judgment must be a reason for allowing the issue to be raised.

28. In our judgment however the question which we have to answer is not simply analogous to an application to amend a statement of case. Although it will be necessary for both sides to reconstitute their evidence both of fact and as to valuation, and to that extent the effect of our decision is indeed analogous to an amendment of case, the question of whether to permit that to be done depends, not merely on case management but on whether or not the raising of the issue amounts to an abuse of process. We gave our reasons for so concluding in paragraph 20 of this Decision. We think that in determining that question, greater weight is to be given to the efficient administration of justice even than would be appropriate in the case of a simple amendment of pleadings. We therefore remind ourselves of the effect on the Tribunal's procedure for the conduct of the case, of the failure to raise the issue at what we consider to have been the proper time. This reference has proceeded by the determination of a preliminary issue, involving the construction of a lease, for which purpose a lawyer member was therefore appointed. Following the dismissal of the Authority's appeal on that issue, the Tribunal's procedure allowed the assessment of the compensation to be allocated to a surveyor member. It is the raising of an issue which again involves questions of law at an inappropriate stage of the proceedings which raises the question of an abuse of process. There is no doubt that the efficient conduct of the Tribunal is prejudiced by the Authority's conduct of its case.

29. The question is, however, whether the raising of the Clubs issue involves a misuse, an impermissible abuse of the Tribunal's process. It is possible for an authority possessing compulsory powers so to conduct itself in proceedings before the Tribunal, with the attendant

delay in paying compensation, as to amount to harassment. The Authority has been lax in complying with Directions on more than one occasion and the Tribunal has had to insist on the time-table set. Nevertheless, we are satisfied that the prejudice to the Tribunal's procedures which we have identified was not deliberate, but was the result of inadvertence in the consideration of the Authority's case. It is, moreover, an inadvertence that appears to have been shared by the Claimant in the preparation of the original claim. There is no such identified impropriety in the authority's conduct as to make it obviously abusive. We are unable overall to conclude that its conduct amounts to harassment. We have therefore, on balance, come to the conclusion that, provided prejudice is avoided in the manner contemplated in paragraph 21 of this Decision, the raising of the Clubs issue falls short of what must be treated as amounting to an abuse.

Conclusion

30. Since writing the above Decision we have received a request from the parties to make the attached order by consent. No further directions are therefore now required. The Decision which we had written included, however, a conclusion of some importance as to the Tribunal's jurisdiction. This was reached with the benefit of full and considered argument by leading counsel for each party, and after the Tribunal had expended time at public expense hearing argument and producing the Decision. We therefore contacted the parties as to whether they objected to the publication of this Decision, albeit that it was no longer required in order to determine any dispute between them. The Claimant raised no objection. The Solicitors for the Acquiring Authority contended that it would serve no useful purpose. We have concluded that on the contrary our decision that Judge Marder's decision in *Finsbury Business Centre Ltd v Mercury Communications* was wrong and our reasons therefor is of sufficient general interest to make it desirable that it should be published, although, of course, it is no more binding on any other court than any other decision of this Tribunal. We have not been told of any reason for confidentiality which should decide us otherwise, and cannot therefore, in the circumstances, accept that it is either inappropriate or contrary to public policy to publish this Decision, although the Award made by consent will not be so published.

Dated: 9 September 2003

(Signed): His Honour Judge Michael Rich QC

N J Rose FRICS