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**UT Neutral citation number: [2015] UKUT 0063 (LC)**

**UTLC Case Number: LRX/127/2013**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – Service Charges –Sections 18, 27A and 38 Landlord and Tenant Act 1985 – jurisdiction – First-tier Tribunal striking out as abuse - issue previously decided – appeal - whether a ‘lodge’ is a ‘dwelling’ within section 18(1) and a ‘building’ within section 38 –appeal dismissed – observations on meaning of ‘building’ - matter of fact and degree***

**IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL DATED 20 AUGUST 2013**

## BETWEEN MR D. and MRS L. CADDICK

## Appellants

**and**

**WHITSAND BAY HOLIDAY PARK LIMITED**

**Respondent**

**re: Lodge 11, Whitsand Bay Holiday Park, Millbrook, Torpoint, Cornwall, PL10 1JZ.**

**Before: HH David Mole QC (sitting as a Deputy Judge of the Upper Tribunal)**

**Sitting at: Plymouth Magistrates Court, St Andrew’s Street, Plymouth,**

**PL1 2DP**

**9 December 2014**

*Rawdon Crozier* of counselinstructed by Fursdon Knapper, solicitors, for the appellants

*Mrs J Headford* of Tozers, solicitors, for the respondent

The following authorities were referred to:

*Phillips v Francis* [2010] 24 E.G. 118

*Elitestone Ltd v Morris* [1997] 1 W.L.R. 687 (HL)

*Webb v Frank Bevis Ltd*. [1940] 1 All ER 247 (CA)

*Boswell v. Crucible Steel Co.* [1925] 1 K.B. 119

*New Zealand Government Property Corporation v HM & S Ltd (The New York Star).* [1982] 2 W.L.R. 837

*Holland v Hodgson* (1871-72) LR 7 CP 328

*Melluish v. B.M.I.* (No. 3) Ltd. [1996] A.C. 454

*Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2014] EWCA Civ 100

*Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch)

*Billing v. Pill* [1954] 1 Q.B. 70

*Stock v Frank Jones (Tipton) Ltd* [1978] 1 W.L.R. 231

*Cheshire County Council v Wooodward* [1962] 1 All ER 517

*Smith v Customs and Excise Commissioners* (1990) VAT Decision 5579

*In the matter of Bedfordshire Pilgrims Housing Assn. Ltd*. (2002) LTL 20/3/2002

*Chelsea Yacht and Boat Co v Pope* (2000) CCRTF/0396/B2 (CA)

*Johnson v Gore-Wood* (No.1) [2002] AC 1

*Mew v Tristmire* [2011] EWCA Civ 912

*Price v Nunn* [2012] EWHC 1251 (Ch)

*R (on the application of Hand) v Secretary of State for Communities and Local Government* [2014] EWHC 314 (Admin), CO/9777/2013

*Law Land Co Ltd v Consumers Association* [1980] 2 EGLR 109

*Aldi Stores Ltd v WSP Group, WSP London Ltd and Aspinwall & Co Ltd* [2007] EWCA Civ 1260

*Woodfall, Landlord & Tenant*

*David Copperfield*, Charles Dickens.

# DECISION

## Introduction

1. This is an appeal against the decision dated 20th August 2013 of the First-Tier Tribunal Property Chamber (Residential Property)(hereafter the FTT). The appeal arose in the following way.
2. In December 2010 the 40 members of the Whitsand Lodge Owners Association applied to the Southern Rent Assessment Committee for recognition as a tenants' association. The effect of sections 29, 18 and 38 of the Landlord and Tenant Act 1985 was that in order to show that they were "qualifying tenants" the occupants of the lodges had to demonstrate that each of them contributed to the same costs by the payment of a "service charge," being an amount payable by a "tenant of the dwelling" in addition to rent. "Dwelling" was defined in section 38 as being "a building or part of a building occupied or intended to be occupied as a separate dwelling…" The application was opposed on behalf of Mr Wintle, the initial respondent, on the basis that the committee did not have jurisdiction to grant such a certificate because, firstly, the lodges were not "dwellings" because they were not "buildings"; secondly, the applicants were not "tenants" of the lodges at all but tenants only of the plots on which the lodges were sited.
3. The Southern Rent Assessment Committee (hereafter SRAC) inspected the park, then of 58 lodges, in the presence of representatives from both sides. This inspection included the substructure of two of the lodges which it was agreed were representative of them all. On 14 June 2011 SRAC held a hearing. Both parties were legally represented and made submissions of law. Expert reports and relevant documents were received and evidence was heard. On 7 July 2011 the SRAC issued a thorough and comprehensive decision declining jurisdiction and finding that "the lodges are not the subject of tenancies, nor are they dwellings for the purposes of the Act." (Paragraph 28) There was no appeal against that decision.
4. In November 2012 Mr and Mrs Hussey and 12 other leaseholders at Whitsand Bay Holiday Park, including Mr and Mrs Caddick, made an application to the SRA Panel for the determination of service charges payable under section 27A of the 1985 Act. The Leasehold Valuation Tribunal (hereafter LVT) took the point that jurisdiction to determine that matter depended upon the particular lodges being "dwellings", which point had been decided against the leaseholders (except Mr and Mrs Caddick) by the SRAC. The LVT was therefore minded to dismiss the application under regulation 11 of the LVT Regulations 2003. The point was taken on behalf of the then respondent Mr Wintle. There was a hearing on 18 February 2013. Legal submissions were made by Mr Crozier of counsel on behalf of the applicants and Mrs Headford, solicitor of Tozers, on behalf of the respondent. Those legal submissions addressed the issues of estoppel and procedural abuse contrary to the regulations. It was argued on behalf of the applicants that there had been significant changes since the last matter and that the original case had been put to the SRAC on a false basis.
5. In a decision dated 18th of March 2013 the LVT noted that the matter had been fully dealt with before the SRAC and had not been appealed. The LVT dealt in detail with all the arguments raised and dismissed the application, save for the case of Mr and Mrs Caddick. The position of Mr and Mrs Caddick had been discussed at the beginning of the hearing. They were not in the same position as the other applicants as they had not purchased their lodge until after the SRAC decision. Initially Mrs Headford had indicated that the regulation 11 notice did not apply to Mr and Mrs Caddick but at the hearing she indicated that she would be seeking the dismissal of their case as an abuse of process as well. The LVT decided that it would be unfair to permit an application to dismiss to proceed against Mr and Mrs Caddick at that hearing, however Mrs Headford said a further application to dismiss was likely to be made against them later. (See paragraphs 7 - 10 of the decision.)
6. Mr and Mrs Hussey and the other applicants applied to the Upper Tribunal, Lands Chamber, (hereafter UT) for permission to appeal against the LVT decision but permission was refused by the Deputy President on 22 July 2013. He said that the LVT had arrived at its own conclusions after undertaking a broad merits-based assessment of the application. None of the grounds of appeal raised an arguable case.
7. In the meantime the former LVT, now the First-Tier Tribunal Property Chamber (Residential Property) (hereafter the FTT) indicated that it was minded to strike out the Caddick's case as being frivolous, vexatious or otherwise an abuse of process under Rule 11 but would give them the opportunity to persuade the Tribunal to the contrary. The case was heard on 1 August 2013. (By that time Rule 11 had been superseded by regulation 9(3)(d) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 (hereafter the 2013 FTT Rules) but no point is taken by either party in the present case that there is any significant difference between the two relevant provisions.) Mr Wintle was named as the respondent. The legal representation was as before. Mr Crozier argued that the way in which the notice had been issued against the Caddicks was unjust and that in effect the first decision had held that their application was not an abuse. In addition he argued that the Caddicks could not have raised the point before, which was an important consideration as shown in the case of *Price v Nunn* [2012] EWHC 1251 (Ch) at paragraph 69. He further submitted that the recent case of *Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch) had significantly improved the applicants’ prospect of success.
8. The FTT issued its decision on 20 August 2013. It said (paragraphs 18 - 22) that criticisms raised in the applicants’ primary submissions were either not accepted or matters that would be taken into account in the exercise of discretion. The *Peel Land* case did not change the legal landscape. There was no significant difference between Mr and Mrs Caddick's case and those of the previous applicants. The FTT said it was applying a wide merits-based tests in the case, taking into account the principles enunciated in *Johnson v Gore-Wood (No.1)* [2002] AC 1, that there should be finality in litigation. It balanced this against the right of a person to have their case heard, referring to *Price v Nunn* at para 108 and to Article 6 of the Convention on Human Rights, noting that the right to a fair hearing “is not an unconditional right to bring and have determined any proceedings any person may choose to bring irrespective of other competing policy considerations.” It concluded that, having weighed the competing interests, the same considerations applied to Mr and Mrs Caddick's case as applied to the other applicants and there was no good reason for treating them differently. The case was therefore struck out.
9. On 20 September 2013 the FTT refused permission to appeal. In paragraph 2 the FTT noted that "although the determination did not expressly say so, the determination makes it clear that the strike out was on the basis of abuse of process and so was affected under Rule 9 (3) (d) of the said rules." It therefore pointed out that Rule 9 (3) (c) was irrelevant. There had been no argument by the applicant that Rule 9 (3) (d) was in any way linked or fettered or affected by Rule 9 (3) (c) and if that was now being said that proposition was rejected.
10. An application was made to the UT for permission to appeal. Ground 2 of that application related to regulation 9(3)(d) of the 2013 Rules. It was submitted that the FTT did not apply a broad merits-based test because it failed to address the substantive merits of the Applicants' primary case which was that their lodge was a tenant's fixture, which was said to be a different issue from that determined by the SRAC and which was likely to succeed with the support of the decision in *Peel Land.* Ground 4 of the application appears to have been primarily arguing that the FTT wrongly failed to take into account the fact that Mr and Mrs Caddick were parties to a 125 year lease who were seeking to invoke the statutory protection in relation to the levying of a service charge and they were not in the same position as the applicants involved in the first decision who were involved in a necessarily collective attempt to have the Tenants' Association recognised. The submissions under this ground added that there was a confusing overlap between regulations 9 (3) (c) and (d) as the former required identity of parties and the latter did not. The FTT had been confused by it and had wrongly taken into account a "floodgates" argument in consequence.
11. The decision of the Deputy President, given on 11 November 2013, as expressed in paragraphs 1 -4, was as follows:

"1. This application raises the issue of what approach should be taken by the First-Tier Tribunal to an application made to it by the successor in title of a party to earlier proceedings in relation to the same lease, where the FTT's original decision was not appealed to the Tribunal. The applicants' predecessors in title were members of the tenants association which chose not to appeal the adverse 2011 determination their leases were not within the scope of the Landlord and Tenant Act 1985.

2. Nonetheless, there is some force in the applicants’ complaint that they were not parties to the original proceedings or to the decision not to appeal, and ought to be entitled to seek a determination on the same issue because of its significance for the remainder of the 125 year term and because it has not been the subject of consideration at an appellate level. The extent to which successors in title may raise issues before the FTT which have already been determined under the same lease in earlier proceedings to which they were not party is an issue of some importance which it is appropriate for this Tribunal to consider.

3. This permission does not extend to the grounds raised in paragraphs 1, 3 or 5 of the applicants' draft grounds of appeal, but is restricted to the grounds in paragraphs 2 and 4.

4. The appeal will be dealt with as a review with a view to a re-hearing. If the Tribunal allows the appeal and proceeds to a rehearing, it will wish additionally to determine the substantive issue of whether the lodges are within the scope of section 27A, Landlord and Tenant Act 1985."

1. At the opening of the hearing I was invited to order the substitution of Whitsand Bay Holiday Park Limited as respondent in the place of Mr Wintle on the grounds that it was that company and not Mr Wintle that was the lessor in this case. This substitution was not opposed and was duly made.
2. In the light of the Deputy President's direction in paragraph 4, I indicated to the parties at the opening of the hearing I conducted on 9th of December 2014 that I wished to hear all the evidence and submissions relating to both the appeal and the substantive issue.
3. On 10th December 2014 I conducted an accompanied site visit and was shown the lodges and the holiday park, paying particular attention to its layout and means of access. I undertook a detailed examination of the outside of Mr and Mrs Caddick's lodge, its landscaping and decking, and included an inspection on hands and knees of what could be seen underneath the lodge with a torch.

**Facts**

1. The parties produced statements of agreed facts and issues from which, together with the evidence and the assistance received from counsels’ skeleton arguments and closing submissions, and my accompanied inspection of the lodge and its surroundings I find the following facts.
2. The Whitsand Bay Holiday Park sits at the top of the peninsular between Plymouth Sound to the east and north and the English Channel to the south and west. It has extensive views over Whitsand Bay to Rame Head and, in the opposite direction, over the Sound towards Plymouth and Dartmoor. In this commanding and comparatively exposed position it is no surprise to find that part of the holiday park lies within a former fort and gun emplacement, now an ancient monument. It was noted by the SRAC in 2011 that there were 58 lodges in the park, of which 40 belonged to Association members. Nothing was said in evidence before me to suggest that the numbers are significantly different now. There are 11 lodges in the discrete section of the park in which Mr and Mrs Caddick's lodge is to be found. Their lodge, which is on plot 11, is at the northern end of that section, nearest to the gate. I observed that although all 11 lodges in the Caddicks’ section looked more or less identical in basic design, lodges in other sections of the park were to different designs. However all the evidence I heard suggested that the various lodges followed the same basic principles of construction and I note that in the SRAC case the two units whose substructure the Committee inspected were agreed to be representative of all the lodges the subject of that application. (Para 5.)
3. The identification plaque affixed to the rear of Mr and Mrs Caddick's Lodge shows it to be British Standard 3632 approved Park home manufactured by Omar Park Homes Ltd in 2004. It came on to the site in 2005. It is made up of two units brought in one by one and then joined side by side along their higher inside length. Each unit appears to be a timber framed, timber clad construction. The two units are joined at the peak of the roof pitch and the joint is covered with steel ridge tiles. There is a timber cover strip over the join in the walls. Underneath the structure of each unit the timber floor joists rest on a metal chassis, constructed out of galvanised steel angle. The main elements of this chassis are two substantial welded steel cross-braced frames which run the length of the unit. The lower members of each frame rise to the same height as the joists at either end of each unit but towards the centre the frame deepens to approximately 60 cm and is parallel to the ground. The frame rests on timber blocks at the axle locations with timber props on either side. Axles are visible although the wheels have been removed. Each frame is supported at either end on a U-shaped bracket fixed to a screw jack which appears to be set into the concrete of the base. Each frame is also chained from a steel bar eye welded to the side of the frame to a substantial eye-bolt set in each corner of the concrete base. Steel bolts hold the two chassis together. Each chassis also incorporates a fitting for a tow hitch at the front, although the hitch itself has been removed. The steelwork I have described shows some sign of corrosion, but nothing, to my mind, that would present any serious obstacle to replacing the wheels and dismounting, un-shackling and un-bolting the two chassis. The joined chassis rest on a concrete slab which was said to be made of 150mm depth of reinforced concrete. The slab is of the same dimensions as the lodge and does not appear to extend to any significant extent under the decking.
4. The overall width of the lodge, including its overhanging eaves and gutters is 6.667 m, its overall length, including front and rear gables is 13.07 m. Mr Vestey gave evidence that the Caravan Sites Act 1968, section 13, allows caravans to be constructed of not more than two sections. A twin unit caravan may be up to 6.8 m wide with each unit up to 3.4 m wide. The maximum allowable length for a caravan under order 2006/2374 is 18.288 m.
5. The void between the bottom of the lodge and its decking and the concrete slab is surrounded by a screen or ‘skirt’ of timber and boarding, constructed and stained to match the weather boarding of the lodge itself. This skirt is suspended from the base of the lodge or the side of the decking rather than being fixed to the slab. Gaps have been left between the boarding to provide ventilation to the space inside and there are a couple of hatches which allow access to it. There is a connection to receive foul drainage in the void. A timber frame and board cabinet has been constructed against the west side of the lodge which contains the electricity supply and meter and the water pipes. There is another larger cabinet at the back of the lodge (on the northern side) which contains garden implements and furniture. Both these structures closely match the colour and materials of the lodge and its skirt but are additions to it and appear to be screwed or nailed to the side of the lodge itself while standing on their own bases.
6. Across the front of the lodge and along its eastern side there is an area of decking, edged with a wooden railing, at the same level as the floor of the living accommodation. The decking extends nearly 3m to the front and at its corner there are four steps down to ground level and the gravel path which leads to the roadway. The decking at the side is narrower but then widens out at the rear to provide enough room for chairs and a small table. The decking is also constructed of timber boards and provides the skirt for the void at the front and eastern side. The decking is supported on simple cross frames fixed to` timber posts. Some of the inside posts sit on the edge of the concrete slab but only one seems to be actually screwed to it. None are attached to the structure of the lodge. The remaining posts are set into the ground. It is evident that some of them have been set in concrete - I was told in evidence that it is a proprietary product called ‘Post-crete’. It may be that they all have; it would be sensible and easy enough to do. The decking has been built to fit closely against the lodge but nowhere is it actually fixed to it.
7. In front of the decking and on one side of the gravel path there are beds of shrubs, including two or three large and rather wind-swept broadleaved grasses. Along the northern edge of this section of the site there is a broad grassy mound, its flat top roughly level with the eaves of Mr and Mrs Caddick's lodge as it curves round the western side of it. At the end of this mound is the metal gate to this section of the site. This was the subject of some dispute but was measured on the site visit. The agreed dimensions are: the distance from post to post of the gate is 3.8 m; the distance from the gate to the wall facing the gate on the other side of the road is 10 m; the distance from wall to wall across the entrance with the gate removed is 6.2 m. These dimensions were at issue because of the parties’ disagreement whether it would be possible to move the lodge off-site.
8. The lease of plot 11 was granted by Whitsand Bay Holiday Park Limited to a Mr Jordan on 6 March 2006. The lease was assigned by him to a Mr Frier who in turn assigned it to Mr and Mrs Caddick probably on or shortly after 12th December 2011. (The uncertainty about the date is because neither the license to assign nor the deed of covenant put before me are dated. Nothing turns on the precise date.) Mr and Mrs Caddick covenanted with the respondent that they would pay the rent and service charge and observe and perform the covenants of the lease. The lease said the "Lodge" "means either a Whitsander or Tamar Class Lodge or a Pennlee or a Sunseeker as specified by the Lessor or such other Lodge as may be agreed between the parties at the absolute discretion of the Lessor".
9. The lease demised the "premises" which were defined as meaning the "Plot and the Parking Space" in consideration for £1 and a promise to pay the rent and service charge and observe the covenants. The ‘Plot’ "means the Plot numbered 11 which is for the purpose of identification only edged red on Plan upon which the Lessee has the right to station their Lodge." The lease plan shows both the lodge and notional decking but the red line is around the lodge only. I should record that I was shown a set of "replies to enquiries before contract" which stated in paragraph 1 that "there is no physical demarcation of the boundaries of the plot. The boundaries will be the lodge plus any decking." Some stress was placed on the last three words quoted on behalf of the appellants. However I note that this was in respect of plot 22, not on the same part of the site, and the buyer was Mr and Mrs C Devonshire. This document is neither dated nor is it plain who completed these replies, although Mr Wintle said it might have been him. I put little weight on it. On the other hand, the red line on the plan is expressly "for identification only" so I derive little assistance from that either.
10. The lease contains a number of covenants which are expressed to be enforceable both by the lessor and by each of the lessees of the other leased plots. Covenant 5.2 is "to keep the Lodge in a good repair and condition safe for human habitation to the Lessor's reasonable satisfaction *and to maintain its mobility*". (sic) The lessee covenanted with the lessor alone –

"6.3 not to make any alterations or additions to the Lodge and not to make any structural alterations or structural additions or to erect any new building or structures on the Premises whatsoever or change the colour of the Lodge"

6.4 to keep the Lodge in good repair and condition at all times excepting the decoration of the exterior walls, cladding, decking and fencing

6.5 to repair and replace all or part of the Lodge, exterior cladding, covered decking and fencing with identical materials as existing and in the case of the whole of the Lodge with an identical structure. Any variation to that already existing must be approved by the Lessor at his absolute discretion to the extent such a variation alters the external appearance of the lodge.

6.7 *at the expiration or sooner determination of the Term peaceably to surrender and yield up to the lessor the whole of the Premises and together with any permitted additions or at the option of the lessee to uplift and remove the Lodge and its contents and will forthwith at its own expense make good any damage done to the park by the removal of the Lodge to the reasonable satisfaction of the lessor and if requested by the lessor the lessee shall render safe any service installations serving the Premises in such manner as determined by the lessor”* (sic)

1. The lease contained a covenant to observe the terms of the site licence under the Caravan Sites and Control of Development Act 1960. Clause 6.33 required the lessee to "maintain a Lodge on the plot at all times for the duration of the Term.

**Evidence**

1. **Mr Philip Wiltshire** BSc, MRICS of Kivells Chartered Surveyors gave evidence on behalf of the appellants. His report presented a thorough account of the Lodge, its construction and its attachment to the slab, supported by photographs and other documents. It emerged that there was very little difference between him and Mr David Vestey MRICS about the basic facts. Mr Wiltshire concluded that although the Lodge is apparently mobile it would require a team of reasonably experienced contractors (builders, haulage and mechanical and electrical) to move and reinstate it in a new location. New materials would be needed and very possibly heavy plant, such as a crane. Some making good to the lodge would be required as well as some to the plot itself. He clarified that the chain anchors were necessary to counter the risk that the Lodge might be moved by strong winds. He agreed in cross-examination that the timber decking was not fixed to the lodge, however he felt that there would be a need to make the decking good if the Lodge was removed and this would apply to other things such as the service boxes and the cover strips. He accepted that those only appeared to be nailed in place but it would not be possible to be certain about what had to be done until the removal had taken place. He had not seen Mr Evans' statement which described a team that was experienced in moving lodges but he accepted that if such a team with their equipment could be put together then the Lodge could probably be moved and he would not wish to contradict evidence that to such a team this might be a simple and comparatively minor matter. He confirmed that his reference to demolition simply meant the replacement or making good to such things as the cover strips. How much work it would take to restore any damage would probably depend upon the skill of the crane operator. The presence of the decking would make it more difficult to take the Lodge out on its own wheels. His assertion that the plot would have no value without a lodge on it because it could not be enjoyed unless a lodge was situated upon it was strongly challenged by Mrs Headford and the costs of lodges on and off site were explored in some detail.
2. **Mr David Vestey** MRICS gave evidence on behalf of the respondent. He said that his experience in general building surveying work had included the surveying and assessing of approximately 130 mobile or park homes. He had also done a careful survey of the Lodge and its plot and also produced a number of photographs and other documentation. He described the Lodge and its construction. It was constructed from two sections as envisaged by the Caravan Sites Act 1968, delivered to the site in two halves and then connected by a variety of bolts, screw fixings or clamps, as appropriate. The steps and decking were what would be envisaged for a park home or caravan and do not physically form any part of the lodge. These steps and decking do not prevent the lodge from being mobile. He noted that the wheels had been removed. That was not uncommon. They could readily be reinstalled. If either the wheels or the axles had become corroded, which was not unusual, new axles and wheels could be fitted without problem. It was commonplace to remove the tow hitches because otherwise they would protrude from the front of the caravan and become a potential hazard. It was his view that the structure of the lodge had not deteriorated to any significant effect since it had been put on the plot. The tethers are simply required to prevent wind lift in what is an exposed coastal location.
3. Mr Vestey's overall conclusion was that the lodge could be relocated by crane in two halves or by crane as a single item or after the wheels and tow hitches were reinstated, by towing each half away separately. This need not involve any significant delay or damage to either the lodge or decking. He was cross examined on that point by Mr Crozier. He accepted that work would be necessary to prepare the lodge for removal but so far as the decking, boxes and cover strips were concerned he reckoned it would take one man about three hours with an electric screwdriver to do it. If moving it in halves he would contemplate that they would probably be lifted over the gates which he had not then measured.
4. He would not expect that it would be lifted over the bank down to the road at the back but if it had to be done it could be done with a big crane. It could be moved as a whole unit and put on a low loader. He thought the cabinets for utilities and other items were commonplace; most caravans had them these days. The materials from which the lodge was constructed would be expected to have a life of about 40 years but with careful maintenance the lodge could be kept going much longer than that. He remarked that the oldest building in Plymouth had a timber frame and was 500 years old.
5. **Mr David Evans** said he was one of the directors of Jade Enterprises (South West) Ltd, a family owned company which specialises in selling and siting new mobile homes and in relocating them when required. He said he had re-sited lodges similar to that belonging to Mr and Mrs Caddick on many occasions. He would not have any problem in any respect in taking it apart and moving it and then putting it back in the same way that it came onto the site in the first place. He felt that the decking would probably be taken down and might be moved as well. Sometimes people wanted to take the decking with them. The most likely method would be to take away the front of the decking and then tow the two halves of the lodge off. That would probably be the cheaper way of doing it. He would always get new wheels and hubs. He thought it could all be done with very little damage caused. In cross-examination he agreed that although he had put lodges on this site he had not removed any. He had started to be involved with the site five or six years ago. He did not think that the width of the gate or the turn in the road would present any problems if the lodge were split into two halves.
6. **Mr Robert Wintle** said that he was the sole director of Whitsand Bay Holiday Park Ltd. He produced photographs showing the siting of Mr and Mrs Caddick's lodge which he took on 17 February 2005. He explained a number of matters concerning the lease. He said that in his view the right to site a lodge in the lease was not limited to any specific lodge and there was no requirement or assumption that the first lodge to be sited would remain throughout the term of the lease. He would hardly contemplate that the first lodge could last 125 years. He explained that the lodge was an Omar Kingfisher, which the manufacturers declared would have a life of at least 50 years. Its off-site cost would be nearly £54,000. The lodges in the different phases were from varying manufacturers with different designs but were the same in terms of the way they were sited, their build quality, approximate size and their legal status.
7. Mr Wintle described the development of the site. The bank to be seen around the side had always been there since it was a gun battery. As for the replies to enquiries that had been produced he could not find any record of making those replies but he acknowledged that he might have given them. He agreed in cross-examination that it would be possible to keep the lodge going for the full extent of the lease. As the plots had only been there for a few years no lodges had been moved off that section yet. He said that while each park was unique in the legal arrangements it made, he believed that the plot added a considerable premium to a lodge; good views sell lodges, he said, and the owners on his sites would have access to many extra facilities.

**ISSUES**

1. The **first issue** is whether the FTT erred in law in striking out the Caddicks' case as being an abuse of process. If there is no error in law in the FTT's decision that is the end of the matter.
2. The **second issue**, if the FTT are found to have erred in law, is whether the UT should remit the matter back to the FTT or decide the matter itself.
3. The **third issue** arises if the Caddicks’ case is not struck out; that is the substantive issue, whether the Lodge on plot 11 falls within section 27A because -

*(*a) it is a **building** and thus a dwelling within section 38, and

(b) there is a **tenancy** of the dwelling within section 27A.

**The Submissions**

1. On the first issue, whether or not the FTT had made an error of law in the exercise of its discretion, Mr Crozier submitted that he relied upon the points made in his application for permission. Firstly the FTT had failed to apply a "broad merits-based test" because it had failed to address the substantive merits of the applicant' primary case that the lodge was a tenant's fixture. This was a different issue from that considered by the SRAC because, as a result of the decision in *Peel Land and Property*, it went beyond questions of physical annexation. The FTT erred in paragraph 26 in considering that it was wholly inconsistent with the lodges being tenanted that the lease enabled the lessee to remove it at the end of the lease.
2. Mr Crozier's next point drew a distinction between the collective application made to the SRAC by the tenants association and the application made to the FTT by Mr and Mrs Caddick. The former was a lesser and purely collective right to have the tenants association recognised. The latter was an application by the parties to a 125 year lease to seek the protection of the act in relation to the levying of a fair service charge. The FTT had erred in law by not making a distinction between the two.
3. Furthermore, the FTT had gone wrong in law by not reading regulation 9 (3) (c) and (d) together and by failing to take into account the fact that the former requires complete identity of parties but the latter does not. Mr and Mrs Caddick were successors in title to a party to the earlier litigation but not parties to it themselves. This was an important distinction which the regulations should be read as recognising. Regulation 9 (3) (c) would have little or no point if the concept of "otherwise an abuse" in 9 (3) (d) could cover exactly the same ground but without the need to satisfy the same conditions, such as the requirement that the proceedings should be between the same parties. It was an error of law to read 9 (3) (d) in that way. Finally it was an error of law to take into consideration any "floodgates effect" as, if the appellants argument on regulation 9 (3) (c) and (d) were correct, there would be no or only a very limited floodgates effect once an authoritative decision had been made.
4. On the substantive issue Mr Crozier submitted that the Appellants' position could be distilled into two propositions:

1) The Lodge is a part of the demise because, at the least, it is a fixture during the currency of the term (which, under clause 1 of the Lease, is 125 years) and is thus treated in law as part of the Plot,

(2) The lodge can only sensibly be regarded as being a building, both as a matter of ordinary English usage and by reference to other cases in which the meaning of "building" has fallen to be considered.

1. In support of the first of his propositions counsel drew particular attention to *Elitestone Ltd v Morris* [1997] 1 W.L.R. 687 (HL) and its approval of the three-part classification of objects brought onto land as being (A) a chattel, (B) a fixture or (C) part and parcel of the land itself. Objects in categories B and C are treated as part of the land. Fixtures that are physically capable of being severed from the land without damage may revert to being chattels (see *Webb v Frank Bevis Ltd*. [1940] 1 All ER 247 (CA)) but while they are fixtures they are part of the land. The terms of a lease may regulate rights to sever a chattel from the land as between the parties but such an agreement cannot prevent the chattel once it is fixed, becoming in law part of the land. (See *Melluish v. B.M.I.* (No. 3) Ltd. [1996] A.C. 454.) The structures in *Elitestone Ltd v Morris* were chalets that came within category C because they had become irremovable from the land without substantial damage or destruction. But if a chattel has become a fixture within category B it is unnecessary for it to be irremovable without damage or destruction, it is still part of the land as long as it remains a fixture. ( See *New Zealand Government Property Corporation v HM & S Ltd (The New York Star).* [1982] 2 W.L.R. 837; *Holland v Hodgson* (1871-72) LR 7 CP 328.) The class of fixtures is wide and the cases show that a building may be a tenant's fixture removable at the end of the term. (See *Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2014] EWCA Civ 100; *Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch); *Billing v. Pill* [1954] 1 Q.B. 70; *Webb v Frank Bevis Ltd* above) If the lodge has become a tenant's fixture and part of the land which is demised, it must become every bit as subject to the lease as the plot itself. That status, maintained as long as the lodge continues to be part of the land is not contradicted by the ability to remove the lodge at the end of the term, whereupon it becomes a chattel again.
2. The second proposition, that the lodge is a building within section 38 was developed in submission by reference to the New Oxford Dictionary of English, defining a "building" as a "structure with a roof and walls, such as a house, school, or factory" while the Shorter OED defines it as "that which is built, a structure, edifice". Mr Crozier particularly referred to Lord Parker CJ in *Cheshire County Council v Wooodward* [1962] 1 All ER 517 where, at 519 he said

“ …it seems to me that when the Act defines a building as including ‘any structure or erection and any part of a building so defined’, the Act is referring to any structure or erection which can be said to form part of the realty, and to change the physical character of the land.”

1. Counsel also relied upon *Smith v Customs and Excise Commissioners* (1990) VAT Decision 5579 , an official transcript of a decision of the Manchester VAT Tribunal, where he quoted the passage –

Most people can easily recognise a ‘building’ when they see one; and most people can recognise a ‘caravan’ or ‘mobile home’ when they see it. And if the conclusion is analysed it will be apparent that physical characteristics and user will form significant if not decisive, features in reaching the conclusion….It is perfectly possible for a structure which started its life as, say, a holiday caravan intended to be towed behind a car, to become a building, albeit a temporary building, by having its mobility features such as wheels and tow-bar removed and being jacked up on bricks or concrete blocks on its own enclosed site and converted into a dwelling home. It will then be a building even though a temporary building.”

1. Submissions were made on the relevance of section 13 of the Caravan Sites Act 1968. It was suggested that the lodge did not satisfy the conditions set out in that section but that even if it did that would not conclude the matter. The clauses of the lease were referred to in support of the submissions that the lodge was a building, at least a fixture within category B.
2. Mr Crozier identified in detail the factual matters that he said demonstrated that the lodge was not capable of being moved without significant demolition and the potential for damage. He set out the indications that he relied upon in support of his submission that it had been affixed to the ground quite sufficiently to mean that it amounted to a fixture, albeit, perhaps a removable one.
3. In response Mrs Headford submitted that there was no confusion at all in the mind of the FTT about Rule 9 (3) (d) as was made plain in their refusal of permission dated 20 of September 2013. There could be none. Both provisions were perfectly clear and freestanding. Rule 9 (3) (d) in effect re-enacted regulation 11 of the 2003 regulations, it would bite upon successive owners all re-litigating the same issue in turn, which 9 (3) (c) would not.
4. The case of *Peel* had been considered by the FTT, and that was the point. It was open to them to find that it made no difference and they were right to do so. *Peel* had affirmed the principles in *Elitestone,* which had been considered by the SRAC. The decision of the Court of Appeal in *Peel*, reversing the decision of the Judge, turned on the interpretation of the passage in the lease that was said to preclude the removal of tenant's fixtures. (See Rimer LJ at paragraph [38].) It made no difference whatsoever to the principles that were significant in the FTT's decision.
5. Nor was there any error in the way the FTT had approached the question of the comparative positions of the members of the Tenant' Association and Mr and Mrs Caddick. The right under section 29 of the 1985 Act is not a "lesser right” than that under section 27A of the same act. Different litigants may take their own subjective view of it but that is not a sound basis to interpret the act. Nor does the collective nature of the action make any material difference. The owners under the section 29 application had an identity of interest in the outcome. The same would be said of any application under section 27A; the interest of plot holders is the same whether the application is brought by one or many. Jurisdiction to hear applications under section 29 and 27A depends upon exactly the same substantive issue interpreted under the same section of the same act. Nor was there anything in the floodgates argument. The Caddicks could point to no new law and no new facts to distinguish their application from those that had gone before. The FTT was entitled to take the view that it did.
6. On the substantive issue Mrs Headford stressed that the appellants had to satisfy the tribunal on both counts in order to establish jurisdiction. She pointed to the facts and to the provisions of the lease to support the submission that the lodge continued to be a chattel and had never become part of the realty, either by annexation or by becoming a fixture. For similar reasons the lodge was manifestly not a building. She drew particular attention to the judgement of Lord Lloyd in Elitestone at page 690, which I set out below.
7. It was submitted that in the present case the lodge was evidently a mobile home that could be moved elsewhere in whole or in sections to another site without any process of demolition.

**THE LAW**

1. **The First Issue**
2. Regulation 11 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 (hereafter the 2003 Regs.) stated, so far as is relevant, -

(1) subject to paragraph (2) where –

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

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

1. The 2003 Regs were replaced by the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (hereafter the 2013 Rules), with effect from the 1st July 2013. Rule 9, so far as relevant, states that:

(2) the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal –

(a) does not have jurisdiction in relation to the proceedings or case .....

(3) the Tribunal may strike out the whole or a part of the proceedings or case if –

(c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

(e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.

1. SRAC in its decision of the seventh of July 2011 and the LVT in its decision of the 18th of February 2013 were acting under Regulation 11. As the 2013 rules came into force on the 1st of July 2013, Rule 9 applied at the hearing on the first of August 2013. The parties’ submissions on the 1st of August and the FTT's decision dated 20th August referred exclusively to Regulation 11. However in the FTT's decision of the 20th of December 2013, paragraph 2, the FTT noted that, although the determination did not expressly say so, it was clear that the strike out was on the basis of abuse of process and so was effected under rule 9 (3) (d) of the rules. It is common ground between the parties that there is no significant difference between regulation 11 (1) (a) and rule 9 (3) (d) and that is my view.
2. Both the 2003 Regs and the 2013 Rules give the FTT a power to strike out proceedings as an abuse. By way of contrast the rules under which the Upper Tribunal acts are interestingly different and contain no express power to strike out for abuse of process. (See The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 Rule 8(2)(a) and 8(3)) . There is a general power to stay at Rule 5(3)(j).) This confirms my view that the FTT was seen by Parliament as the gatekeeper whose primary responsibility it is to bar vexatious or abusive claims and underlines the importance of the Upper Tribunal not intervening in such matters unless it is obliged to do so.
3. The nature of the decision made by the lower court and the principles upon which an appellate court should interfere with it were set out helpfully in the judgement of Lord Justice Thomas in the case of *Aldi Stores Ltd v WSP Group, WSP London Ltd and Aspinwall & Co Ltd* [2007] EWCA Civ 1260 at paragraph 16, in this way:

"In considering the approach to be taken by this Court to the decision of the judge, it was rightly accepted … that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. Nonetheless an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors …. the types of case where a judge has to balance factors are very varied and the judgements of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgement he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

1. The UT will only interfere with a decision of the FTT on abuse of process if it has made an error of law. The FTT will make an error of law if it misunderstands or misapplies the relevant law but it is for them to put such weight as they think appropriate on the various facts they find. The decision of the House of Lords in *Johnson v Gore-Wood & Co (No 1)*[2002] 2AC 1 gives authoritative guidance on the dismissal of proceedings as an abuse. Lord Bingham said (at page 20):

"…. 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. …. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic approach to what should in my opinion be a broad, merits-based judgement 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

That passage was essentially repeated in paragraph 69 of the judgement of the Chancellor, Sir Terence Etherton in the case of *Price v Nunn* [2013] EWCA Civ 1002, which was cited to the FTT and is quoted in paragraph 12 of the decision.

1. In the Aldi case it was accepted that the approach was to be a broad merits-based judgement but it was argued by Counsel that there was an essential or threshold requirement before that merits-based judgement could be applied. It was said that there had to be a sufficient degree of identity between the defendants to the original action and the defendants to the new action which was being sought to be struck out; without such a degree of identity, it was said, the application was bound to fail. (See paragraph 7.) Thomas LJ rejected that argument in these words (paragraph 10) –

"I cannot accept this argument. Lord Bingham made it clear in his speech that the approach should be a "broad merits-based judgement" and not formulaic. It is clear he was approving the passage in the judgement of Sir Robert Megarry as the "correct approach" and not as a statement of rigid application. The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits-based judgement; it does not operate as a bar to the application of the principle."

**The** **Landlord and Tenant Act 1985**

58. The Landlord and Tenant Act 1985, section 18 (1) provides that:

"In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent—".

59. Section 27A is headed "liability to pay service charges: jurisdiction" and says -

(1) An application may be made to a leasehold valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable,

(e) the manner in which it is payable.

60.There then follow a series of sections of the Act which make provision for service charges and their regulation. They include provisions relating to consultation requirements and requests for information where it will be seen that there are express references to a "recognised tenants' association". (*eg* sections 20ZA (5); section 22(1)) In that context section 29 sets out the meaning of "recognised tenants' association" thus –

(1) a recognised tenants' association is an association of qualifying tenants (whether with or without other tenants) which is recognised for purposes of the provisions of this Act relating to service charges either

(a) by notice in writing given by the landlord to the secretary of the association, or

(b) by a certificate of a member of the local rent assessment committee panel.

61 The section goes on to set out the Secretary of State's regulation making powers in respect of the procedure for applying for a certificate. A "qualifying tenant" in the context of subsection (1) is plainly a tenant liable to pay a service charge, in other words a "tenant of a dwelling" as defined in section 18 and 38.

62 Section 38 declares that:

“dwelling” means a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it”.

**CONSIDERATION AND CONCLUSIONS**

**The First Issue - The Appeal.**

63. The applicant made it plain that reliance is still put on the draft grounds of appeal in paragraphs 2 and 4 of the application for permission. Ground 2 of the application concerned the alleged failure of the FTT to address the substantive merits of the argument that the lodge was a tenant's fixture. Ground 4 argued that the FTT failed to take into account the fact that Mr and Mrs Caddick were parties to a 125 year lease seeking to involve statutory protection and were not in the same position as the applicants involved in the first decision for that reason. There also seems to have been an argument to the effect that the relationship between rule 9 (3) (c) and (d) had confused the FTT in some way.

64. I also bear in mind the point that concerned the Deputy President in paragraph 2 of his grant of permission to appeal, namely the extent to which successors in title should be prevented from raising issues which have already been determined under the same lease in earlier proceedings but to which they were not party.

65. The first question for any Tribunal, including the UT, is always whether the tribunal has jurisdiction. Where jurisdiction depends upon statutorily defined criteria, those criteria must be satisfied. The tribunal cannot be given jurisdiction by the parties’ failure to address a particular criterion or an agreement by them to waive it. Rule 9 (2) of the FTT rules is simply a statutory expression of that basic position. It is however an important purpose of Rule 9(3)(c-e) to give the FTT the ability to avoid, in proper cases as defined by the rules, the necessity to revisit that jurisdictional question on every occasion it arises. It is a desirable procedural power to prevent the FTT being faced with an unnecessary number of applications on essentially the same point.

66. On the first point it must not be forgotten that in order to succeed in establishing jurisdiction under section 27A the applicants must show both that the lodge is a dwelling which is a "building" and that there is a tenancy of it. If the lodge is not a "building" it makes no difference whether there is a tenancy of it or not. The argument as to whether the lodge had become annexed to the plot or was a tenant's fixture attached to it was relevant to whether there was a tenancy of the lodge; it was not relevant to whether the lodge was a building and thus a dwelling. In the decision of 20th August the FTT noted (at paragraph 3) that –

"It had been determined after a full hearing (by the SRAC) that the lodges situated on the plots of land the subject of the Applicants' leases, were not "dwellings".

67. The FTT fully recorded (paragraphs 12 and 13) and clearly understood the applicants "tenant's fixture" argument based on *Peel Land and Property*. The FTT accurately recorded (paragraph 21) -"in this case, there is no suggestion that the Caddick's wish to raise any point in respect of their lodge which is different from or additional to the arguments raised by the other 12 applicants plus the Friers, save .... that the Applicants' Counsel says that the ( SRAC) wrongly focused on the point of physical annexation." The *Peel Land and Property* case did not ‘change the landscape’, the FTT said. The FTT accurately recorded (at paragraph 13) the point the applicants were making and clearly understood it. They had been referred to *Elitestone v Morris* and noted that *Peel Land* followed that case. That was consistent with a recognition that the "tenant's fixture" argument made no difference to the basic finding that the lodges were not dwellings within section 27A and was thus no basis for saying that the Caddick's were in any different position to the original applicants that would justify a different decision.

68 The FTT continued -

" This Tribunal considers, therefore, that it cannot be right to allow a case to be re-litigated on substantially the same grounds as a previous case simply because it is a successor in title to the party to those proceedings who is seeking to bring the new case rather than the party who was tenant at the time of those proceedings. To do so would potentially open the floodgates to litigation from assignees who do not wish to accept the previous ruling."

69 In that passage it seems to me that the FTT is considering the same point that was argued and rejected in the *Aldi* case (above), namely that there is an essential or threshold requirement that there must be a sufficient degree of identity between the parties to the original action. The FTT also rejected the proposition that the matter can be reopened "simply because it is a successor in title" to the earlier party who is bringing the action. It gives one reason in the next sentence but it is plain to me that it does so in the context of the whole factual background. This appears to be exactly what Thomas LJ had in mind when he said that "the fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle." In other words, the fact that the new party is a successor in title who played no part in the previous litigation, is one of the important facts that must be taken into account, but it is for the FTT to weigh that fact with the rest in reaching its overall judgment. In this case the FTT plainly did take the position of the Caddicks as successors in title into account and weighed it in the balance. It had in mind Article 6 of the Convention on Human Rights and the right of a person to have his case heard. (See paragraph 22 of their decision.) The UT can only interfere if the FTT came to a decision that was not reasonably open to it on the facts.

70. The applicants criticise the metaphor of the open floodgates on the basis that the floodgates would be held shut in any event by the application of rule 9 (3) (e), in that the FTT would be able to say that because the matter had been previously determined, a new application on substantially the same grounds would have no reasonable prospect of success. Therefore, it is said, the FTT took into account an irrelevant consideration. While the mention of open floodgates can sound a little apocalyptic, it is perfectly reasonable to take into account the possibility that litigation would be encouraged by what they describe, in the sort of factual circumstances that they were considering. It is not a sufficient answer to say that, because there are other powers in the rules, which might or might not apply in any particular instance, that therefore such a consideration must be disregarded. Once more, that is a matter of balance and weight for them. I cannot conclude from that part of the decision that they took into account any fact that they ought not to have taken into account or that they had failed to understand the range of powers that were available to them. In my view the FTT‘s decision cannot be faulted on this ground.

71. As for Rule 9, I can find no justification for the suggestion that the FTT were in the slightest bit confused by the two subsections of rule 9 (3). It is clear that the FTT was dealing with the matter on the basis that the law had remained the same as it was under regulation 11, in other words on the basis of rule 9 (3) (d).

72. Mr Crozier emphasised the significance to the Caddicks of the fact that the decision would govern the remainder of their 125 year term. In order to succeed in upsetting the FTT's decision on that basis it would be necessary for the applicant to show that there was some extra significance in the case of the Caddick's, as compared with the position of the earlier applicants, and that the FTT had failed to take it into account. It goes without saying that the FTT was fully aware that the Caddick's were not parties the original proceedings or decision not to appeal. As for the relative significance of the point for the Caddicks as opposed to other leaseholders, there is no evidence from which the FTT could properly conclude that there was any significant difference between the Caddick's and the earlier applicants so far as the effect of the decision on a long term lease was concerned. The SRAC recorded that they had studied two leases which they took to be representative. It is right to say that nowhere in either of the decisions before the Caddick's case is there any express mention of the lengths of the leases, although there is detailed recording of their other provisions. However, in the written evidence of Mr Robert Wintle, at paragraph 9, he said "I started to grant 125 year leases of the pitches around 20 years ago. The present lodges are therefore all relatively new and none have yet been replaced or relocated." This was not challenged when he gave evidence in person before me. It seems to me that the inescapable inference is that, although the remaining terms of the leases may not all be of the same length and some of them (like the Caddicks) will have less than 125 years remaining, they will all be long leases. I cannot see that there is any significant factual difference between the importance of the issue to the Caddicks, with 119 years of their lease remaining, and the other applicants, who, whether their leases have shorter or longer to run, are all likely to have a long time left. It seems to me that there was no evidential basis for concluding that the importance of the issue would be significantly different for any of the plot holders. The FTT said that the Caddicks had been given every opportunity of submitting reasons why they should be in a different position from the original 12 applicants but, as the FTT said more than once, they failed to do so. In my judgment the FTT was fully entitled to find that there was no such difference.

73. Nor does it seem to me that any real distinction can be drawn between the position of a party who is seeking to establish that his lodge is a dwelling under the 1985 Act for the purposes of section 27A and one who is seeking to establish exactly the same thing under exactly the same statutory definition for the purposes of section 29 of the 1985 Act. I have set out the relevant provisions of the Landlord and Tenant Act 1985 above and I will not repeat them. It is obvious from a consideration of those provisions that the question whether a particular tenant is a "tenant of a dwelling" within section 18 is exactly the same question in the same statutory context, whether it arises on an application under section 27A or under section 29. There is no justification at all, in my view, in treating the determination of the question on an application under section 29 in a different way from a determination of exactly the same question in the same Act because it is said to be "collective" as opposed to being made by an individual. If the FTT were to certify an applicant, whether alone or as part of a group, as being a qualifying "tenant of a dwelling" for the purposes of section 29 it is inconceivable that the same tenant would be found to be anything other than a ‘tenant of a dwelling’ for the purposes of section 27A.

74. For those reasons I conclude that the appeal against the decision of the FTT fails on the first issue and must be dismissed. However I have been asked to consider the interpretation of section 27A and section 38 of the 1985 Act and I have in fact done so, in case I decided to allow the appeal. Anything I say on that issue will necessarily be *obiter dicta*, unless of course my decision on the appeal were to be overturned. It therefore seems sensible for me to set out my consideration and conclusions on that point as well, although I shall do so briefly. I now turn to that issue.

**The Second issue - Whether the lodge is a building and thus a dwelling**.

75. The question of whether the lodge is a building, and thus a dwelling, is a matter of fact and degree to be decided in the context of the Landlord and Tenant Act. I was referred to a number of cases in which judicial pronouncements are to be found about whether, in the circumstances of those cases and in their particular statutory context, various things were buildings or not. I have already set out above the remarks of Lord Parker CJ in *Cheshire County Council v Woodward* [1962] 1 All ER 517, at 519 and I will not repeat them. This was a decision on the interpretation of section 119 (1) of the Town and Country Planning Act 1947. It was said that the Minister had erred in deciding that a coal hopper and conveyor on wheels did not involve development. Parker LCJ said it was impossible to say that there was any mistake of law. Counsel had additionally argued that the machinery amounted to a building. Parker LCJ dealt with that submission in the passage quoted. It was a very different statutory provision and very different facts and I do not find it particularly helpful. I was also shown *Smith v Customs and Excise Commissioners* (1990) VAT Decision 5579. In that case the Manchester VAT Tribunal had to decide, for the purposes of VAT, whether mobile homes (including ‘OMAR’ homes) that had been put on a plot and set upon a brick foundation were buildings, in which case tax would be deductible, or caravans. The tribunal found as a fact that although described as "mobile homes" it was most unlikely having regard to their physical features that they would ever be moved. In theory the structure could be removed from its base but that was improbable because the base would have to be dismantled and all brickwork and plumbing destroyed, the cost of removal would be prohibitive and the mobile homes were not, if situated on a permanent site, capable of being moved. The tribunal said (page 5) –

"Most people can easily recognise a "building" when they see one; and most people can recognise a "caravan or "mobile home" when they see it. And if the conclusion is analysed it will be apparent that physical characteristics and user will form significant, if not decisive, features in reaching the conclusion. Difficulty can arise, as here, where the various features may lead in opposite directions. …. Thus it is perfectly possible for a structure which started its life as, say, a holiday caravan intended to be towed behind a car, to become a building, albeit a temporary building, by having its mobility features such as wheels and tow-bar removed and being jacked up on bricks or concrete blocks on its own in closed site and converted into a dwelling home. It may well then be a building even though a temporary building. … In the present case we have no doubt that the only true and reasonable conclusion from the evidence is that each of these structures was a building and not a caravan mobile home. It is quite possible, as seems clear from the manufacturer's brochure, that they may have been designed as mobile homes or even as caravans of a sort, but when they were erected on this site they lost the physical characteristics which had made them mobile and they acquired new characteristics (such as the brickwork base) which made them buildings. Applying the ordinary and natural meaning test we have no doubt that these structures were designed and purpose built on this site as buildings and not caravans; they were designed and built as dwelling houses. We find that the whole scope of the Appellants' enterprise was not to purchase land and build a caravan site on it; the whole purpose was to purchase land and develop it for building purposes and to sell the buildings, when completed, for families or couples to live in each structure and the characteristics and user of a dwelling house and was thus a building; by the time they had been erected; developed, landscaped and equipped no one would any longer have described them as "caravans" or mobile homes."

76. Again, the statutory context is utterly different and the facts appear to be very different as well. Of course this case does not bind me but I do not disagree with the general statements that are made. I agree that it is quite possible for objects whose whole purpose is to be movable, such as caravans, railway carriages, and boats to be incorporated into the realty and become buildings or parts of buildings. I agree that an important part of the test is whether the object in question has lost the power to be made mobile, at least at reasonable cost. In *Elitestone v Morris*, Lord Lloyd identified this consideration. (At [1997] 1 WLR 687, 690.) He said –

"… for the photographs show very clearly what the bungalow is, and especially what it is not. It is *not* like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at the site, and therefore cease to be a chattel."

77. Whether or not lodge 11 is a dwelling that is a building is a matter of fact and degree for me. The starting point must be the natural and ordinary meaning. It is also useful to consider the concept of a "building" in the context of the 1985 Act. The draughtsman did not leave the word dwelling as it stands but added the requirement that it must also be a building, plainly intending to exclude a class of "dwellings-not-a-building." Examples that come to mind are a boat, a tent, a cave or a caravan. Of course all those examples can become or be incorporated into a building. (eg Peggoty's house in *David Copperfield*) I find the most persuasive test of the difference to be that of Lord Lloyd in *Elitestone*; namely whether the structure has become something that can only be enjoyed where it is and cannot be removed elsewhere without a process of demolition.

78. The reference to a "process of demolition" must not be misunderstood: it is demolition of the structure itself that matters, not the structure's surroundings. Consider a car parked, unchanged, in a corner of a barn, where it is then bricked in to protect it from requisition: it could well be said that the car could only be enjoyed, if at all, where it was and could certainly not be removed without demolition. However when rediscovered 70 years later the nature of the car would not have changed one jot (although its value might) and no one would suggest that it had therefore become a building by incorporation or even a fixture. For that reason, even if I did conclude that the dimensions of the gate, road or landscaping meant that the lodge could not be moved off without some demolition of them, I would not put much weight on that.

79. On the facts it does not seem to me that there has been any significant change in the nature of the lodge since the day it was brought onto the plot in 2005. Mr Wintle's photographs show the lodge being manoeuvred on its own wheels onto its base. Now the wheels have been removed but the axles remain. The weight of the lodge is taken on the main frames of the chassis, either by timber blocks or by screw jacks. The screw jacks are a practical method of levelling and supporting the lodge. The concrete base is stable and there is no sign whatsoever that the lodge is sinking into it or becoming part of it in any way. The chains that attach the chassis to the concrete base are necessary to ensure the stability and security of the lodge in a location where high winds are sometimes to be expected. I note that British Standard 3632:2005, "Residential Park homes - Specification", which was put in evidence by Mr Vestey, says at paragraph 4.9.2 "Stability (resistance to overturning)" that a "park home shall be provided with holding down points" of a specified strength and position with a suitable chassis fixing. (Emphasis added.) This does not seem to me to make the lodge a building any more than a boat's moorings make it a building or a light aircraft becomes a building when it is chained to a concrete block on the ground to stop it blowing away.

80. The lodge is provided with water pipes and an electricity supply, both of which, as I observed, seemed designed for easy disconnection. The foul sewage connection in the void under the lodge is, as it has to be, of a more substantial construction but is still not much different from the arrangements that ordinary caravans or motorhomes enjoy on some sites and could be disconnected reasonably cheaply and easily. These matters, it seems to me, are the only ways in which the lodge is directly connected to the ground beneath it.

81. Separating the lodge into two halves would involve unbolting the two chassis and removing the covering strips and ridge tiles. I accept that some slight damage might well follow from these operations, depending on the skill of the person carrying them out.

82. The skirt on two sides of the lodge is attached to it and simply rests upon the ground. It would not be a difficult or lengthy matter to remove it

83. I entirely accept that the decking around two sides of the lodge is important for its enjoyment and access. The timber supports for that decking are mostly set in the ground and many if not all are further supported by a bag of post-crete. However it is a matter of agreement and observation that the decking is not attached to the lodge. I accept the evidence of Mr Evans that with the skilful use of a crane the lodge could be lifted out without damaging the decking at all. I also accept his evidence that the more likely way of moving the lodge would be to dismantle the decking at the front of it and pull the lodge out on its own wheels. I can see that such a method of removal would do no good to the planting in front of the lodge but I do not think that matters much.

84. The evidence of Mr Wintle and Mr Evans, which was not challenged on this point, was that wheels and, if necessary, axles could readily be replaced. I accept the evidence, which accords with my own view, that to take away such fixings as there are between the lodge itself and the concrete base would be a straightforward and not very demanding task. I think the same is true for the electricity and water services and the sewage connection. Separating the two halves of the lodge and disconnecting them from the slab would not involve anything that could sensibly be described as demolition although it would undoubtedly require some redecoration. Removing the lodge from the side decking or the cupboards need not involve any demolition whatsoever. However I think that it is right to suppose that removal would involve dismantling and moving the decking at the front, which is quite a substantial structure, and probably the destruction of the flowerbed and shrubs. I have explained why I do not accord that much weight; that is not the sort of ‘process of demolition’ that I think Lord Lloyd had in mind. The evidence was that the decking is also commonly moved with a lodge.

85. I have referred to the dispute about the width of the gate and the turning circle in the road. Having inspected both I incline to the view that Mr Wintle and Mr Evans are right in their judgement that the two halves of the lodge could be taken out by that route without any great difficulty. Even if some adjustments were necessary it would not make any difference to my overall view of the reasons I have given. Finally I am sure Mr Evans is correct to say that if an appropriate crane were used the lodge could be lifted out in one piece without affecting the decking, gate or road at al1.

86. This is sufficient to dispose of the point but I have not forgotten the terms of the lease. I should say that do not read them as preventing the removal of this particular lodge as long as an acceptable lodge is retained on the plot. I do think it would be strange if a tenant of a plot was able to claim that a lodge had become a fixture and thus immobile while under a continuing obligation to the landlord under clause 5.2 to maintain the lodge’s mobility. It seems to me that if a lodge were ever asserted by a tenant to be effectively immobile the landlord might well be entitled to claim under clause 5.2 an order that it be made mobile immediately together with damages for any consequences to him that flowed from its temporary immobility.

87. In summary, as a matter of fact and degree and applying the tests I have set out, I conclude that the lodge is not a building. It cannot only be enjoyed where it is. It can be taken apart and put back together elsewhere without any process of demolition or even any process that could fairly be described as re-erection. It is not attached to the plot in any way that makes it a fixture. It has not become part of the realty. It is indeed a mobile home. For that reason, if it had been necessary to do so, I would have held that the SRAC were correct in their decision dated 7 July 2011.

88. It is unnecessary to deal with Mr Crozier's second submission that the tenancy is of the lodge and plot and not simply the plot alone. I intend no disrespect to him by this, indeed I found his argument interesting and persuasively presented, but my conclusion on his first submission answers the substantive point.

Dated: 16 February 2015



His Honour David Mole QC

Deputy Judge of the Upper Tribunal