Non Domestic Rating appeals; offices and premises; proposals challenging VO notices to give effect to earlier agreements; comparable evidence; Thorntons Plc and Clarion Solicitors Ltd [2018] UKUT 0109 (LC) ; Co-operative Group, Poundland and Virk (VO) and Battelle Agrifood and Sykes (VO) [2020] UKUT 286 (LC) ; Johnson v Gore Wood & Co [2002] HL 2 AC ; Society of Medical Officers of Health v Hope (VO) [1960] HL AC551; the appeal of Michael Pearce (VO) [2014] UKUT 0291 (LC); res judicata; abuse of process; appeals struck out.

RE: 2nd & 6th Floors, Tower Bridge House, St Katharine's Way, London E1W 1AA

APPEAL NUMBERS: 590027529317/053N05 and 590027528733/053N05

BETWEEN:	Mazars Llp	Appellant
	and	
	Mr David Jackson (Valuation Officer)	Respondent

BEFORE: Mr A. V. Clark (Vice President sitting alone)

CLERK; David Slater (Deputy Registrar)

ON: Friday 19 March 2021

APPEARANCES: Mr Luke Wilcox from Landmark Chambers (Appellant's Counsel)
Mr Paul Rabbette (Appellant's expert witness)
Mr George MacKenzie from FTB Chambers (Respondent's Counsel)
Mr Karl List (Valuation Officer's expert witness)

Summary of decision

1. The appeals were struck out.

Introduction

2. The President of the Valuation Tribunal for England (VTE) is required to make sure arrangements are in place and make such statements and Directions so as to ensure that business before the Tribunal is conducted in accordance with The Local Government Finance Act 1988, Schedule 11, Part 1, paragraph A17(1) and The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. By virtue of Part 2 regulation (5) (arrangement for appeals) and regulation (6)(3)(g) (appeal management powers) the VTE may determine the form of any hearing.

3. Therefore, in pursuance of Regulation (6)(3)(g) the VTE has incorporated "remote hearings" as part of that definition and for the time being as the default option until it is safe to return to normal working. The Tribunal's Consolidated Practice Statement has been amended to reflect this.

4. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the submissions presented by counsel were fully considered by me before coming to a decision. Consequently, the absence of a reference to any statement should not be construed as it having been overlooked.

5. The appeals before me today arose from two proposals that were served on the Valuation Officer on 1 August 2016. The proposals challenged the Valuation Officer's notices of alteration dated 13 July 2016. The list alterations were to give effect to previous agreements reached with the Valuation Officer, on the Appellant ratepayer's behalf, by Aitchison, Rafferty and Buckland. The agreement was to apply a 5% end allowance within the assessment so as to reflect city office oversupply.

6. There was no dispute that the proposals were validly made. However, the proposals effectively challenged the ratepayer's earlier agreement(s) with the Valuation Officer. With the agreement of the parties, the appeals were consolidated and heard together.

7. Following the advice of the clerk, I decided to vary the model procedure and invited the Respondent's counsel to begin, because the Respondent wished me to consider preliminary arguments as he sought the striking out of both appeals either on the basis of *res judicata* or abuse of process. Mr Slater advised that the burden was on the Respondent to prove that the appeals should be struck out. The clerk's advice was not challenged and Mr Mackenzie accepted that the onus was on him, on behalf of the Respondent, to convince me that the appeals should be struck out rather than on the Appellant to prove why they should not.

8. I advised the parties that I would take an adjournment after hearing arguments relating to the preliminary issue. If I found for the Valuation Officer and struck out the appeals the hearing would end there. In the alternative, if there was no basis for striking them out, I would hear arguments relating to the valuation issues arising from the proposals either later in the day (or at some subsequent time if I needed longer to consider the preliminary points).

History of assessment

9. It would be an understatement to say that the rating history in respect of Tower Bridge House was not interesting.

10. On 29 July 2010 this Tribunal heard an appeal which sought the merger of two assessments, being £600,000 RV (with effect from 24 August 2006) for the 2nd Floor and £605,000 RV (with effect from 26 November 2007) for the 6th floor.

11. This Tribunal determined that the two assessments should be merged into a single assessment of £1,144,750 RV. That being arrived at by adopting a basic rate of £250 per m² (as defended by the Valuation Officer) but reduced by way of a 5% fragmentation end allowance.

12. The Valuation Officer appealed that decision to the Upper Tribunal (Lands Chamber). That Tribunal, in its judgment given on 11 June 2012, confirmed that there should be a single entry in the Rating List still based upon £250 per m² but it removed the 5% end allowance. Thus the RV was increased to £1,205,000 with effect from 26 November 2007.

13. There was then a further appeal by the Valuation Officer, this time to the Court of Appeal, which was dismissed, the judgment being released on 17 April 2013.

14. An appeal was then made to the Supreme Court, who by a decision issued on 25 July 2015, upheld the Valuation Officer's appeal and determined that there should indeed be separate entries in the 2005 Rating List for the 2nd and 6th Floors notwithstanding that they were both occupied by Mazars LLP.

15. To give effect to the Supreme Court's decision the Valuation Officer, by way of a Valuation Officer Notice dated 18 November 2015, amended the Rating List so as to show the original entries of £600,000 RV for the 2nd Floor and £605,000 RV for the 6th Floor both with effect from 26 November 2007.

16. On 15 December 2009, two proposals were made, on the Appellant ratepayer’s behalf, by Aitchison, Rafferty and Buckland. Both proposals were made on the grounds of a material change of circumstances where reduced entries were sought to reflect city office oversupply. The appeals arising from those proposals were listed and then stayed by the Tribunal on a number of occasions until the Supreme Court’s judgment to which I referred to earlier was released. The two appeals were eventually settled by agreement in July 2016 when an end allowance of 5% to reflect city office over supply was agreed with effect from 1 April 2009. The Valuation Officer altered the list entries to reflect the agreement(s) on 13 July 2016 and soon after on 1 August 2016 further proposals were made, on behalf of the Appellant, to challenge the accuracy of those “agreed” alterations.

17. At the date of the proposals, the existing entries were £570,000 Rateable Value for the 2nd floor and £575,000 for the 6th floor, both with effect from 1 April 2009. These proposals against the 2005 Rating List were made in accordance with Regulation 4(1)(d) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009. The two earlier appeals which had arisen from proposals made under Regulation 4(1)(b) on the grounds of a material change of circumstances.

18. The Deputy Registrar, who assisted me today, had in the past given advice to a lay panel that a ratepayer was not permitted to make a proposal challenging a Valuation Officer’s notice of alteration, the effect of which was merely to give effect to an earlier agreement. The lay panel, acting on his advice, held that the proposal was invalid. That lay panel decision was appealed and was the subject

of the Upper Tribunal's judgment in *Thorntons Plc and Clarion Solicitors Ltd* [2018] UKUT 0109 (LC).

19. In *Thorntons* the Upper Tribunal decided that the proposal was not invalid as it was made on a different ground. The earlier proposal challenged the accuracy of the compiled list entry and was made in accordance with Regulation 4(1)(a). The second proposal which was against the list alteration was made under Regulation 4(1)(d). However, given that the agreements had been reached on earlier appeals which had been referred to the VTE by the Valuation Officer as appeals, the Upper Tribunal did express the view that whether the ratepayer was entitled to challenge their own agreement was open to doubt. In the Upper Tribunal's view the matter could be deemed *res judicata* unless new evidence had come to light, which could not have been ascertained through due diligent investigations, before the earlier agreement was reached. Paragraphs 48 and 49 of the judgment were as follows;

> 48. In both appeals the Appellants says the alteration made by the VO to give effect to the agreed compiled list rateable value was inaccurate because it was incorrect, excessive and bad in law. It is possible that since the agreements were reached fresh evidence has come to light that could not have been obtained by reasonable diligence beforehand and that such evidence entirely changes the previous cases upon which the agreements were based. That seems unlikely, but we cannot say it is impossible. Whether, in such a case, it would be open to the ratepayer to make a second proposal is open to doubt. To do so might be thought to engage another legal rule (separate from but closely related to the type of abuse of process of which *Johnson v Gore Wood & Co* is an example), namely the prohibition on re-litigating the same dispute once it has been decided by a court or Tribunal. The rule is referred to either as the *res judicata* principle or as "cause of action estoppel". It prohibits the making of a second claim where the basis of the claim is identical to a claim in earlier proceedings between the same parties. In such a case the bar on the second proceedings is absolute (unless fraud or collusion is alleged) and even the discovery of new evidence which could not have been found before the previous proceedings were settled or determined will not allow the dispute to be re-opened (see *Arnold v National Westminster Bank plc* [1991] 2 AC 93).
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> 49. The appeals have been conducted on the single issue of the validity of the second proposals and we have not received any evidence about the accuracy of the list as altered following agreement. It seems likely that the present appeals have been brought, as the VTE concluded, to enable the Appellants to resile from their agreements and to argue the same case again rather than to bring forward fresh evidence of which they had been unaware at the time of the previous agreements. Nevertheless, these appeals have been argued on one side only and the VTE did not examine all the facts, including the evidence that was before them, and we will limit our own decision to dealing with the VTE's reasoning. We are satisfied that the VTE's general reference to abuse of process did not provide any basis for its decision that the second proposals were invalid because they were made on the same grounds as the first proposals.

20. In *Thorntons,* the UT held that the VTE erred in dismissing an appeal against a Valuation Officer's alteration to give effect to an earlier agreement, on the basis that it was an abuse of process without considering properly whether there was such an abuse. In *Thorntons* the UT concluded that there was no abuse of process but the matter could be *res judicata* unless the ratepayer could show that new evidence had come to light, which could not reasonably have been foreseen since the earlier agreement was reached. If no such new evidence had become available, the UT suggested that the correct approach for the VTE to have taken was to strike out the appeal on the basis that the appeal had no reasonable prospect of success.

21. In a more recent judgment in *Co-operative Group, Poundland and Virk (VO) and Battelle Agrifood and Sykes (VO) [2020] UKUT 286 (LC)* , the UT held that *res judicata* did not apply as the Valuation Tribunal had not made a judicial determination setting the respective RV entries appealed against, the appealed entries being determined following an earlier agreement between the parties. Consequently, abuse of process may apply which was a wider concept of which *res judicata* formed part. Having invited submissions on whether or not the appeals should be struck out for an abuse of process and hearing from the parties, the UT found that no new evidence had become available since the earlier agreements were made. Therefore, the ratepayers were not legitimately entitled to 'a second bite of the cherry'.

22. Two appeals were therefore struck out on the basis that there was no reasonable prospect of success. However the VO's application to strike out one of the appeals (Poundland) was rejected because it was made by a new ratepayer, who was not a party to the earlier agreement.

23. The Valuation Officer was of the opinion that these appeals before me should be struck out on the basis of *res judicata* as no new evidence had, in his opinion, come to light since the earlier agreements were made. In the event that I decided that *res judicata* did not apply, the Valuation Officer's secondary argument was that the appeals should be struck out on the basis of abuse of process instead. The Tribunal did serve on the Appellant's representative a notice of intention to strike out the appeals prior to the hearing and Mr Rabbette made representations against the proposed strike outs. The President gave judicial consideration to the representations made and decided not to strike out the appeals, in his notice of determination that was issued to the parties on 17 December 2019. The President was unable to decide on the papers whether or not new evidence had come to light, since the earlier agreements were made and left the matter for me to determine as a preliminary issue at this hearing.

Submissions

24. Mr Mackenzie, on behalf of the Respondent, submitted his legal arguments as to why the appeals should be struck out on the basis of either *res judicata* or abuse of process.

25. In response, Mr Wilcox, on behalf of the Appellant submitted his legal arguments to try to persuade me that the appeals should not be struck out. Mr Wilcox

accepted that he had to succeed on both points and successfully argue that neither *res judicata* nor abuse of process was applicable in these appeals.

26. Although Mr Wilcox originally intended to argue that the Tribunal had no power to strike out these appeals on the basis of *res judicata* or abuse of process, he rightfully conceded that the Upper Tribunal had decided that the VTE does have the power which can be exercised under Regulation 10 (3) (c) of the VTE's procedure regulations. He also accepted that the Upper Tribunal's judgments were binding on the VTE.

27. After hearing from the parties' respective counsel, I invited the Deputy Registrar to give his advice and any observations he wished to make in open Tribunal for the parties to comment upon and challenge if they felt necessary.

Discussion on abuse of process

28. On behalf of the Respondent, Mr Mackenzie, chose to present his arguments in relation to why the Respondent believed that the Appellant's lodging of these appeals was an abuse of process first. The leading authority on abuse was the House of Lords' judgment in *Johnson v Gore Wood & Co [2002] 2 AC.* In *Gore Wood,* Lord Bingham stated;

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in 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 an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. 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. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

29. Mr Mackenzie argued that there was an important distinction between what matters ‘could’ have been raised in a previous case or ‘should’ have been raised. He contended that this was a ‘should’ case. In paragraph 44 of its judgment in *Thorntons* the Upper Tribunal set out when a ‘should’ case would arise;

> 44. A number of categories of abuse are recognised in the case law summarised in the notes to CPR 3.4 in Civil Procedure 2017. One such category is where a party seeks to raise in a second action issues or facts which could and should have been, but were not, raised in a first action which was determined or resolved by agreement. The basis of this line of authority is that the processes of the court should not be permitted to be used to harass a defendant by subjecting them to repeated actions concerning the same subject matter. The leading modern authority is the decision of the House of Lords in Johnson v Gore Wood & Co [2002] 2 AC 1.

30. In *Co-op* the Upper Tribunal decided that the ratepayer by appealing its own agreement was seeking a second bite of the cherry and therefore guilty of an abuse of process. In paragraph 54 of its judgment, the Upper Tribunal stated;

> So far as the first Appellant is concerned, we strike out the appeal on the basis that it has no reasonable prospect of success. An agreement was made in 2013 at a point when the shop was unoccupied. Even if the first Appellant regarded that agreement as being interim or provisional, no evidence has been produced that gives any indication that the VO so regarded it or that it was aware that the first Appellants so regarded it. The alteration was made by agreement. The first Appellant is indeed seeking to have a second bite at that cherry and for it to do so is an abuse of process. This is not a case where a second bite is legitimate on the basis that significant new evidence is available that was not available to the parties when the agreement was made. With the premises already empty, nothing had changed at the date of the proposal. The first Appellant may not re-open the agreement and the appeal is struck out under rule 8(3)(c).

31. Mr Mackenzie argued that by lodging these appeals against the Valuation Officer’s alterations, which merely gave effect to earlier agreements, the ratepayer

was blatantly misusing the resources of both the Valuation Office Agency and the VTE. He further submitted that if the ratepayer says now that the base rate for the appeal offices of £250 per m^2 was wrong, it should have raised it in the 2009 proposals and when the 2016 settlement was reached. He did not accept that the VTE panel decision, in relation to the later 2010 list entries, which was released to the parties on 17 February 2017 constituted new evidence which was not available or could not have been reasonably ascertained, when the earlier agreements were reached.

32. In response, Mr Wilcox asked me how do you as the VTE decide if a matter should have been raised when the earlier agreement was reached? He then referred to the same extract of Lord Bingham's speech from *Johnson and Gore Wood* to which Mr Mackenzie referred. He argued that the determination of whether there has been an abuse of process requires the adoption of a broad, merits based judgment taking account of all the public and private interests involved and all of the facts of the case.

33. Mr Wilcox referred me to an extract from Lord Millett's speech from *Johnson and Gore Wood* in which he stated;

> In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.
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> However this may be, the difference to which I have drawn attention is of critical importance. 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 art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). While, therefore, 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 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. In *Brisbane City Council v A G for Queensland* [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it—
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> 'ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

> There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson *could* have brought his action as part of or at the same time as the company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in *Manson v Vooght* [1999] BPIR 376 at 387, it may in a particular case be sensible to advance claims separately. In so far as the so called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.

34. Mr Wilcox argued that the VTE should be slow to strike out on the basis of abuse of process. He drew my attention to Appendix 3 of Mr Rabbette's expert valuation report to show that when the 2016 agreement was reached it was only the level of end allowance for the office oversupply which was discussed. The contemporaneous notes prove that the underlying basis of assessment was never discussed.

35. Mr Wilcox said that if I followed the merits based approach in *Gore Wood* I would find in the Appellant's favour. He submitted that the 2017 panel decision had established that the VO's stance on the Appellant's comparable properties was erroneous. It was plainly against the public interest to allow the VO to prevent the correction of list inaccuracies by a reference to a procedural mechanism such as a strike out.

36. In addition, the VO seems not to have turned his mind to the implications of the 2017 VTE panel decision and the agreements which followed it, for the correctness of the 2005 List entries for the appeal hereditaments. The VO's legal submission on strike out do not mention the 2017 decision. Even more surprisingly, nor does the expert report of Mr Karl List. It may be that the VO is unaware that his case is contrary to the reasoning of the VTE decision on the same building. Whatever the reason, that conflict raises issues which ought to addressed now and which could not have been addressed in 2016.

37. The documentation appeared to suggest when the 2016 agreements were reached the accuracy of the basis of assessment appears to have been assumed to be correct, rather than discussed and agreed. The Appellant was therefore not looking to renege upon any matters which had been discussed and agreed. Therefore he was not as the VO suggested having his cake and eating it. Instead the Appellant was simply seeking a reconsideration of an untested assumption which had been undermined by subsequent judicial decisions. A strike out would prevent the list inaccuracies to be corrected and given that the VO and the VTE

existed to ensure that list entries were accurate, there were strong public policy considerations which militated against striking out these appeals.

38. The Deputy Registrar advised me in open Tribunal that, unless there were special circumstances at play, I was entitled to strike out the appeals. By special circumstances, Mr Slater explained that new evidence may have come to light or could not reasonably have been found by the exercise of due diligence at the time when the 2016 agreement was reached. However, if it was simply the case that the ratepayer’s previous professional representative had not investigated the accuracy of the assessments in the same thorough manner that Mr Rabbette had, it would be in order for me to strike out the appeals.

39. Mr Mackenzie agreed that Mr Slater had correctly identified the test I needed to make. However, Mr Wilcox argued that the appeals should not be struck out if the new evidence was decisive in showing that the list entries were inaccurate.

Discussion on *res judicata*

40. I was advised by learned Counsel for both parties that there were two types of estoppel per rem judicatam (*res judicata)* cause of action estoppel and issue estoppel. The difference, and the operation of the two types, was explained by the Upper Tribunal in paragraphs 21 to 27 of its *Co op* judgment.

> *Res judicat*a is the principle that once a court or Tribunal has made a decision, the parties cannot come back for another bite of the cherry (save by the proper appeal route). Once a person has brought proceedings for damages for personal injury in an accident on 1 January 2020, and the court has made an order awarding or refusing damages, the claimant can appeal that order if there are grounds to do so but may not start a fresh action claiming damages on the same basis arising from the same accident.
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> *Res judicata* has a number of branches, which are described in some detail by Lord Sumption in paragraph 17 of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. For present purposes it is sufficient to focus on the two main branches: cause of action estoppel and issue estoppel. Cause of action estoppel is what we described in the preceding paragraph. As Lord Sumption put it:
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> > “once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings.”
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> Issue estoppel, and again we quote Lord Sumption, is:
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> > “the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.”

So where, for example, a court makes a declaration about the ownership of land, and in order to make that declaration makes a finding of fact that the boundary lies along the north bank of a stream, the parties to that action will not be able to challenge that finding about the position of the boundary in later proceedings brought to claim damages for trespass.

In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 Lord Keith explained that issue estoppel may not close the door for ever:

> "… there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings … being material which could not with reasonable diligence have been adduced in those proceedings."

What is common to both these branches of *res judicata* is that there has been a decision of a court or Tribunal, as the name of the doctrine indicates: something (res) has been decided (judicata).

An issue estoppel may also arise where a court has made a decision and a relevant issue was not raised by a party who could have done so. But again, there must have been a decision. A full discussion of *res judicata* can be found in *Halsbury's Laws, vol 12A (2015) on Civil Procedure*, paragraphs 1603 and following.

41. Both Counsel also referred me to the House of Lords' Judgment in *Society of Medical Officers of Health v Hope (VO) [1960] AC551.* Mr Wilcox argued that the Valuation Officer was not a party for the purposes of *res judicata* and referred me to the following passage from Lord Ratcliffe's speech;

> The other main consideration which has influenced the courts in their treatment of these questions is the special position of the Valuation Officer, surveyor or equivalent official or committee. This reflects on the propriety of using the words "party" or "*lis inter partes*" in this connexion. It will be shorter to limit attention to the case of rating, though a study of the judgments of the Court of Appeal in *Sneath's* case will show how closely parallel are the arguments that develop with regard to a surveyor or inspector of taxes. However that may be, the position of the Valuation Officer in rating is that he is a neutral official charged with the statutory and recurring duty of bringing into existence a valuation list and maintaining its contents in correct and legal form. He has, of course, no personal interest when he appears before the local valuation court; nor would it be correct to say that he represents the rest of the ratepayers other than the complainants. It is in the nature of the rating scheme that all those other ratepayers, a body of persons varying from year to year, are interested in the valuation or exemption allotted to any single hereditament on the list. Indeed, we were reminded by counsel that, at the time of the 1951 decision, there was no bar to any ratepayer, as a person aggrieved, raising an objection to the alteration of the list consequent on that decision

and asking for his objection to be heard. Some statutory limitation has since been placed on this right of objection, the details of which I have not checked, because its existence is only significant as illustrating how inappropriate are the general circumstances of rating procedure to the importation of the legal doctrine of estoppel per rem judicatam into its ordinary administration. It is no reflection on the responsible work carried out by the local valuation courts if I say that they are not the natural repositories of the right to decide for good such legal issues as the interpretation of statutes or general legal questions affecting ratepayers; and to hold that, subject to appeal, such decisions are to be treated as conclusive for all time would be, in my opinion, to impose a needlessly heavy burden on the administration of rating.

My Lords, the words themselves may be plain, but they involve several distinctions that are far from clear. What is direct? and what collateral or incidental? By what test is the matter the same or different? When are the parties the same and what are the determining marks of a party or a *lis* for this purpose? To take only the instance of the present case. Certainly the local valuation court is a court of competent jurisdiction able to give a final decision of some sort between those who appear before it; but then the question arises, for what decisions is it a court of competent jurisdiction and do they or can they extend beyond the range of the form and contents of the current valuation list? Again, the Valuation Officer is no doubt a party to a controversy between himself and the complainant; but, having regard to his statutory function and duties, including that of preparing the new valuation list, and to the interests of the whole body of ratepayers from time to time in the contents of the list, is this controversy a *lis* or is he a party for the purpose of the principles of estoppel per rem judicatam?

42. Both Counsel also referred me to paragraph 18 of the Upper Tribunal's judgment in the *Appeal of Michael Pearce (VO)* [2014] UKUT 0291;

18. Hope was not cited in Thrasyvoulou, as the President pointed out, but it can properly be understood as an application of the approach taken by Lord Bridge. In Hope a local valuation court had upheld a ratepayer's claim to exemption from rates on the grounds that it was a scientific society to which a specific statutory exemption applied. When the next rating list was compiled the VO once again included the society's premises, arguing that the valuation court decision did not bind him in relation to the new list. The Court of Appeal and the House of Lords each agreed with that contention. As the President was at pains to point out and as appears from the first sentence of the leading speech of Lord Radcliffe, the only question raised by the appeal in Hope concerned the application of the principle of res judicata "to the making of a new valuation list". The case was not concerned with the question whether a decision of a valuation court could be departed from by the VO during the currency of the list to which the decision related. Lord Radcliffe regarded the fields of

rating and taxation generally as territory in which the res judicata principle did not operate for two reasons. The first was that the jurisdiction of the local valuation court was a limited one and its function was restricted to deciding the liability of a ratepayer for a defined and terminable period. The view which the valuation court took on any particular issue was incidental to its function of fixing a specific rating assessment, as Lord Radcliffe explained:

"For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it: but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the estoppel per rem judicatam that arises in certain contexts from legal judgments."

The second reason militating against the application of the res judicata principle to the rating sphere was the special position of the VO as a neutral official, with no personal interest in the outcome of a determination, charged with the statutory duty of compiling and maintaining the list "in correct and legal form."

43. Mr Mackenzie had drawn my attention to the fact that the Valuation Officer was a party for the purposes of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 which was a point that was not disputed by Mr Wilcox. However, Mr Wilcox argued that the Valuation Officer was not a party for the purposes of *res judicata.*

44. Mr Mackenzie argued that the appeals could be struck out on the basis of *res judicata* as the VTE had previously determined the underlying tone of value of £250 per m^2 in its decision to merge the entries. He contended that if the Appellant had an issue with the base rate it could have appealed the VTE decision to the Upper Tribunal. In Mr Wilcox's prepared legal argument, on behalf of the Appellant, he argued that there was no previous VTE decision. Mr Mackenzie pointed out that there was and it went all of the way to the Supreme Court.

45. As far as the Valuation Officer was concerned the accuracy of the base rate had been judicially determined. Now the Appellant wanted to ride on the coat tails of the 2016 agreement to re-open the issue and give it the kiss of life.

46. Mr Wilcox argued that I could not strike out these appeals on the basis of *res judicata* because the Tribunal had never given a judicial decision in respect of the appeal hereditaments. He did not accept that issue estoppel applied because the only VTE decision on the 2005 list related to its decision to merge the 2nd and 6th floors. The VTE had never given any judicial consideration to the correct valuation of the individual floors when the assessment was split following the Supreme Court's judgment.

47. The alteration that took effect from 1 April 2009 related to a different subject matter namely a material change of circumstances at a time when the former merged hereditament was split. The Valuation Officer was therefore relying on the VTE's historic decision to merge for issue estoppel. He referred me to paragraph 32 of the Upper Tribunal's judgment in *the Appeal of Michael Pearce (VO)* to support his argument;

> There is a final point which would, in my judgment, justify allowing the VO's appeal even if I am wrong in my acceptance of Mr Buley's second and more moderate submission. On the facts of this case the rateable value which was altered by the VO on 29 October 2009 was not a rateable value determined by the Valuation Tribunal but was rather the value agreed between the parties in July 2008 following the merger of the office building into the Airfield hereditament. Not only was the VO's revaluation a change to a figure agreed by the parties, but that figure represented the rateable value of a hereditament which was itself materially different from the hereditament which had been valued by the Valuation Tribunal in its decision of 19 March 2008. The constitutional and jurisdictional considerations which attend interference by the VO in a rateable value which was the result of a Valuation Tribunal decision do not seem to me to apply to an alteration to a rateable value shown in the list as a result of an agreement between the VO and the ratepayer.

48. Mr Wilcox also submitted that the VTE panel's decision in relation to the 2010 list entries was a relevant matter that could displace *res judicata.*

49. Mr Slater advised me that I should not strike out these appeals on the basis of *res judicata* as the VTE had never given any judicial consideration to the accuracy of the list entries which were effective from 1 April 2009.

50. The oversupply of offices within the city was a change in a paragraph 2 (7) Schedule 6 to the Local Government Finance Act 1988 matter and therefore constituted a material change of circumstances. The fact that there had been a material change meant that the parties could approach the whole valuation exercise afresh. It was therefore open to the parties to negotiate and agree a different basis of assessment. However, instead of adopting say an agreed basis of £237.50 per m², the parties had adopted a different approach by simply reducing the assessment by an agreed end allowance and leaving the existing tone of value undisturbed.

51. Whilst Mr Slater understood why the VO had argued that issue estoppel applied, given that the Appellant only wished to challenge the underlying tone of value and not the level of end allowance, the VTE's judicial decision pre-dated the material change. Consequently, these appeals could not be struck out on the basis of *res judicata.*

52. Neither party challenged Mr Slater's advice on the *res judicata* issue.

Decision and reasons

53. After due consideration of the competing legal arguments on the preliminary issues, I decided to strike out the appeals on the basis of *res judicata.* I informed the parties of my decision orally, after a short adjournment so that I could consider the matter. Normally decisions of this Tribunal were reserved, however, I considered it appropriate to inform the parties of my decision as their respective expert witnesses, who were in attendance, needed to be made aware if they needed to be called to give valuation evidence, in relation to the substantive issues raised in the proposals. In the event, the expert witnesses were not required to give evidence.

54. When the entries relating to the 2nd and 6th floors were entered into the 2005 rating list as new hereditaments both floors were assessed at a basis of £250 per m². The 2nd Floor had an assessment of £600,000 RV with effect from 24 August 2006 and the 6th Floor at £605,000 RV with effect from 26 November 2007. The panel's decision from 29 July 2010 which merged the two entries made no alteration to the base rate applied and therefore quantum was not deemed to be a factor, despite Mr Rabbette arguing for a lower rate. The two entries were combined to form a single assessment of £1,144,750 RV. The panel did, however, apply a 5% end allowance to reflect fragmentation given the distance between the two floors and the time to travel between the two. The panel stated in its decision;

> With regard to the valuation, there was it seems no issue between the parties that the accepted tone of the list for this building in the 2005 list was £250 per square metre. This was stated in Mr Osborn's evidence and not rebutted by Mr Rabbette, although he was contending for £225 and a 10% overall end allowance by reason of the merger. The decision of the panel is that this was a double counted allowance for the effects of the fragmentation. It should only attract a 5% end allowance for the relatively small inconvenience suffered.

55. The Valuation Officer appealed the panel's decision to the Upper Tribunal. In its judgment which was released on 11 June 2012, the Upper Tribunal confirmed the VTE panel's decision that the 2nd and 6th Floors could form a single entry. However, it determined that the VTE was wrong to apply a 5% end allowance for fragmentation and therefore this was removed from the valuation. The combined assessment was as a result increased to £1,205,000 RV to reflect the aggregate sum of its component parts (£600,000 and £605,000 for the 2nd and 6th floors respectively) with effect from 26 November 2007. The existing tone of value of £250 per m² was also confirmed.

56. As the Valuation Officer was of the opinion that non-contiguous floors could not be merged, the Valuation Officer appealed the Upper Tribunal's judgment to the Court of Appeal on a point of law. The latter dismissed the Valuation Officer's appeal on 17 April 2013. The Valuation Officer then appealed the Court of

Appeal's judgment to the Supreme Court again on a point of law. In a landmark judgment, the Supreme Court upheld the Valuation Officer's appeal and determined that there should indeed be separate entries in the 2005 Rating List for the 2nd and 6th Floors, notwithstanding that they were both occupied by Mazars LLP.

57. Lord Sumption identified the correct test to follow in respect of whether more than one hereditament existed in paragraph 12 of the Supreme Court's judgment. He stated;

> I derive from these decisions three broad principles relevant to cases like this one where the question is whether distinct spaces under common occupation form a single hereditament. First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second Bank of Scotland case illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately. Third, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it.

58. In paragraph 51 of the Supreme Court's judgment, Lord Neuberger stated;

> Where premises consist of two self-contained pieces of property, it would, in my view, require relatively exceptional facts before they could be treated as a single hereditament. The mere fact that each property may have the same occupier should, at least normally, make no difference. As Lord Keith said in Glasgow University v Assessor for Glasgow 1952 SC 504, 509, "[i]n the ordinary case … the question whether separate

buildings, or parts of buildings, should be entered in the Roll as unum quid falls to be decided primarily from the geographical standpoint".

59. To give effect to the Supreme Court's judgment, the Valuation Officer altered the list entries by notices of alteration dated 18 November 2015. The original entries, prior to the VTE panel decision to merge, were reinstated. The 2nd floor was shown in the list as having an assessment of £600,000 RV and the 6th floor had an entry of £605,000 RV. Those entries, of course, being based upon the established tone of value of £250 per m² that both the VTE and the Upper Tribunal had, in my view, confirmed to be correct.

60. Following the settlement by agreement with Aitchison, Rafferty and Buckland, on behalf of the Appellant in July 2016, the rating list entries for both the 2nd and the 6th floors were altered by notice on 13 July 2016. Both assessments were reduced by an end allowance of 5% to reflect city office oversupply. This reduced the respective rating list entries to £570,000 RV for the 2nd floor and £575,000 for the 6th floor with effect from 1 April 2009. The underlying basis of £250 per m² was not disturbed as it was assumed to be correct.

61. Within a very short timescale, 19 days if my maths was correct, two proposals were made on behalf of the ratepayer challenging the accuracy of the list entries which resulted from the Valuation Officer's alterations. These proposals were served on the Valuation Officer on 1 August 2016 and gave rise to the appeals before me. The ratepayer was therefore effectively challenging its own agreements.

62. Having listened to the competing arguments of Counsel, I chose not to follow the Deputy Registrar's advice and concluded that issue estoppel was engaged in these proceedings. The main space price of £250 per m² having previously been determined by both the VTE and the Upper Tribunal.

63. Whilst I understood Mr Wilcox's argument that the VTE and Upper Tribunal decisions on the base rate related to the merged entry, the fact is that both prior and after the merger the base rate remained undisturbed at £250 per m². That tone of value was therefore considered or accepted as correct when the floors were rated separately and together. When the July 2016 agreement was reached it was on the basis that the underlying tone of value was assumed to be correct. The only matter that was discussed, in the lead up to the July 2016 agreement was the level of end allowance for city office supply. An end allowance of 5% was agreed which Mr Rabbette for the Appellant was not looking to disturb. However, on behalf of the Appellant, Mr Wilcox argued that the ratepayer was in possession of new evidence which proved that the agreed assessments were excessive.

64. *In Arnold v National Westminster Bank Plc* [1991] 2 AC 93 Lord Keith explained that issue estoppel may not close the door for ever:

> "… there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings … being material which could not with reasonable diligence have been adduced in those proceedings."

65. I was not impressed by the Appellant's argument that the existence of new evidence was decisive. This new evidence that was referred to related to a panel

decision, following a hearing held on 20 January 2017, in relation to the 2010 list entries for the 2nd and 6th floor offices occupied by the ratepayer. Within its decision, the panel referred to direct rental evidence from the appeal properties and indirect rental evidence from other parts of the building. The Appellant also referred to a number of comparable office buildings within the locality. I could not see how the evidence recorded in the panel's decision could have been legitimately described as new. This evidence was known or should have been known to the ratepayer and their representatives, at the time of when the 2016 agreements were reached. If some of the so called new evidence was not known, I do not accept that it could not have been reasonably ascertained with the exercise of the necessary due diligence.

66. As the base rate of £250 per m² had already been decided to be correct by the VTE and the UT, the Appellant, in my opinion, cannot relitigate the same issue before this Tribunal. The matter is *res judicata*. Whilst I understood the point that the Deputy Registrar was making that there has been a material change of circumstances that gave rise to later list alterations, in my opinion, that had no effect on the accuracy of the base rate. The ratepayer accepted that £250 was correct for the base rate and the agreement was limited to the level of end allowance that should be applied to offices in the locality to reflect office over supply. Mr Rabbette had accepted that the 5% end allowance was correct.

67. In view of the foregoing, as the base rate of £250 per m² had already been determined by this Tribunal and therefore issue estoppel was engaged and since the end allowance of 5% was not disputed, the appeals were struck out under regulation 10 (3) (c) of the VTE Council Tax and Rating Appeals (Procedure) Regulations 2009 as having no reasonable prospect of success.

68. Even if I am wrong in my interpretation that *issue estoppel* arises, I have nevertheless been convinced that the ratepayer, through its representative, was seeking a second bite of the cherry.

69. These appeals had arisen from proposals served on the Valuation Officer on 1 August 2016. The dates when these proposals were served was in itself significant because they were served within a month of when the agreements were made and the list entries altered, to reflect city office oversupply.

70. As I have already explained, all of the rental evidence and the comparable assessment evidence that was relevant to the appeal properties was known or readily available to be found, with the exercise of due diligence by the then ratepayer's representative. The fact that the Valuation Officer's alterations that were so soon challenged on the basis that the entries were inaccurate was a clear indication the ratepayer's interests were being protected, in order to try and secure a further reduction in the assessment(s) at a later date. It appeared to me to be a tactical manoeuvre by the ratepayer to take whatever offer the Valuation Officer put on the table which allowed them to come back at a later date for a second helping. That to me was a clear abuse of process because if the ratepayer was not satisfied with the 5% end allowance it had the opportunity to pursue the appeals before this Tribunal in 2016. It chose not to do so. Instead buoyed by the success of its 2010 list appeals, it decided that it had an argument to reduce the 2005 list entries on the basis of this later panel decision from 2017 constituting new evidence. However, it was not new evidence at all.

71. In *Arnold v Dearing* [2019] UKUT 224 (LC) (sometimes referred to as "*The Crooked Spaniard",* that being the premises to which the decision related*)* the Tribunal had to consider whether an earlier alteration of the list by agreement meant that that alteration could be challenged by a later proposal. The Tribunal (Andrew Trott FRICS) referred to the decision in *Thorntons* and made reference to *res judicata*. However, the decision rested squarely on the reasoning appropriate to abuse of process. At paragraph 55 Mr Trott said:

> "There is no new evidence on the point, just an explanation that the evidence previously considered was misinterpreted. In my opinion the agreement reached between the parties on the previous appeal in 2016 concerns the same hereditament, the same mode or category of use and the same physical condition of the property. It is not open to the Appellant to argue the point for a second time and it does not matter that the previous litigation before the Tribunal the case was settled by agreement and did not proceed to judgment. As Lord Bingham said in *Johnson v Gore Wood & Co…*

72. I also do not accept Mr Wilcox's argument that if the appeals were struck out it would leave inaccuracies in the list. Even if he was right, in my opinion, any fault was with the ratepayer because it had two choices open to it in July 2016. It could either agree a settlement of the appeals or run the appeals before this Tribunal. It chose the former. As Lord Bingham stated in *Gore Wood,* see paragraph 28 above. There was an underlying public interest that there should be finality in judicial proceedings and that a party should not be twice vexed by 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.

73. It was in the public interest that Valuation Officers dealt with appeals quickly and that any appeals referred to the Tribunal be dealt with as expeditiously as possible. If duplicate or unnecessary appeals are lodged, the Valuation Officer's resources could be stretched which could result in a delay in him dealing with other ratepayers' appeals. Similarly, unnecessary appeals could result in the delay in listing other ratepayers' appeals by the Tribunal. There was also the cost to the public purse to consider from having to administer more appeals than was truly necessary.

74. The ratepayer's actions therefore, in appealing their own agreement, were clearly abusive. This was a clear case where if the ratepayer was of the opinion that the existing tone of value of £250 per m^2 was excessive, this issue should have been raised at the time when the merits of the 2009 appeals were being discussed in July 2016.

75. The corollary of the above is that had I not decided that the appeals should have been struck out on the basis of *res judicata*, I could just as easily have struck them out on the basis that they were abusive.

Date: 1 April 2021

Appeal numbers: 590027529317/053N05 and 590027528733/053N05

Vice President