UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0286 (LC)
UTLC Case Nos: RA/39, 45 & 46/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – alteration of rating list – validity of proposal challenging alteration to list made by VO to give effect to agreement – application to strike out appeals from the Valuation Tribunal for Wales and Valuation Tribunal for England – res judicata – abuse of process

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE VALUATION TRIBUNALS FOR WALES AND FOR ENGLAND

BETWEEN: **CO-OPERATIVE GROUP** **RA/45/2019** **Appellant**

POUNDLAND LIMITED **RA/46/2019** **Appellant**

and

MR DALJIT VIRK
(VALUATION OFFICER) **Respondent**

Re: The Co-operative Food, Berriew Road, Welshpool, SY21 7SN

AND BETWEEN:

BATTELLE AGRIFOOD LTD **RA/39/2019** **Appellant**

and

MR C SYKES
(VALUATION OFFICER) **Respondent**

Re: Office, laboratories and premises, 29 Springfield Lyons Approach, Springfield Chelmsford CM2 5LB

Determination on written representations

Upper Tribunal Judge Elizabeth Cooke
Mrs Diane Martin MRICS FAAV

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The following cases are referred to in this decision:

Arnold v Dearing (VO) [2019] UKUT 224 (LC)

Arnold v National Westminster Bank Plc [1991] 2 AC 93 (HL)

Johnson v Gore Wood & Co [2002] 2 AC 1

Thorntons plc and *Another's Appeal* [2018] UKUT 109 (LC)

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160

Introduction

1. This is a decision in three appeals to the Tribunal, each about non-domestic rating. In each appeal the legal issue raised is the same, and so the Tribunal has directed that that issue be determined on written representations in a single decision.

2. In RA/45/2019 and RA/46/2019 the appellants are Co-operative Group Limited and Poundland Limited, and the appeals relate to the Co-operative Store in Welshpool. The Valuation Officer ("the VO") has applied to strike out both appeals from a decision of the Valuation Tribunal for Wales ("the VTW") on the basis that the rateable value of the hereditament has already been the subject of an appeal to the VTW which was settled by agreement.

3. RA/39/2019 is an appeal by Battelle Agrifood Ltd relating to offices, laboratories and premises at 29 Springfield Lyons Approach, Chelmsford. The VO has applied to strike out the appeal from a decision of the Valuation Tribunal for England ("the VTE") on the basis that the rateable value of the hereditament had already been the subject of an appeal to the VTE which was settled by agreement.

4. It will be convenient first to set out the facts, the legal issues, and our decision in the Welshpool Co-operative appeals and then, with the law already expounded, to turn to the Battelle Agrifood appeal.

The factual background to the Welshpool Co-operative appeals

5. Co-Operative Group Limited ("the first appellant") and Poundland Limited ("the second appellant"), are the former and current occupiers respectively of a shop and premises known as Co-Operative Food, Berriew Road, Welshpool, SY21 7SN ("the property").

6. The first appellant went into occupation of the property on 1 April 2010. The rateable value of the property in the 2010 compiled list was £123,000, the antecedent valuation date ("the AVD") being 1 April 2008.

7. Three proposals were made against that original assessment by Colliers International ("Colliers") acting for the ratepayer; one on 8 June 2010, one on 7 April 2011 on the basis of a material change in circumstances on 15 October 2010, namely roadworks in Welshpool, and a third on 7 April 2011 on the basis of a further material change in circumstances on 21 March 2011, namely the opening of a Tesco store nearby in Welshpool.

8. All three proposals were referred to the VTW on appeal and settled by agreement in advance of a hearing. The rateable values agreed were:

    a. £115,000 with effect from 1 April 2010,

    b. £110,000 with effect from 15 October 2010 and

c. £95,500 with effect from 21 March 2011.

9. Agreement notices were signed by Colliers on behalf of the ratepayer dated 11 July 2013 and the appeals were treated as withdrawn by the VTW. For present purposes the third agreement is the important one; as a result of that agreement, by a notice dated 16 July 2013 the VO altered the list ("the 2013 alteration") to show the agreed rateable value of £95,500 with effect from 29 November 2011.

10. In November 2012 the first appellant vacated the property.

11. On 30 March 2015 Colliers, on behalf of the first appellant, made a proposal ("the 2015 proposal") to reduce the rateable value of the property to £1 with effect from 29 November 2011 on the grounds that the 2013 alteration had introduced an inaccuracy into the list.

12. On 17 August 2015 the second appellant took a sub-lease of the property; there was a two year rent-free period, and the rent from August 2017 was £31,000 per annum.

13. On 30 March 2017 Colliers, on behalf of the second appellant, made a proposal ("the 2017 proposal"), again challenging the 2013 alteration and proposing a rateable value of the property of £1 with effect from 29 November 2011.

14. The 2015 and 2017 proposals were referred by the VO to the VTW and the appeals were heard together. On 11 October 2019 the VTW issued its decision, dismissing both appeals on the grounds that the appellants had failed to substantiate the case for a reduction in the listed rateable value of £95,500. Mention was made in the decision of the agreement reached in 2013 but the reason for the dismissal of the appeal, as we understand it, was the VTW's view that the valuation evidence was insufficient to substantiate the case for a further reduction. The present appeals are from that decision.

15. The two cases were listed to be heard together under the simplified procedure on 8 April 2020. On 24 March 2020 the solicitor for HM Revenue & Customs ("HMRC") made an application on behalf of the VO for the Tribunal to strike out the appeals pursuant to Rules 5(1) or 5(2) of The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("Tribunal Rules"). As we noted above, the Tribunal determined that the application be decided on written representations. Mr Luke Wilcox made submissions on behalf of the appellants and Mr George Mackenzie made submissions on behalf of the respondent.

The law relating to the strike-out application in the Welshpool Co-operative appeals

16. HMRC's letter of 4 March 2020 referred to the Tribunal's decisions in *Thorntons plc and Another's Appeal* [2018] UKUT 109 (LC) and in *Arnold v Dearing (VO)* [2019 UKUT 224 (LC) and said that the appellants "should be debarred from re-litigating the rateable value of [the Welshpool Co-operative] … pursuant to the doctrine of *Res judicata*". It asked the Tribunal to exercise its case management powers under rule 5 of the Tribunal Rules to strike out the appellants' case. Although the letter referred variously to "Appellant" and

"Appellants" it is headed by both case references and states that it is an application "to strike out the above appeals".

17. In the alterative the letter asked the Tribunal to remit the appeals to the VTW so that the VO could ask the VTW to strike out the appeals on the basis that they have no reasonable prospect of success.

18. Mr Wilcox in his written submissions of 16 April 2020 argued that the Tribunal has no power to strike out the appeals on this basis; that the doctrine of *res judicata* is not engaged; that the case is factually distinct from *Arnold v Dearing* because new evidence has come into being; and that the alternative application for remission to the VTW is not understood.

19. Mr Mackenzie's written submissions of 1 May 2020 focused on the agreement made in 2013, the doctrine of *res judicata* and its two branches, cause of action estoppel and issue estoppel, and the Tribunal's power to strike out appeals. Mr Mackenzie accepted that there is no estoppel against the second appellant, because it was not a party to the 2013 agreement, but argued that the second appellant's appeal should be struck out on the basis that it has no reasonable prospect of success; and that is also put forward as an alternative basis for the striking out of the first appellant's appeal.

20. For reasons that we shall explain, the doctrine of *res judicata* is not relevant to the present appeals. We therefore have to do a little disentangling, and we hope that counsel will forgive us for not setting out their arguments in full insofar as they focus on an area of law which is not engaged in these appeals. In the paragraphs that follow we explain why *res judicata* is not relevant, and then go on to discuss whether the appeals should be struck out on the basis that they are an abuse of process and therefore have no reasonable prospect of success.

Res judicata

21. *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.

22. *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:

> "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."

23. Issue estoppel, and again we quote Lord Sumption, is:

> "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."

24. 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.

25. 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."

26. 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).

27. 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.

28. In the present appeals no decision was made by the VTW in 2013 and therefore there can be no question of *res judicata*. Regulation 12(2) of the Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005 ("the Welsh ALAR") provides:

> "(1) Where, following the making of the proposal all the persons mentioned in paragraph (2) agree on an alteration of the list in accordance with this Part in terms other than those contained in the proposal, and that agreement is signified in writing–
>
> > (a) subject to paragraph (4), the valuation officer must, not later than the expiry of the period of two weeks beginning on the day on which the agreement was made, alter the list to give effect to the agreement; and
> > (b) the proposal shall be treated as having been withdrawn.
>
> (2) The persons referred to in paragraph (1) are–
> > (a) the valuation officer;
> > (b) the proposer; …"

29. So where there has been agreement, as in this case, the Welsh ALAR provide that the proposal is treated as withdrawn without any judicial involvement. The VO's decision to make the agreement and alter the list is not a judicial act and so cannot itself give rise to *res judicata.*

30. For future reference, however, we note that where there has been a judicial decision about rateable value, both in Wales and in England Parliament has made specific provision preventing a second bite at the cherry, which can be used without the need for reference to the detailed learning associated with res judicata. We have referred already to the Welsh ALAR. In England the rules governing the making of proposals to alter the 2010 Rating List are contained in the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the English ALAR"). Both provide as follows at regulation 4:

> "(1) The grounds for making a proposal to alter a list are as follows -
>
> (a) the rateable value shown in the list for a hereditament was inaccurate on the day the list was compiled;
>
> (b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled;
>
> …
>
> (d) the rateable value shown in the list for a hereditament by reason of an alteration made by a valuation officer is or has been inaccurate;
>
> …
>
> (3) No proposal may be made -
>
> …
>
> (b) by an interested person, where -
>
> > (i) that person (or a person having a qualifying connection with that person) has made a proposal to alter the same list in relation to the same hereditament on the same ground and arising from the same event;
> >
> > (ii) a proposal to alter the list in relation to the same hereditament and arising from the same facts has been made by another person (excluding a person having a qualifying connection with the interested person) and has been considered and determined by a valuation tribunal (otherwise than as mentioned in regulation 30(4)) or, on appeal under regulation 37, by the Lands Tribunal[1];
>
> (c) on the ground set out in paragraph (1)(d), to the extent that the alteration in question gives effect to the decision of a valuation tribunal, the Lands Tribunal or a court determining an appeal or an application for a review from

[1] Now the Lands Chamber of the Upper Tribunal.

> a valuation tribunal or Lands Tribunal in relation to the hereditament concerned."

31. The 2015 and 2017 proposals were made under regulation 4(1)(d), challenging the 2013 alteration. Had the VTW made a decision to which that alteration gave effect, the proposal would have been invalidated by regulation 4(3)(c), without the need to make reference to the case law on *res judicata*.

32. But that is not what happened, and the relevant legal concept is not *res judicata* but abuse of the process of the court or tribunal.

Abuse of process

33. If our imaginary claimant at paragraph 21 above had settled the action for personal injury and withdrawn it, without proceeding to judgment, that is not *res judicata* because there has been no judicial decision; but it is nevertheless an abuse of process, a wider concept of which *res judicata* forms part.

34. *Thorntons plc* a*nd Another's Appe*al [2018] UKUT 109 (LC) was a decision in two appeals from a decision of the VTE. In both appeals the premises in question had been entered in the 2010 compiled list; later, a proposal was made challenging that assessment, and the proposal was referred to the VTE but settled by agreement, and the list altered pursuant to that agreement. Later still, a second proposal was made on the basis that that alteration was incorrect.

35. The second proposal was referred to the VTE, which dismissed the appeal on the basis that it fell foul of regulation 4(3)(b)(i), quoted above. The VTE said that the second proposal was made on the same ground as the one already made and subsequently agreed, and was therefore an abuse of process. The ratepayer appealed, successfully. The Tribunal (the Deputy President and Andrew Trott FRICS) held that there was no contravention of regulation 4(3)(b)(i). The first proposal had been made under regulation 4(1)(a), challenging the list, and the second was made under regulation 4(1)(d), challenging an alteration to the list. The VTE had taken the view that the two proposals were in substance the same, but the Tribunal regarded it as decisive that they were, on their face, made on different grounds and in response to different events. There was no contravention of regulation 4(3)(b)(i).

36. However, the Tribunal went on to discuss the concept of abuse of process. At paragraph 43 it said:

> "In the civil courts the term "abuse" is used to mean "using the process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General v Barker* [2000] 1 FLR 759, *per* Lord Bingham of Cornhill, Lord Chief Justice).
>
> 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.

45. The burden of establishing that there has been an abuse of process is on the party who seeks the dismissal of the proceedings. 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 the facts of the case: *Johnson v Gore Wood & Co per* Lord Bingham at 31D.

46. In these appeals there was no prior judgment or determination of the VTE, the first proposals having been treated as withdrawn following agreement of the rateable values by the parties. When considering whether there has been an abuse of process there is no distinction in law between previous litigation where the case was settled and previous litigation where the case proceeded to judgment. Thus, in *Johnson v Gore Wood & Co* Lord Bingham said at 32-33:

> "A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

37. The Tribunal in *Thorntons* went on to point out that the VTE has no express power to strike out proceedings as an abuse of process, but that it has power to strike out proceedings that have no reasonable prospect of succeeding. In the *Thorntons* appeals the VTE had referred in general terms to abuse of process but had not considered properly whether they were such an abuse. It might be that fresh evidence was to be produced that was unavailable when the earlier agreement was made, which (as is the case with issue estoppel) might make it proper to re-litigate the matter. And the parties had not had a proper opportunity to make representations on the point. Accordingly the appeals were remitted to the VTE for proper consideration of the point and to decide whether to strike out the appeals either on the ground of abuse of process or on the basis:

> "53 … that the issue of rateable value of the hereditaments in the 2010 list was *res judicata* and barred from further challenge in view of the settlement of the original appeals and that the second appeals therefore have no reasonable prospect of succeeding and they should be dismissed under regulation 10(3)(c) of the Procedure Regulations."

38. If the Tribunal intended by that, and by its remarks at paragraph 48 of *Thorntons*, to say that the making of a proposal challenging an alteration of the list that has been made by agreement, and not as a result of a judicial decision, means that the matter is *res judicata* then we respectfully disagree. *Res judicata* is a useful analogy to this situation, but the

relevant concept is the wider and more flexible one of abuse of process, rather than *res judicata* in either of its branches because there has been no prior judicial decision.

39. Similarly 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…* [quotation as above]".

40. The parties to the present appeals focused on the references to *res judicata* in *Thorntons* and in *Arnold v Dearing*, but we have to decide the applications to strike out on the basis of abuse of process and not of *res judicata.*

Does the Tribunal have power to strike out the appeals for abuse of process?

41. Before we look at the substantive question in these two appeals, namely whether the 2015 and 2017 proposals amounted to an abuse of process, we have to consider whether the Tribunal has power to strike them out for that reason.

42. Like the VTW and the VTE, the Tribunal has no express power to strike out proceedings on the basis of abuse of process, in contrast to the express power in CPR Rule 3.4(2)(b). The Tribunal has power under rule 5 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to regulate its own procedure, but rule 8 relates expressly to the power to strike out. It sets out a number of circumstances in which the Tribunal may or must strike out proceedings; importantly, it says:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if
>
> …
>
> (c) the Tribunal considers there is no reasonable prospect of the case of the appellant, applicant or claimant, or part of it, succeeding."

43. Mr Wilcox argued that the absence of any mention of abuse of process means that the Tribunal cannot strike out proceedings for that reason, and moreover that the Regulations set out exhaustively the circumstances where a proposal is invalid. The 2015 and 2017 proposals do not fall foul of regulation 4(3)(c) and should not be struck out for any other reason. We disagree; rule 8(3)(c) is a broad power, applicable to all the Tribunal's

jurisdictions, and abuse of process takes many forms. It would be incongruous if the Tribunal did not have power to strike out abusive proceedings and was required to let them continue to a final hearing even though they were doomed to failure. Where the Tribunal finds that proceedings are abusive and must fail on that basis, rule 8(3)(c) enables the Tribunal to strike them out.

44. Mr Wilcox made a further point about the Welsh ALAR. We have set out the words of regulation 4(3)(c) above. The rule was amended for proposals relating to the 2017 list in England, but not in Wales, so as to read as follows, with the inserted words underlined:

> "[No proposal may be made …] on the ground set out in paragraph (1)(d), to the extent that the alteration <u>was made as a result of a previous proposal relating to that hereditament or</u> gives effect to the decision of a valuation tribunal, the VTE, the Lands Tribunal, the Upper Tribunal or a court determining an appeal or an application for a review in relation to the hereditament concerned.

45. Mr Wilcox invited us to infer that those words indicate a change in the law. Such proposals would have been valid prior to the change, and have been valid and remain valid in Wales. We agree that the 2015 and 2017 proposals did not fall foul of regulation 4(3)(c) of the Welsh ALAR; the fact that the alteration challenged was made as a result of the 2013 proposal does not make it automatically invalid. But in certain circumstances, and in particular where the new proposal amounts to an attempt to have a second bite at the cherry because there has been a prior agreement, such proposals will be abusive and will therefore have no prospect of success, and can be struck out for that reason.

The substantive issue in the application to strike out the Welshpool Co-operative appeals.

46. We can now consider the two Welshpool Co-operative appeals and the application to strike them out, which we treat as an application to do so on the basis that they amount to an abuse of process and should be struck out because, for that reason, they have no reasonable prospect of success. We pass over the alternative suggestion that they be remitted to the VTW to be struck out on that basis, which is unnecessary since the Tribunal is empowered to make the relevant decision and has the information it needs in order to do so (as it had not in *Thorntons*).

47. In reviewing the parties' submissions we have distilled the arguments relevant to the question of abuse of process, even though they are couched in terms that refer to *res judicata*. The appellant's submissions are set out first since they were made first in response to the letter of application.

The appellant's submissions

48. Mr Wilcox argued that the 2013 agreement to a rateable value of £95,500 was not an agreement to a final and permanent rateable value, but an interim agreement which could be re-opened if additional evidence became available later. Before the VTW Mr Garnett of Colliers produced a "document" prepared by his colleague Mr G Ryall which referred to the agreement as being interim. The Tribunal has not seen that document.

49. Mr Wilcox also argued that both appeals brought new evidence to the VTW in the form of the absence of market interest in the property after the 2013 alteration, and the eventual letting to Poundland at a low rent after two rent-free years. He submitted that there was therefore no role for issue estoppel in the appeals and that the presence of that new evidence meant that it was acceptable for the first appellant to go back on the 2013 agreement,

50. As to the second appellant's appeal and the 2017 proposal, Mr Wilcox submitted that there was nothing to prevent a third party from advancing an appeal on the basis of the new evidence of its own rent. He referred to the VOA Rating Manual (Section 7, Part 1) describing the "one bite at the cherry" rule as not applicable where the occupier had changed and there was not a previous tribunal decision.

The respondent's submissions

51. So far as the first appellant is concerned, the argument for the VO is essentially that it made an agreement in 2013 and cannot now take another shot at the rateable value arising from the material change of circumstances in the form of the opening of Tesco's. It was the VO's evidence before the VTW that the Valuation Office was not aware of anything interim about the agreement or about any desire on the part of the ratepayer for it to be regarded as non-binding. Mr Mackenzie submitted that the first appellant's claim that the 2013 agreement was only an interim one has not been supported either by any evidence that the agreement was for a limited time only, nor by identification of an event which would have triggered a review of the agreement. Nothing in the rules provided for the revival of a proposal after an agreement had been reached. There was 'one bite of the cherry' not a 'moveable feast'.

52. The appellant chose to settle in 2013; if it had thought that it needed more time or evidence before reaching agreement then the proper course of action would have been to stay the VTW proceedings in 2013 until the time had been reached or the evidence gathered.

53. Mr Mackenzie conceded that it might be appropriate to allow the proceedings to continue if new evidence had become available to the first appellant, provided that (a) the new evidence could not reasonably have been obtained in 2013 and (b) that it would be in the public interest to allow the issue to be re-examined in the light of fresh evidence. He argued that the Tribunal needed to be satisfied that the evidence was sufficiently material and of sufficient weight that it would be unjust to hold the parties to the agreement. He made these points, of course, in the context of his argument about estoppel, but they are equally relevant to abuse of process.

54. Mr Mackenzie submitted that the new evidence had only marginal materiality. He pointed out that the property was already unoccupied and unlet in 2013 when the agreement was made, and that therefore the fact that it remained so until 2015 added nothing new. The rent agreed with Poundland was for the letting which commenced in August 2015; the 2015 proposal was made in March 2015 and there was no evidence that the new letting and rent were known at that date. Furthermore, the letting was seven years after the AVD and made under entirely different economic conditions which cannot be taken into account in a consideration of the material change in circumstance arising from the opening of Tesco.

55. The respondent's evidence in support of a rateable value of £95,500 included the rent for the property agreed in 2007, a date close to the AVD, and the range of allowances made for other hereditaments on the opening of Tesco; we note that the VTW regarded those other rents as important.

56. Accordingly the VO's position as far as the first appellant is concerned is that nothing in the 2015 proposal would give it a reasonable prospect of success.

57. It is difficult in the circumstances to know what is the VO's position now so far as the second appellant is concerned. Mr Mackenzie accepted that the estoppel for which he argued could not bind the second appellant.

Conclusions on the Welshpool Co-operative appeals

58. 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).

59. The second appellant is in a rather different position. It did not make the 2013 agreement. Moreover it is not clear that the VO's application now encompasses the second appellant. At any rate, we take the view that for the second appellant to bring that challenge is not abusive. It did not eat the first bite of the cherry; so the question whether the evidence put forward by the second appellant is enough to make the proposal legitimate despite the prior agreement does not arise. The application to strike out the second appellant's appeal fails.

The Battelle Agrifood appeal

60. Battelle Agrifood Ltd ("the appellant") is the occupier of 29 Springfield Lyons Approach, Chelmsford Business Park, Springfield, Chelmsford CN2 5LB ("the property"). The property was newly entered into the 2010 rating list with effect from 10 June 2013, described as office and premises, at a rateable value of £437,500. A proposal under regulation 4(1)(d) that the list was inaccurate was made by Ruddle Merz Ltd for the appellant on 13 September 2013. Agreement was reached just before the VTE hearing of the appeal for alteration of the list to a description of offices, laboratories and premises, at a rateable value of £392,500, assessed on net internal area ("NIA"). The alteration was made on 6 May 2014 with effect from 10 June 2013.

61. A subsequent proposal under regulation 4(1)(d) was made on 29 March 2017 by Altus Edwin Hill on behalf of the appellant on the basis that the previous alteration was inaccurate.

The proposal was appealed to the VTE and was heard on 30 July 2019. The appellant's expert contended that the appeal property should be measured and valued on an industrial basis, using gross internal area ("GIA") and a lower base rate per square metre. He referred to new evidence of a list alteration for the very similar adjacent building at 31 Springfield Lyons Approach ("the comparable property").

62. The original list entry made for the comparable property in December 2013 was as offices and premises, measured to NIA, at a rateable value of £352,500. In September 2017, with effect from December 2013, the list entry was altered to workshop and premises, measured to GIA and valued at a lower base rate to give a rateable value of £236,000. Key evidence had been the rent agreed in the open market for the letting of the comparable property in December 2013.

63. The VO contended that the property remained correctly measured and valued as offices, laboratories and premises. Extensive alterations costing over £2.5 million had been carried out by the occupier to create the laboratory and office accommodation inside the building. It had ceased to be industrial in mode of use or category of occupation from completion of the redevelopment works and those works were more than could be considered minor works that a tenant may undertake.

64. The VTE dismissed the appeal on its merits. It attached significant weight to the previous agreement made with a reputable rating firm. Both parties accepted that all physical facts relating to the property and its locality, and the use of the premises, had remained unchanged since the previous agreement had been reached in 2014. The VTE did not accept that the evidence of a list alteration for the comparable property was material since, unlike the property, it was predominantly used as a full height warehouse and therefore valued on an industrial basis.

The application to strike out the Battelle Agrifood appeal

65. HMRC's letter of 20 March 2020, written in very similar terms to that of 4 March 2020 in the Welshpool Co-operative appeals, referred to the Tribunal's decisions in *Thorntons* and *Arnold v Dearing* and said that the appellants "should be debarred from re-litigating the rateable value of the hereditament … pursuant to the doctrine of *Res judicata*". It asked the Tribunal to exercise its case management powers under rule 5 of the Tribunal Rules to strike out the appeal.

66. In the alterative the letter asked the Tribunal to remit the appeal back to the VTE so that the VO could ask the VTE to strike out the appellant's case on the basis that it had no reasonable prospect of success.

67. No further legal submissions were made on behalf of the appellant or the VO in this case. The appellant's representative Mr Emerick reiterated the points made to the VTE and in particular that the amendment to the list for the comparable property in September 2017 was made nearly three and a half years after the agreement for the property in May 2014. He submitted that that this had created a material change in description and tone values such that the rateable value for the property should be revised.

Conclusion on the Battelle Agrifood appeal

68. The facts in the Battelle Agrifood appeal are very similar indeed to those of the Welshppol Co-operative appeals. We consider that the legal issue is the same, namely whether the making of a new proposal and appealing to the VTE was an abuse of process in light of the previous agreement. We take the view that there is no real difference between the circumstances here and those in the Welshpool Co-operative appeals. The ratepayer chose to resolve its challenge in 2013 by agreement, at a point when the premises were in the same physical state and mode of use, and occupied by same ratepayer as it is today, and we have to consider whether there is new material available that may mean that the new challenge and appeal is not an abuse of process. If not, then it must be struck out on the basis that it has no reasonable prospect of success.

69. The only new evidence is that the list was altered for the neighbouring property, to accord with its actual use as a workshop and premises. That property differs internally from the appeal property, and has always differed; crucially, its use as a full height warehouse means that it is not on all fours with the property. Nothing has changed from 2013 and there is no new material that enables us to take the view that the appeal has a chance of success.

70. Accordingly the appeal is struck out under rule 8(3)(c) on the basis that it has no reasonable prospect of success.

Judge Elizabeth Cooke

Diane Martin MRICS FAAV

Dated: 22 October 2020