

Res judicata and issue estoppel in rating cases

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What is res judicata?

Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2013] UKSC 46,
at paragraphs 17 to 26

- A portmanteau term
- Cause of action estoppel
- Issue estoppel
- The overlapping principle of abuse of process

Res judicata in the rating context

- Thorntons Plc v Clarion Solicitors Limited [2018] UKUT 109 (LC)
- Co-operative Group v Virk (Valuation Officer) [2020] UKUT 286 (LC)

Proposals to alter the list

- The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (“ALA Regulations”)
- The Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005
- Regulations 2, 4(1), 4(3) and 12
- Regulation 4(3)(c) “No proposal may be made— on the ground set out in paragraph (1)(d), to the extent that the alteration [was made as a result of a previous proposal relating to that hereditament or] 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

Thorntons

- Initial proposals to alter – regulation 4(1)(a)
- Referred as appeals
- Agreements on proposals – regulation 12
- Further proposals to alter – regulation 4(1)(d)
- Referred as appeals
- VTE – dismissed appeals – regulation 4(3)(b)(i) and general reference to abuse of process
- Appeal to UT

Thorntons – UT Decision

- Disagreed with VTE - neither of the later proposals could be said to be invalid on the basis of regulation 4(3)(b)(i)
- [36] “...The ground of a proposal is required to be stated so it will or ought to be clear from the document itself and cannot be second-guessed by the VO or the VTE and be deemed or treated as being a proposal on a different ground”

Thorntons – UT Decision

- [38] “...The VTE considered that the second proposals had only been made “to secure a second bite of the cherry which amounted to an abuse of process” ...”
- [40] to [46]
 - Neither the VTE nor the UT have specific power to strike out for abuse of process
 - Abuse means using the process for a purpose or in a way significantly different from its ordinary and proper use
 - One category of abuse 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

Thorntons – UT Decision

Continued

- The burden of establishing an abuse of process is on the party who seeks the dismissal
- 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
- 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

Thorntons – UT Decision

- Conclusion – appeals allowed and proceedings remitted to the VTE

Cooperative Group

- Three joined appeals
- First and second relating to shop premises in Wales
- A1 – former occupier, A2 – current occupier
- June 2010 and April 2011 – A1 made proposals to alter the list
- A1 agreed to settle
- November 2012 – A1 vacated premises
- July 2013 – the last of the agreements to settle entered into by A1
- 2015 – A1 made a further proposal to alter the list – regulation 4(1)(d)
- Later in 2015 – A2 took sub-lease of premises
- 2017 – A2 made a proposal on same basis as 2015 proposal

Cooperative Group – UT Decision

- Res judicata not relevant where no previous decision
- [20] “For reasons that we shall explain, the doctrine of res judicata is not relevant to the present appeals...”
- [21] “Res judicata 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)...”
- [26] “...as the name of the doctrine indicates: something (res) has been decided (judicata)”

Cooperative Group – UT Decision

- Abuse of process – Thornton
- Power to strike out for abuse of process:

[43] “... 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”

Cooperative Group – UT Decision

- A1's appeal – struck out [58]
- A2's appeal – not struck out [59]
- Appeal relating to premises in England – struck out

To conclude

- Res judicata is applicable in the rating context
- Res judicata is a broad concept comprising a number of different principles
- In order for res judicata to be engaged there must be a previous determination
- If there is no such determination, the overlapping principle of abuse of process may be engaged
- The determination of whether there has been an abuse of process involves a broad, merits-based judgment, taking account of all the interests involved and all the facts of the case
- It will be relevant to consider whether new evidence is available that was not available to the parties previously

To conclude (continued)

- The UT and VTE can strike out for abuse of process
- Specifically when making a proposal to alter the list, first consider – 4(3) of the ALA Regulations
 - (i) Consider whether there been a previous proposal to alter the same list in relation to the same hereditament on the same ground and arising from the same event?
 - (ii) If relying on regulation 4(1)(d), consider whether the alteration was made as a result of a previous proposal relating to that hereditament [in England] or whether it gives effect to a decision of a tribunal or court in relation to the hereditament concerned [in England and Wales]?

Thank you for listening

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