

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2021] UKUT 0044 (LC)
UTLC Case Number: RA/11/2020**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – alteration of rating list – proposal – validity – whether proposal made on same ground as previous proposal – whether VO estopped from arguing invalidity where no invalidity notice served upon receipt of second proposal – res judicata – application to strike out appeal from the Valuation Tribunal for England – application granted

AN APPEAL AGAINST THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

J J WILSON (IPSWICH) LTD

Appellant

and

**JOANNE MOORE
VALUATION OFFICER**

Respondent

**Re: Warehouse, office and premises,
White Elm Street,
Ipswich,
IP3 8BB**

A J Trott FRICS

Determination on written representations

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The following cases are referred to in this decision:

Re the Appeals of Thorntons Plc and Clarion Solicitors Ltd [2018] UKUT 109 (LC)

Tuplin v Focus (DIY) Ltd [2009] UKUT 118 (LC)

Amalgamated Investments & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84.

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

Mainstream Ventures Ltd v Woolway (VO) [2000] RA 395

Western Fish Products Limited v Penwith District Council [1981] 2 All ER 204

R (on the application of Reprotech (Pebsham) Limited) v East Sussex County Council [2002] UKHL 8

Co-operative Group and Poundland Ltd v Virk (VO) and Battelle Agrifood Ltd v Sykes (VO) [2020] UKUT 286 (LC)

Introduction

1. This appeal concerns a warehouse, office and premises at White Elm Street, Ipswich IP3 8BB which was entered in the 2010 local non-domestic rating list at a rateable value of £26,500 with effect from 15 August 2012. The appellant ratepayer is J J Wilson Ltd.
2. On 12 May 2016 Mr Simon Wright FRICS, as agent for the appellant, made a proposal to delete the existing entry with effect from 31 March 2015, the date the property was vacated, on the grounds that:

“The premises are derelict, namely incapable of occupation and beyond economic repair bearing in mind the defects I have observed [to roofs/gutters, doors and services].
3. The valuation officer did not consider the proposal to be well-founded and it was duly referred as an appeal (“the first appeal”) to the Valuation Tribunal for England (“VTE”).
4. On 1 December 2016, before the first appeal was heard by the VTE, the appellant made a second proposal, this time by Mr Richard Wilson in the capacity of owner. In part B of the proposal form (details of the proposed list alteration) Mr Wilson stated in answer to question 14:

“I propose that the property ... should be shown as a new entity in the rating list at a rateable value of £De-listed with effect from 31.03.2015.”

At question 16 of the proposal form he gave his detailed reasons for believing that the rating list was inaccurate as “the premises are derelict” and provided further details, including photographs.
5. The VO did not consider the second proposal to be well-founded and it was referred to the VTE as an appeal (“the second appeal”). The VO did not serve an invalidity notice under regulation 8(1) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (“the 2009 Regulations”). In particular, the VO did not serve an invalidity notice on the ground that the proposal had contravened regulation 4(3)(b)(i) of the 2009 Regulations which states:

“4(3) No proposal may be made –

...

(b) by an IP, where –

(i) that person (or person having a qualifying connection with that person), acting in the same capacity, 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.”
6. The first appeal was dismissed by the VTE on 8 January 2018 on the grounds that the property was not beyond economic repair at the material date. There was no appeal against this decision to the Tribunal.

7. The second appeal was heard on 30 July 2019 but the appellant was unaware of this because notification of the hearing was sent to the subject property which had been vacated on 31 March 2015 and sold on 17 August 2017. The second appeal was dismissed on 5 August 2019 but re-listed for a hearing following a successful application by the appellant for a review.
8. The second appeal was eventually heard on 7 February 2020. The VTE identified a preliminary issue in the appeal, namely whether the second proposal was valid in the light of the first proposal. Having heard submissions on the point the VTE determined that the making of the second proposal was “specifically precluded” under regulation 4(3)(b)(i) of the 2009 Regulations because “the two proposals arise from the same event, namely, that the hereditament shown in the list ought not to be shown in that list.” The second appeal was dismissed on 4 March 2020.
9. The appellant appealed this decision on 19 March 2020 and the VO responded on 8 June 2020. In her statement of case the VO requested that the Tribunal strike out the appeal under Rule 8(3)(c) of the Upper Tribunal (Lands Chamber) Rules 2010 on the basis that it had no reasonable prospect of success.

The strike-out application

10. The respondent’s strike-out application was made by Ms Helen Barnard for and on behalf of the Solicitor and General Counsel for the Commissioners for Revenue and Customs. The basis of the application is that the second proposal was not validly made because it contravened Regulation 4(3)(b)(i) of the 2009 Regulations, as the VTE had found. The VO acknowledged that invalidity is normally identified at the time the proposal is received. That did not happen in this case because the second proposal “was initially taken by the VO to be a different ground from a request for a deletion.”
11. The then case officer for the respondent, Mr Adrian Garwood MRICS, apparently noticed in the course of dealing with the first proposal that the appellant had submitted a second proposal. He wrote to Mr Wilson on 8 February 2017 pointing out that the second proposal was effectively the same as the first and invited its withdrawal. Mr Wilson declined to do so and in his undated reply (a copy of which was included in the trial bundle of the second VTE appeal) said the second proposal “was significantly different from our original appeal and we would like this to be heard in conjunction with the original appeal...”
12. The VO argued that the interested person, the hereditament and the compiled list date were the same in both proposals and that the only difference between them was that the first proposal sought “deletion” from the list from 31 March 2015 while the second proposal wanted the hereditament to be “de-listed” from the same date. The reasons given for deletion/de-listing were effectively the same as was the outcome being sought. These reasons concerned the condition of the hereditament at 31 March 2015 and the VTE in the first appeal determined that it was not uneconomic to repair.
13. The VO submitted that the pursuit of the present appeal engaged the principles of *res judicata* (cause of action estoppel and issue estoppel). In addition she said the appellant’s

grounds of appeal lacked particularity and did not explain why either the first or second VTE decision was wrong in law or involved conclusions that no reasonable tribunal could have reached.

14. The VO noted that the appellant's notice of appeal and statement of case referred to both appeals before the VTE. The VTE's decision on the first appeal was made on 8 January 2018 and the time limit for submitting an appeal against it expired on 8 February 2018. It was now, over two years later, far too late to seek to appeal the VTE's first decision and no reason, let alone a compelling reason, for this delay had been given.
15. Ms Nora Wannagat of counsel acted for the appellant and replied to the respondent's statement of case and strike-out application in written submissions dated 13 August 2020.
16. Ms Wannagat considered firstly whether the second proposal was invalid, as the VTE had found in its second decision. She said the VTE had erred in its finding in three respects. Firstly, it had wrongly said the two proposals had been made on the same ground; secondly, it had given insufficient weight to the fact that the VO had not served an invalidity notice when the second proposal was originally received; and, thirdly, it had failed to conclude from the facts before it that the VO was estopped from relying on regulation 4(3)(b)(i) to say that the second proposal was invalid.

(i) *The difference between the proposals*

17. The VTE held that both proposals had been made under regulation 4(1)(h) of the 2009 Regulations, i.e. that "a hereditament shown in the list ought not to be shown in that list." The appellant accepted that the first proposal was made on that ground but argued that the second proposal was not. Ms Wannagat submitted the second proposal sought that the hereditament should remain in the list at "£De-listed", which she argued amounted to an allegation that the rateable value shown in the list for the hereditament was inaccurate on the day the list was compiled, and that the true rateable value should be £0 (or a nominal value). This meant the second proposal was made on ground 4(1)(a) of the 2009 Regulations and not ground 4(1)(h).
18. Ms Wannagat found support for this interpretation of the second proposal in an email sent by Ms Sharon Burn of the Valuation Office Agency to Mr Wilson on 17 September 2019 in which she confirmed a recent telephone conversation between them:

"Your proposal was to reduce the rateable value to £0 as the property is in a state of disrepair."

19. In *Re the Appeals of Thorntons Plc and Clarion Solicitors Ltd* [2018] UKUT 109 (LC), the Tribunal, Martin Rodger QC, Deputy Chamber President and A J Trott FRICS, said at [36]:

"It was not open to [the VTE] to treat proposals which, on their face, were made on different grounds and in response to different events as if they were really made on the same ground and arose from the same event."

Ms Wannagat said that as the two proposals had been made on different grounds it could not be said that the second proposal was invalid under regulation 4(3)(b)(i) since that only applied where a proposal had been made on the same ground. Ms Wannagat submitted that the legislative intention must have been that even a small difference in proposals would lead to the second proposal being considered.

(ii) *Notice of invalidity*

20. In the alternative, Ms Wannagat submitted that the VTE had failed to consider sufficiently the relevance of the VO's failure to serve an invalidity notice upon receipt of the second proposal. The VO acknowledged in her statement of case that "normally invalidity is identified by the VO when a proposal form is received".
21. In *Tuplin v Focus (DIY) Ltd* [2009] UKUT 118 (LC), the Tribunal, George Bartlett QC, President, said at paragraph 27:

"I would add that I am not unhappy to reject this particular contention on the part of the VO since she failed to serve an invalidity notice on the proposer as provided for by Regulation 7(1) and thus deprived it of the opportunity of serving a further notice under Regulation 7(3). In such circumstances, it seems to me, a VT may often be able to treat the fact that the VO did not serve an invalidity notice as a good indication that the proposal was not invalid."

Ms Wannagat observed that although the VTE had that passage before it, it had failed to say what the VO's failure to serve an invalidity notice within four weeks should mean for the subject case. The closest the VTE came to considering this matter was its comment at paragraph 25 of its decision:

"In addition, the panel can find nothing in the Appeal Regulations [SI 2009 No.2269] preventing any party to an appeal from contending for the purposes of that appeal that the proposal to which the appeal relates was not validly made. Thus, there is no reason why a VO who had not served an invalidity notice because he had no reason to suppose that the proposal was invalid (as in this case) should not later argue invalidity if, by the time of the hearing, he had acquired information suggesting that the proposal was invalid."

22. Ms Wannagat explained that the VTE's reference to the Appeal Regulations revealed a mis-understanding of how *Tuplin* applied in this appeal. The appellant did not aver that a failure to serve an invalidity notice prevented the VO from asserting invalidity at the appeal, but did aver that such a failure was strong evidence that the second proposal was not in fact invalid. The VTE had not properly considered this evidence.
23. This was not a case where the VO required any further information to decide whether or not the second proposal was invalid. On its face it was either made on the same ground as the first proposal or it was not.

(iii) *Estoppel*

24. Following her email dated 17 September 2019 (see paragraph 18 above) Ms Burn of the VOA wrote again to Mr Wilson on 26 September 2019 and said:

“I am now in the position that I can offer zero rating with effect from 18th August 2016 as per your quote. If this is acceptable I will get final authorisation and then send an agreement for you to sign.”

Mr Wilson accepted this on the same day, but Ms Burn wrote again on 1 October 2019 saying she may “have been premature in telling you that zero rating is possible for this property” because “an issue has arisen regarding occupation”, namely that the property may still have been occupied on 18 August 2016. Ms Wannagat said the appellant did not understand this comment since the property was vacated on 31 March 2015.

25. It was said at the hearing of the second appeal that Ms Burn was not authorised to enter into such an agreement and this was repeated in paragraph 37 of the VO’s statement of case. Ms Wannagat submitted this did not change the impression created by Ms Burn’s emails.
26. Ms Wannagat argues that by its actions (failure to serve an invalidity notice and making an offer that appeared to engage with the second proposal) the VOA created the impression that it was considering the substance of the second proposal and that it had not been conclusively rejected for invalidity. The appellant had placed detrimental reliance on this to the extent it did not pursue an appeal against the VTE’s decision on the first proposal.
27. Ms Wannagat submitted that because of its action the VOA was estopped from arguing that the second proposal was invalid as an estoppel by convention, as described in *Amalgamated Investments & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84.
28. Ms Wannagat then turned to the respondent’s argument that the appellant was prevented from pursuing the second appeal under the doctrine of *res judicata* (cause of action estoppel and issue estoppel). She said these could not apply where, as here, the first and second proposals had been made on different grounds. Furthermore, as the VTE’s first decision was not appealed, the Upper Tribunal was not involved so the making of the second proposal should not be viewed as an attempt to have the Tribunal hear a matter it had already determined.
29. Ms Wannagat submitted that the respondent was using procedural arguments to prevent the Tribunal from considering the substantive issues in the appeal. These were matters which amounted to “special circumstances” due to which applying the estoppel sought by the respondent would result in injustice: see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, per Lord Sumption JSC at [22].
30. Finally, Ms Wannagat submitted that the Tribunal should view the current appeal as having been made against both VTE decisions and that the reason why an earlier appeal had not been made against the first decision was because the appellant, a litigant in person at the time, had been pursuing his appeal regarding the second proposal in circumstances where the respondent “did not send particularly clear messages”.

31. Ms Wannagat emphasised the importance of the Tribunal not adopting too rigid an approach and that it should consider the substantive issues in the case. She went on to explain the appellant's case on such substantive issues which amounted to a critique of the VTE's failure to (i) consider beneficial occupation and the reality principles; and (ii) attach sufficient weight to the appellant's evidence. I do not consider these arguments in this decision which is concerned solely with the respondent's strike-out application.

Discussion

32. The key issue is whether the appellant's two proposals were submitted on the same ground.
33. The first proposal was submitted on the appellant's behalf by Mr Simon Wright FRICS. The details of the proposed list alteration are given in Box B to question 13 of the proposal form: "the existing entry to be deleted with effect from 31-MAR-15". The ground for the proposed list alteration was said to be "G [15/07] the entry shown should be deleted for reasons other than E [15/05: the property has been demolished or no longer exists] and F [15/06: the property is now domestic or exempt from rating and is no longer rateable] above." The detailed reasons for believing that the rating list was inaccurate are set out at paragraph 2 above and commence "The premises are derelict." In terms of the 2009 Regulations this ground for making a proposal falls under regulation 4(1)(h): "a hereditament shown in the list ought not to be shown in that list".
34. The second proposal was made by Mr Richard Wilson. The details of the proposed list alteration are given in answer to question 14 of the proposal form and not by ticking one of the boxes in question 13. The answer given states:
- "I propose that the property identified in Part A should be shown as a new entry in the rating list at a rateable value of: £De-listed with effect from 31.03.2015."
35. Ms Wannagat submits that this ground falls within ground 4(1)(a) of the 2009 Regulations rather than 4(1)(h). Ground 4(1)(a) states:
- "The rateable value shown in the list for a hereditament was inaccurate on the day the list was compiled.

This is not the ground upon which Mr Wilson relies in the second proposal which, as worded, must be made under ground 4(1)(g):

"A hereditament not shown in the list ought to be shown in that list."

That ground is obviously wrong since the subject property was already entered in the 2010 list. Nor can the second proposal have been made on ground 4(1)(a) because any inaccuracy is not one that existed on the day the list was compiled, there already having been an alteration to the list with effect from 15 August 2012 (see paragraph 3 of the VTE's second decision).

36. It seems to me that the ground under which the second proposal was made was either ground 4(1)(h) of the 2009 Regulations, as the VTE determined in its second decision, or ground 4(1)(b) which states:

“The rateable value shown in the list for a hereditament is inaccurate by reason of a material change in circumstances which occurred on or after the day on which the list was compiled.”

These two grounds correspond to boxes 15/07 or 15/04 (“circumstances affecting the rateable value of the property changed on –”) respectively on the proposal form. Unfortunately, Mr Wilson did not complete any of the boxes in question 15. But he completed question 16, giving his detailed reasons for believing that the rating list is inaccurate. His answer begins with the same words used by Mr Wright in the first proposal:

“The premises are derelict. The company’s trading desk has failed to generate profits for many years and therefore the directors were unable to fund improvements and structural dilapidation which has occurred to the premises ... The properties now remain in a derelict state.”

37. There is no material difference between the two proposals in the description of the detailed reasons for believing the list to be inaccurate.
38. The appellant argues that “£De-listed” on the second proposal form means “£0” and not “deleted”. It finds support for this in the correspondence with Ms Burn of the VOA on 17 September 2019 where she records Mr Wilson’s proposal as being “to reduce the rateable value to zero”.
39. In its application to the VTE dated 23 August 2019 for a review of the VTE’s decision dated 5 August 2019, Mr Wilson stated:

“The advice from our professional rates consultant was that the property should be de-listed ... the property is beyond economic repair.”

Insofar as that advice came from Mr Wright, and Mr Wilson does not identify any other rating consultant, reference to the property being “de-listed” must mean the same as deleting it from the list. If the property was beyond economic repair, i.e. a permanent state of affairs, there would be no reason to seek a rateable value of £0 (or nominal sum) and keep the hereditament in the list.

40. The word “delist” means “remove from a list” (Shorter Oxford English Dictionary). There is no difference between that and “delete from a list”. The circumstances giving rise to the two proposals are the same and no new reasons were given by the appellant to suggest any new basis for making the second proposal.
41. I am satisfied that both proposals were made on the same ground, namely ground 4(1)(h) of the 2019 Regulations, and that the second proposal was prohibited by regulation 4(3)(b)(i). As such the proposal was invalidly made, as the VTE found. The appeal to the

Tribunal therefore has no reasonable prospect of success and I strike it out under Rule 8(3)(c) of the Tribunal's Rules.

42. It is therefore not necessary for the determination of the application for me to consider the other arguments raised by the appellant but I set out my comments briefly below for the sake of completeness.
43. The circumstances of this appeal can be distinguished from those in *Tuplin* and the VO's failure to serve an invalidity notice upon receipt of the second proposal cannot reasonably be treated as a good indication that the proposal was not invalid. An objective appraisal of the two proposals reveals they are fundamentally the same.
44. In *Mainstream Ventures Ltd v Woolway (VO)* [2000] RA 395 the Tribunal, George Bartlett QC, President, said at paragraph 13:

“There may well be circumstances in which the doctrine of estoppel may prevent a valuation officer contending for the first time in an appeal to the Lands Tribunal that the proposal on which the appeal is founded is invalid. Unless a valuation officer follows the invalidity notice procedure he may be at risk of finding that the appeal has proceeded on the basis of a common assumption that the proposal is valid and that it would be unconscionable for him to argue at this particular stage that it is invalid. I do not think, however, that an estoppel can arise where, as here, the invalidity consists of the absence of any power on the part of the proposer to make a proposal. The provision as to who may make a proposal, creating as it does substantive statutory rights and duties, is not in my judgment capable of being overridden by the conduct of those who may have an interest in the proceedings that have been set in train by a proposal.”

Unlike *Mainstream*, the appellant in this case was entitled to make the second proposal and so the question of estoppel needs to be addressed.

45. Ms Wannagat says the conduct of the VOA satisfied the requirements of an estoppel by convention as described in *Amalgamated Investments*. That description was derived from a passage in Spencer Bower and Turner's "Estoppel by Representation" 3rd edn (1977) at [157]. The current edition of Spencer Bower, "Reliance-Based Estoppel and Related Doctrines" 5th edn (2017) restates the requirements at 8.2:

“An estoppel by convention is an estoppel from denying a proposition established, not by representation or promise by B to A, but by mutual, express or explicit assent. The estoppel is not founded on A believing a representation by B, but on a common assumption of facts or law as a basis of their relationship, to which B has so assented as to make B responsible for A's reliance on it. When the parties have so acted in their relationship upon that shared assumption that it would be unfair on A for B to resile from it, then A will be entitled to relief against B.”

46. In *Western Fish Products Limited v Penwith District Council* [1981] 2 All ER 204 Megaw LJ noted at page 219(c) that “an estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.”

47. In *R (on the application of Reprotect (Pebsham) Limited) v East Sussex County Council* [2002] UKHL 8 Lord Hoffmann (with whom their other Lordships agreed) said at [35] that:

“In *Western Fish* the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction ... It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underly the private law concept of estoppel and the time has come for it to stand on its own two feet.”

Lord Mackay added at [6]:

“I would also wish expressly to agree that where public authorities are fulfilling statutory duties or exercising statutory discretions, the public interest in their activities and the effect on members of the public who are not parties to the particular process which the authority is conducting requires the law to differentiate clearly between such activities and those in which interests only of those directly involved must be considered.”

48. In the present case the VO had to consider and respond to any proposals she received in accordance with the relevant rating legislation which is designed to promote and safeguard the public interest and which requires the VO to maintain an accurate list. In my judgment it is not open to the appellant in these circumstances to pursue an estoppel by convention against the VO.
49. In any event I think that even if the VO was a private party there was no sufficient material upon which such an estoppel could be based. I do not believe that a common assumption of facts or law existed in this case sufficient to estop the respondent from saying that the second proposal was invalid. Ms Wannagat focuses on the correspondence between Ms Burn and Mr Wilson in September and October 2019, but this is explicitly made conditional upon “final authorisation” and was accepted as such by Mr Wilson in his email dated 26 September 2019:

“When you have received final authorisation I will be happy to sign the relevant agreement form.”

Ms Burn was quick to tell Mr Wilson that such authorisation had not been forthcoming, sending him an email explaining the reasons (not limited to the question of occupation) on 1 October 2019.

50. Ms Wannagat submitted that the principle of *res judicata* which the respondent sought to rely upon in the alternative to its invalidity argument, were not engaged because the first proposal was not appealed to the Tribunal. So the making of the second proposal should therefore not be viewed as an attempt to have the Tribunal hear a matter it had already determined.

51. The principles of *res judicata* were recently considered by the Tribunal, Judge Elizabeth Cooke and Diane Martin MRICS FAAV, in *Co-operative Group and Poundland Ltd v Virk (VO) and Battelle Agrifood Ltd v Sykes (VO)* [2020] UKUT 286 (LC) where the Tribunal said at [26]:
- “What is common to both these branches of *res judicata* [cause of action estoppel and issue estoppel] 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).”
52. The fact that the decision of the VTE on the first proposal was not appealed to the Tribunal is not to the point. What matters is that the VTE was asked to determine an appeal against the second proposal which as it found, and I have agreed, was made on the same ground as the first proposal. It is the second appeal to the VTE that engages the principles of *res judicata*. It is not necessary for me to consider how those principles might apply in this case given my decision that the second proposal was invalidly made.
53. Finally, Ms Wannagat submitted that the appellant should be granted permission by the Tribunal to submit a late appeal against the VTE’s decision on the first proposal. The essence of this application appears to be the appellant’s view that the Tribunal should consider the substantive issues in the case and not adopt too rigid a procedural approach. The appellant, a litigant in person, is said not to have been idle during the relevant period and to have been dealing with a respondent who “did not send particularly clear messages”. The reason for the delay is said to be that the appellant chose to pursue its second proposal rather than appeal to the Tribunal against the VTE’s decision on its first. That was a choice freely made and nothing in the circumstances of this case justifies or compels granting permission to appeal some two and a half years late. There are no “special circumstances” of the kind referred to in *Virgin Atlantic Airways*. I therefore refuse permission to appeal against the VTE’s first decision made on 8 January 2018.

Determination

54. The appeal is struck out under Rule 8(3)(c) on the basis that it has no reasonable prospect of success.

Dated: 5 March 2021

Andrew Trott FRICS