**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2016] UKUT 0109 (LC)**
**UTLC Case Number: LRX/82/2015**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S 11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007.**

**LANDLORD AND TENANT – Service Charges – whether the FTT is bound to follow a previous decision in respect of the same lease and the same parties – issue estoppel – whether special circumstances prevent an estoppel arising.**

## BETWEEN

**Appellants**

**(1) PHILIP HEMMISE**
**(2) TINA HEMMISE**

**and**

**LONDON BOROUGH OF TOWER HAMLETS** **Respondent**

**Re: 181 Campbell Road London E3 4DP**

**Before** :**His Honour Judge Behrens**

**Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL**
**on**
**23 February 2016**

*Mr Hemmise in person* for the Appellants
*Rebecca Cattermole* (instructed by Anjum Iqbal) for the Respondent

The following cases are referred to in this decision:

*West Midlands Baptist (Trust) Association (Inc) v Birmingham Corp* [1968] 2 QB 188

*Birmingham CC v Keddie and Hill* [2012] UKUT 32

*Elysian Fields v Nixon* [2015] UKUT 0427 (LC)

*Lennon v Ground Rents* [2011] UKUT 330 (LC)

*Staunton v Kaye* [2010] UKUT 270 (LC)

*Cain v London Borough of Islington* [2015] UKUT 0117 (LC)

*Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1988] 3 AER 977 (at first instance), [1990] 1 AER 529 (in the Court of Appeal)

*Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46

*Price v Nunn* [2013] EWCA Civ 1002

*Henderson v Henderson* (1843) 3 Hare 100 at 115

## DECISION

## 1 Introduction

**1.** This is an appeal from 2 decisions of the First – Tier Tribunal ("the FTT") made on 20th April 2015 and 8th July 2015. Mr and Mrs Hemmise ("the Tenant") are the tenants of a first floor flat known as 181 Campbell Road, London ("the property") under a lease granted by the London Borough of Tower Hamlets ("the Landlord") on 28th February 2000. The lease creates a term of 125 years from 24th March 1986 at a rent of £10 per year.

**2.** The property forms part of a building described in the lease as "the block known as 173 – 193 Campbell Road". The building forms part of an estate known as Lincoln Estate (North) or Lincoln 1B. The plan (on p 332) shows a number of other buildings, grassed areas, estate roads, estate footpaths, flower beds, communal areas and playgrounds.

**3.** The lease contains an obligation by the Landlord to maintain and repair the Common Parts and to recoup the costs by means of a service charge. In May 2006 the Tenant made an application to the Leasehold Valuation Tribunal ("the LVT") challenging the reasonableness of the service charge relating to the service charge years 2000/2001, 2001/2002, 2002/2003 and 2004/2005. The challenge related to the maintenance of the block and Estate, gardening, cleaning of the block and common parts and the Administration and Management charges.

**4.** It will be necessary to refer to the decision in more detail later in this judgment. For present purposes it sufficient to note that the LVT held that claims in respect of the Estate could not be justified as a matter of construction of the lease and accordingly disallowed claims in respect of the Estate.

**5.** There was no appeal against that decision. However, notwithstanding the decision the Landlord continued to include with the service charge items attributable to the Estate. In due course the Tenant made a further challenge to the FTT in respect of the service charges for the years from 2006/2007 to 2013/2014 inclusive. The principal challenge related to Estate items which, in the light of the previous decision were said to be irrecoverable. In addition there were a number of other challenges including a challenge to the contribution required for TV aerials and costs.

**6.** The matter came before the FTT on two occasions. In its first decision on 20th April 2015 it decided that it was not bound to follow the decision of the LVT and concluded that the definition of Common Parts in the lease was wide enough to include the Estate items that were claimed.

**7.** In the second decision the FTT upheld all the charges with the exception of the repair charges in respect of refuse chute door and the refuse area door. In so doing it upheld the

claim in respect of TV aerials and rejected an application under s 20C of the 1985 Act that the Landlord's costs should not be added to the service charge.

**8.** On 28 September 2015 the Deputy President granted limited permission to appeal against the decision of the FTT. In paragraph 2 of his observations he made the point:

> It is arguable that [the FTT] is bound to follow the decision of a previous tribunal which had not been the subject of an appeal and which included a determination on the meaning and effect of the same lease in proceedings between the same parties.

**9.** In addition to the point of principle which he identified the Deputy President also granted permission in respect of the TV aerials and the refusal to make an order under s 20C of the 1985 Act.

## 2 The terms of the lease.

**10.** By clause 4(4) of the Lease the Landlord covenanted to pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule. The Service Charge is defined as such reasonable proportion of Total Expenditure as is attributable to the Flat (see Fifth Schedule, para.1(2)). Total Expenditure means the total expenditure incurred by the Respondent in carrying out its "obligations under Clause 5(5) of this Lease"

**11.** By clause 5(5) the Landlord covenanted, inter alia,

> "(a) to maintain and keep in good and substantial repair and condition: …
>
> (iii) the Common Parts…
>
> (d) To keep clean and in the opinion of [the Landlord] where appropriate lighted the Common Parts and to keep clean the windows in the Common Parts and where appropriate to furnish the Common Parts in such style and manner as [the Landlord] shall from time to time in [its] absolute discretion think fit…
>
> (f) For the purposes of performing the covenants on the part of [the Landlord] herein contained at their discretion to employ…one or more caretakers porters maintenance staff gardeners cleaners or such other persons…
>
> (k)To maintain (if and when installed by [the Landlord] at their discretion) a rented communal television aerial or aerials serving the Building and to pay all expenses in connection with the installation and maintenance thereof…"

**12.** The Common Parts are defined in clause 1(10) as follows:

> "all main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) means of refuse disposal (if any) and other areas included in the Title above referred to or comprising part of [the Landlord's] Housing Estate and of which the Building forms part provided by the

[Respondent] for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the [the Landlord is] entitled to the reversion."

## 3 The decision of the LVT

**13.** I have set out the basis of the challenge in the Introduction. The relevant parts of the decision are at paragraphs 13, 17 and 19 of the decision:

> 13. "It is noted that in the terms of the Applicant's lease [sic] that there is no reference to 'Estate' only to the "Demised Premises" and "Building" the latter comprising 173 to 193 Campbell Road. The Fifth Schedule of the lease provides an explanation of The Service Charge which concerns only the expenditure in relation to the Building (and the Common Parts) and the Demised Premises. It does not refer to any wider area such as the "Estate" as claimed by the Respondent, as clause 5(5) of the lease also only expressly refers only to the Building, the Demised Premises and the Common Parts. Consequently, the Tribunal are of the opinion that it cannot be right that the Applicants are liable to a contribution towards the upkeep of the Estate as sought by the Respondent and those sums so specifically claimed are disallowed in their entirety."
>
> 17. "The same argument in respect of the definition of "Estate" is also applicable here [i.e in respect of Estate maintenance] i.e. these costs are not recoverable under the terms of the lease. …"
>
> 19. "In conclusion the Tribunal finds that the service charges for the service charges years 2000 to 2005 (inclusive) should be recalculated in accordance with the express terms of the lease and exclude charges relating to the "Estate". The remaining charges should be attributable only to the Demised Premises/ Building and Common Parts as defined in the Applicant's lease. After recalculation , those charges remaining relating to the Demised Premises/Building and Common Parts, should where indicated … above, be reduced by 50% …. The maintenance charge for the Building and Common Parts being allowed in full.

## 4 The first decision of the FTT.

**14.** The first decision of the FTT was concerned with the preliminary issue of whether the FTT was bound by the previous decision of the LVT. It held it was not.

**15.** In paragraph 5 of its decision the FTT noted and set out paragraph 13 of the LVT's decision. In paragraph 6 it noted that the Landlord did not appeal the decision but pointed out that:

> [the Landlord] has now put forward an argument which, somewhat puzzlingly, was never put to or considered by the previous Tribunal. The Tribunal is not bound to follow the previous decision and therefore listened to the new argument.

**16.** In paragraph 7 the FTT set out the definition of "common parts" in clause 1(10) set out above. After commenting on that definition in paragraph 8 the FTT continued in paragraph 9:

> "With all due respect to the decision of the previous Tribunal, this Tribunal is satisfied that the definition of "Common Parts" in clause 1(10) of the lease extends to the whole of the Title or the Estate and that, therefore, an appropriate proportion of the expenditure on the Estate is properly chargeable to the service charges payable by [the Tenant]. It is not [the Tenant's] fault that the effect of clause 1(10) was previously overlooked and the Tribunal intends no criticism of their decision to challenge service charges since 2006 in reliance on the previous tribunal's decision.

## 5 The second decision of the FTT.

**17.** Having decided the point of principle in its first decision the second decision is concerned with the detailed objections that were made by the Tenant. In the light of the limited permission to appeal given by the Deputy President I am only concerned with the decision in relation to the aerials and the costs.

**18.** The decision on the aerials is dealt with in paragraphs 9 to 12. In summary:

1. In paragraph 9 the FTT noted that the system adopted by the Landlord involving pooling the costs of properties beyond those included within the Estate.

2. In paragraph 10 it pointed out that the Landlord was not entitled to pool an area larger than Lincoln B. In the FTT's judgment the Landlord should only have apportioned the costs attributable to the Lincoln 1B Estate. However it held that it should make no difference mathematically and so this issue should make no difference to the charge payable by the Tenant.

3. In paragraphs 11 and 12 the FTT referred to Mr Hemmise's objection which related to the charge relating to call outs caused by problems relating to wires leading from the communal system. It held that that the Landlord was entitled to apportion the call out in the way it had without trying to allocate particular call outs to particular flats.

**19.** Although the Landlord had indicated that it had no intention of doing so, the FTT held (in paragraph 33) that the Landlord was entitled to add its costs to the Tenant's service charge as the Tenant had lost on most issues.

## 6 Binding Nature of a decision of the FTT/LVT

**20.** Ms Cattermole submitted that as the LVT and the FTT are not courts of record a decision of law by one tribunal does not create a binding precedent requiring any subsequent tribunal to follow it. She referred me to the case of *West Midlands Baptist (Trust) Association (Inc) v Birmingham Corp* [1968] 2 QB 188. Up until that date it had been the practice of the Lands Tribunal[1] to follow its own decisions on points of law. All 3 members of the Court of

[1] At that time the Lands Tribunal was not a court of record whereas its successor – the Upper Tribunal (Lands Chamber) is.

Appeal deprecated the practice in somewhat different terms. Salmon LJ took the view that (at p 210D)

> No doubt previous decisions of the tribunal on points of law should be treated with great respect and considered as persuasive authority, even when made by a layman. But they should never be treated as binding. It is important that such decisions should be most carefully scrutinised and if necessary rejected particularly in cases such as the present which raise points of law of outstanding importance with far reaching consequences.

**21.** In the light of this decision I accept that a decision of law by a tribunal such as the LVT does not create a binding precedent. Thus, in a case involving different parties the FTT would be free to depart from it if having scrutinised it with appropriate care it believed the decision to be wrong.

**22.** However this is a case involving the same parties and the same lease. The question of whether the FTT was entitled to depart from the 2006 decision of the LVT depends on whether there was an estoppel as between these parties.

## 7 Jurisdiction of the FTT/LVT

**23.** Relevant to her submissions on issue estoppel Ms Cattermole submitted in effect that the LVT had no jurisdiction to determine that no service charge was payable in respect of the Estate. She pointed out that the jurisdiction of the LVT and the FTT are statutory. She submitted that it only had power to determine the application before it. In particular she drew my attention to observations of HHJ Gerald in *Birmingham CC v Keddie and Hill* [2012] UKUT 323

> "17 …it is important to bear in mind not just that the jurisdiction of the LVT is a creature of statute but that it is also a function of what the applicant and, by his response, the respondent wish the LVT to resolve. It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so...
>
> 18 It follows from the above that the LVT does not have jurisdiction under section 27A "to determine the entire service charge not only the matters in dispute, pleaded or otherwise specifically identified in the Service Charge application" as stated in the Refusal Decision. It is not an inquisitorial tribunal. It is there to resolve issues it is asked to resolve, not uncover ones which do not exist or which the parties are not concerned about."
>
> "19. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But

it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

20. In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT."

**24.** She pointed out that the 2006 LVT decision was limited to service charges for the years 2000/2001 to 2004/ 2005. She submitted that it was limited to those years. She also submitted that the 2006 LVT's jurisdiction was limited to a determination as to the *reasonableness* of those service charges. It is made clear in para. 1 that the Applicants were seeking a determination of the *reasonableness* of service charges relating to the specified years. She accordingly submitted that the question of whether any service charge was payable at all in respect of the Estate was not before the LVT.

**25.** A number of points must be made in answer to these submissions.

**26.** First, it is by no means clear what was before the LVT. The only document which has been relied on is the decision letter itself. That letter does not set out the arguments in any detail. It is possible to infer from paragraph 11 that there must have been some discussion about the Estate; equally it is clear from paragraph 13 that some consideration must have been given to the lease itself. Mr Hemmise attended the LVT and confirmed there was a discussion about the Estate and the lease but he could not give details about what was discussed. On the other hand it is plain from the decision as a whole that the LVT was not referred to the definition of Common Parts in clause 1(10) of the Lease. Indeed paragraph 19 of the decision is only explicable on the basis that the LVT believed that the Common Parts did not include any part of the Estate. It is to my mind a reasonable inference from paragraphs 13 and 19 that the question of whether the maintenance of the Estate was within the Landlord's obligations under the lease was not argued before the LVT. Some support for this inference is to be found in paragraph 6 of the decision of the FTT which I have set out above.

**27.** Second, as the judgment of Judge Gerald shows the LVT is entitled to raise matters of its own volition. Furthermore in more recent decisions this Tribunal has taken a more liberal view of the jurisdiction of the FTT.

**28.** Thus in *Elysian Fields v Nixon* [2015] UKUT 0427 (LC) I dealt with a similar point and cited a decision of the Deputy President:

44. Mr Dymond's submitted that the question of whether the service charges were recoverable at all was not in issue in the County Court proceedings and that accordingly the FTT had no jurisdiction to determine it.

45. This, to my mind, is a point based on the pleadings in the County Court. It is, however to be noted that Mr Nixon did plead (in paragraph 5 of the Defence) that the Management Company was in breach of the terms of the lease by failing to provide audited accounts for the years from 2009 – 2012. It is true that he did not plead that as a consequence of that no service charge was payable; but to my mind bearing in mind that these were proceedings in the County Court and that Mr Nixon was a litigant in person this pleading was wide enough to enable Mr Nixon to submit, as a matter of law that no service charge was payable. Thus I reject the pleading point.

46. There is more substance in Mr Dymond's other point which is based on the terms of DJ Johnson's order of 10 January 2014. He submits that in relation to those 3 claims the jurisdiction of the FTT was limited to considering the reasonableness of the service charge. He referred me to two decisions of the Upper Tribunal – *Lennon v Ground Rents* [2011] UKUT 330 (LC) at paragraphs 23 – 24; and *Staunton v Kaye* [2010] UKUT 270 (LC), at paragraphs 19 – 21.

47. Both of these decisions have very recently been considered by Martin Rodger QC in *Cain v London Borough of Islington* [2015] UKUT 0117 (LC) who said at paragraphs 17 – 18:

> The order transferring the proceedings referred only to a determination of the reasonableness of the service charge demanded. As the Tribunal has explained in *Lennon v Ground Rent (Regisport) Ltd* [2011] UKUT 330 (LC) and in *Staunton v Taylor* LRX/87/2009, the jurisdiction of the F-tT in a case transferred to it from the County Court is confined to the question transferred and all issues comprehended within that question. I would suggest, however, that that principle ought to be applied in a practical manner, with proper recognition of the expertise of the F-tT in relation to residential service charges. When trying to identify which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred it is not appropriate to be too pedantic, especially where an order transferring proceedings is couched in general terms and where there is no suggestion that the court intended to reserve for itself any particular question. It is not uncommon for orders for transfer to be expressed rather generally, and in practice the tribunals of the Property Chamber sensibly recognise that it would be a disservice to the parties (and to the transferring court) for them to adopt an over-scrupulous approach to their jurisdiction.
>
> This case provides a good example. Although the issue transferred was "the reasonableness of the service charges demanded", Mr Bhose did not suggest that, at the beginning of the F-tT hearing at least, those issues did not include the subsidiary question of apportionment. Before determining the statutory question under section 19 of the Landlord and Tenant Act 1985 concerning, in short hand, the reasonableness of the service charge, it was necessary for the F-tT to consider the prior contractual question of how much Mr Cain was obliged to pay under the terms of his lease. Until that sum was quantified, it would not be possible to determine whether it was reasonable, except in rather abstract terms. Construing the order for transfer with appropriate generosity, it can therefore be seen that subsumed within the jurisdiction which it conferred was the power to rule on any question of interpretation of the lease on which the quantification of the service charge depended. At the commencement of the proceedings before it, the F-tT therefore had jurisdiction to determine the question whether the Council was entitled to apportion service charges by reference to the number of bed-spaces in the Building. It was necessary for it to do so in order to determine the sum payable by Mr Cain, which itself was a precondition of determining the reasonableness of that sum.

48. In my view the approach of the Deputy President can be applied to the order of 10 January 2014. It is to my mind inconceivable that the parties or the District Judge intended there to be

a different jurisdiction for the 3 properties included in that order from the 4 properties included in the 13 March 2014 order.

49. If, as a matter of law, no service charge is payable I find it difficult to understand how any figure can be said to be reasonable. Thus, adopting the generous interpretation advocated by the Deputy President the order of 10 January 2014 can be said to encompass the question of whether any service charge is payable at all.

**29.** In my view similar arguments apply to this situation. If as a matter of law no service charge is payable in respect of the Estate I find it difficult to see how any charge could be reasonable.

**30.** Third, there is some force in the point that the Landlord should have been given an opportunity to deal with the point. However the Landlord's normal remedy would be to appeal the decision and not to ignore it and carry on as if it had not been made. However, as will appear below, the fact that the Landlord did not have an opportunity to argue the point may be relevant as a special circumstance why an issue estoppel does not arise.

**31.** Fourth Ms Cattermole is, of course, correct to point out that the decision of the LVT related to the service charge for 2001 – 2006 whereas this decision relates to the period from 2007 – 2012. It follows that the causes of action are not identical and that no "cause of action" estoppel can arise. However this does not prevent issue estoppel arising.

## 8 Issue Estoppel

**32.** The law relating to issue estoppel has been the subject of three recent decisions. Two of these are decisions of the highest authority – *Arnold v National Westminster Bank plc* [1991] 2 AC 93, *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46. The third – *Price v Nunn* [2013] EWCA Civ 1002 is a judgment of a strong Court of Appeal where the leading judgment was given by the Chancellor.

**33.** In *Virgin Atlantic* Lord Sumption dealt with the issue in paragraphs 17 – 22 of his judgment. In the light of the issues in this case it is useful to cite parts of those paragraphs.

> **[18]** It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at 115, [1843-60] All ER Rep 378 at 381-382. This was an action by the former business partner of a deceased for an account of sums due to him by the Estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the Estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. The Vice-Chancellor said:

'In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ...

Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled.

The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.'

**[20]** The implications of the principle stated in *Henderson v Henderson* were more fully examined by the House of Lords in *Arnold v National Westminster Bank plc* [1991] 3 All ER 41, [1991] 2 AC 93. The question at issue in that case was whether in operating a rent review clause under a lease, the tenants were bound by the construction given to the very same clause by Walton J in earlier litigation between the same parties over the previous rent review. The Court of Appeal had subsequently, in other cases, cast doubt on Walton J's construction, and the House approached the matter on the footing that the law (or perhaps, strictly speaking, the perception of the law) had changed since the earlier litigation. Lord Keith of Kinkel began his analysis by restating the classic distinction between cause of action estoppel and issue estoppel:

'Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened ...

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.' ([1991] 3 All ER 41 at 46, 47, [1991] 2 AC 93 at 104, 105.)

The case before the committee was treated as one of issue estoppel, because the cause of action was concerned with a different rent review from the one considered by Walton J. But it is important to appreciate that the critical distinction in the *Arnold* case was not between issue estoppel and cause of action estoppel, but between a case where the relevant point had been considered and decided in the earlier occasion and a case where it had not been considered and decided but arguably should have been. The tenant in the *Arnold* case had not failed to bring his whole case forward before Walton J. On the contrary, he had argued the very point which he now wished to reopen and had lost. It was not therefore a *Henderson v Henderson* case.

The real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the Committee agreed, held that it did.

**[21]** Lord Keith first considered the principle stated by Wigram V-C that res judicata extended to--

> 'every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.'

He regarded this principle as applying to both cause of action estoppel and issue estoppel. Cause of action estoppel, as he had pointed out, was 'absolute in relation to all points decided unless fraud or collusion is alleged'. But in relation to points not decided in the earlier litigation, *Henderson v Henderson* opened up--

> 'the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action.' ([1991] 3 All ER 41 at 46, [1991] 2 AC 93 at 105.)

He considered that in a case where the earlier decision had decided the relevant point, the result differed as between cause of action estoppel and issue estoppel:

> '... there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different.' ([1991] 3 All ER 41 at 50, [1991] 2 AC 93 at 108.)

The relevant difference between the two was that in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected. He formulated the latter exception [1991] 3 All ER 41 at 50, [1991] 2 AC 93 at 109 as follows:

> 'In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result ...'

This enabled the House to conclude that the rejection of Walton J's construction of the rent review clause in the subsequent case law was a materially altered circumstance which warranted rearguing the very point that he had rejected.

**[22]** The *Arnold* case is accordingly authority for the following propositions:

> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

**34.** Ms Cattermole made a number of submissions as to why issue estoppel did not apply on the facts of this case. First, she submits that the issue of whether Estate costs were recoverable under the lease was not an issue before the LVT. I reject this submission. In my view it is clear from paragraphs 13, 17 and 19 of the decision that the LVT did in fact decide that the Landlord's obligations under the lease did not include obligations in respect of the Estate. This was an issue which was a necessary ingredient of the decision that the charges in respect of the Estate were irrecoverable and (by inference) unreasonable.

**35.** Second she submits that the issue was subsidiary to the issue to be determined in the application. I reject this argument for the same reasons. It was an issue that was determined and was central to the determination of the claims relating to the Estate items.

**36.** Third she submits that the LVT findings were not clear or certain. In support of that argument she pointed to the apparent ambiguity in paragraph 19 where at one point the LVT states that charges relating to the Estate are to be excluded and in a later part it suggests that the maintenance charge for the Common Parts is to be allowed in full. She points out that the definition of Common Parts in clause 1(10) includes the Estate. I reject this argument. In my judgment the decision letter has to be read as a whole. A fair reading of the decision letter leaves no room for doubt that the LVT have decided that the Landlord's obligations under the lease did not include obligations in respect of the Estate. The reference to Common Parts in paragraph 19 plainly arises because the LVT did not appreciate that the definition in clause 1(10) included references to the Estate. In my judgment the LVT's findings were sufficiently clear and certain.

**37.** It follows in my view that unless there are special circumstances the doctrine applies so as to prevent the Landlord challenging the finding in subsequent proceedings.

### Special Circumstances

#### The Law

**38.** The question of what amounts to special circumstances was considered in some detail in *Arnold*. At first instance [1988] 3 AER 977 Sir Nicholas Browne-Wilkinson V-C decided

the matter on first principles that the facts of the case amounted to special circumstances. He said:

> Turning again to the circumstances of the present case, I have no doubt that justice does require the matter to be relitigated. The following factors are in my judgment relevant. (1) There is a continuing contractual relationship of landlord and tenant under which (if there is an issue estoppel) the decision of Walton J will regulate four further rent reviews and thereby affect the rent payable until the end of the term. (2) Because of the peculiarities of the procedure applicable to appeals from arbitrators, unlike the ordinary case of a prior decision by a judge, the decision of Walton J was not subject to appeal. Therefore a matter of very great financial importance involving millions of pounds will, if an issue estoppel applies, be decided on a point of law which the lessees have never had the opportunity to test in the higher courts. (3) The decision whether or not to permit an appeal was the decision of Walton J himself and there was no right of appeal against his refusal to certify the matter fit for appeal. The lessees took every possible step to test the decision in the earlier case in the higher courts but without success. (4) Subsequent decisions, in particular that of the Court of Appeal in *Equity and Law Life Assurance Society Ltd v Bodfield Ltd* [1987] 1 EGLR 124, make it, at the lowest, strongly arguable that the decision of Walton J was wrong. These factors taken together satisfy me that this is a case in which justice requires that issue estoppel should not apply. I therefore hold that the plaintiffs are not estopped from raising the matter of construction pleaded in para 20 of the statement of claim and accordingly dismiss the application to strike out that paragraph.

**39.** The decision was upheld by a Court of Appeal comprising Dillon, Staughton and Mann LJ [1990] 1 AER 529. Dillon LJ's view is summarised at the end of his judgment. He agreed with the V-C that the yardstick of whether issue estoppel should be held to apply is the justice to the parties. He went on:

> It is not enough for a litigant who has argued a point of law and lost, to say, in order to avoid issue estoppel, merely that it is arguable in the light of other decisions at first instance that the previous decision at first instance might have been wrong. He must go further. But the lessees here do go further. Sir Nicolas Browne-Wilkinson V-C said ([1988] 3 All ER 977 at 980, [1989] Ch 63 at 67):
>
> > 'To put it no higher, there is a very substantial chance that if the rent review clause in this sub-underlease were not to be construed in the light of the Court of Appeal decision, the opposite result would be achieved.'
>
> That seems to be an understatement, but it is not necessary for us to reach a final conclusion. I merely draw attention to three points. (1) It is admitted that Walton J's approach was not in accordance with the guidelines since laid down and approved by this court. (2) There was nothing in this lease, properly construed, to constrain him to the extreme (and to my mind ridiculous) position that he seems to have taken of assuming a hypothetical lease with no covenant for payment of rent and no power of re-entry for non-payment. (3) His decision is contrary to commercial sense and the underlying commercial purpose of a rent review clause in that he has saddled the lessees with the rent for a term they do not have, that is to say a term at a fixed rent without reviews.

**40.** In the course of his judgment Staughton LJ said:

> In this case too there has been further elucidation of the law since the decision of Walton J, as Dillon LJ has explained. That, with the continuing contractual relationship, is in my judgment sufficient to justify the decision to allow the lessees in this case to argue the construction of the lease anew. But I do not say that the result would have been different if there had been no further elucidation of the law. I have difficulty in seeing why the lessees would have failed if the original decision had merely been plainly wrong (as I think it was), but should succeed now that subsequent courts have shown that to be the case. That difficulty may have to be resolved on another occasion.

**41.** Mann LJ said this:

> It therefore follows that nowadays 'special circumstances' or 'exceptional circumstances' can defeat an issue estoppel of whatever species. What is a special, or if one wishes it, exceptional circumstances cannot, and in my judgment should not, be defined. It is a matter for the judge in any case. I only say that a special or exceptional circumstance may relate to fact, law or even, apparently, practice: see *The Mekhanik Evgrafov and the Ivan Derbenev (No 2)* [1988] 1 Lloyd's Rep 330.
>
> I would not disagree with Sir Nicolas Browne-Wilkinson V-C's finding of special circumstances in this case (see [1988] 3 All ER 977, [1989] Ch 63). I regret to say that Walton J's decision was in my view plainly wrong (see [1985] 1 EGLR 61). If it were arguably wrong, I might have taken a different view as to whether there was a special circumstance.

**42.** In the House of Lords the leading speech was given by Lord Keith. He agreed that there were special circumstances so as to require the tenant to be required to be permitted to re-open the question of construction decided against it by Walton J. He approved the judgment of the V-C. In doing so he made the point that there was no right of appeal against the decision of Walton J. He then said:

> There is much force also in the view that the landlord, if the issue cannot be reopened, would most unfairly be receiving a very much higher rent than he would be entitled to on a proper construction of the lease. The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

**Application to this case.**

**43.** When I apply the guidance from Arnold to the facts of this case the following matters seem relevant:

1. The decision of the LVT seems to me to be plainly wrong. It is, as the FTT pointed out, clear from the definition of Common Parts in clause 1(10) that the Estate is included within the definition of the Common Parts and that accordingly the Landlord's maintenance obligation extended to the Estate. It follows that it can recover the appropriate proportion of those costs from the Tenant.

2. There is a continuing relationship between the Landlord and the Tenant. The lease is for a period of 100 years. Whilst Mr and Mrs Hemmise have sold the lease any estoppel would endure for the benefit of their successors in title. Thus, if there is an estoppel, it would mean that the Tenant and its successors in title would be underpaying the service charge for a very considerable period of time.

3. It does not appear that the point was taken in the hearing before the LVT. It seems that it was a point taken by the LVT itself without the Landlord being given a proper opportunity to deal with it.

4. As Ms Cattermole pointed out the pleaded issue before the LVT related to the reasonableness of the charges. No doubt the lawyer employed by the Landlord was prepared to deal with that point. Whilst this does not mean that the LVT were not entitled to decide the point it does mean that that it was a point that it was reasonable for the Landlord not to deal with.

5. As Ms Cattermole accepted the Landlord could (and probably should) have appealed the decision. On the other hand the Landlord was not seeking to overturn the LVT's actual decision in relation to the service charges prior to 2006. It was seeking to be able to re-argue the point in respect of later charges.

**44.** Whilst this case is not on all fours with *Arnold* in that there was no right of appeal in *Arnold* I think there are many similarities. I think the remarks of Lord Keith are as applicable to this case as to that. It is a case where justice is not served by perpetuating a wrong decision over the whole life of the lease. I accordingly think that special circumstances do exist and that accordingly the Landlord was not estopped from arguing whether it could recover the appropriate portion of the service charge in respect of maintenance of the Estate

**45.** Accordingly the Appeal on the major issue is dismissed.

## 9 The TV Aerials.

**46.** This is a very minor part of the dispute and I propose to deal with it quite shortly. In my view the decision of the FTT cannot stand. The FTT has treated the aerials as part of the Estate and has held that the total cost should be divided amongst all the members of the Estate. In fact the position is governed by clause 5(5)(k). This requires the Landlord to maintain the aerials serving the Building rather than the Estate. Thus the Tenant is only liable to pay an appropriate part of the costs of the maintenance of the aerials serving the Building. This is not the same as the calculation performed by the Landlord which is thus not in accordance with the lease. It may be that the final figure will be similar to that which has already been charged in that a smaller sum will be divided between a smaller number of people but it is impossible to say that it will be the same. No doubt the effect of this clause is administratively inconvenient for the Landlord. This is especially true because following digitalisation in 2012 the number of aerials has changed. It would obviously be sensible if some sort of compromise could be reached in relation to the aerials. However in the absence

of a compromise the Landlord will either have to abandon the claim in respect of the aerials or recalculate the sum due in accordance with the lease.

## 10 Costs

**47.** This is academic in view of the fact that the Landlord has repeated that it will not seek to add its costs to the Service Charge. However in view of the fact that the main part of this appeal has been lost I agree with the FTT that it is inappropriate to make an order under s 20C of the 1985 Act.

## 11 Conclusion

**48.** In the result I allow the appeal in respect of the TV aerials but in all other respects the appeal is dismissed.

DATED: 2 March 2016

HHJ John Behrens