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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/29UG/LUS/2014/0001**

Property : **1-3 Lansdowne Square, Northfleet
Gravesend, Kent, DA11 9LX**

Applicant : **Midas RTM Company Limited**

Representative : **Mr Wellings (counsel)
instructed by
The Merriman Partnership**

Respondent : **BM Samuels Finance Group Plc**

Representative : **Mr Thornton
(Hurford Salvi Carr)**

Type of Application : **s94CLRA02 (Jurisdiction)**

Tribunal Members : **Judge D Dovar**

**Date and venue of
Hearing** : **27th June 2014, London**

Date of Decision : **4th July 2014**

DECISION

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Introduction

1. This is the second application by the Applicant for a determination under s94 of the Commonhold and Leasehold Reform Act 2002 ('the Act') for a determination of the sum which should be paid over to the Applicant pursuant to its acquisition of the right to manage the Property.
2. The first application was in proceedings CHI/29UG/LSC/2013/0054.
3. This is a hearing of a preliminary issue to determine whether or not the Tribunal has jurisdiction to consider this application a second time around.

Background

4. The Tribunal having conducted a hearing on the first application and heard the submissions and evidence of the parties, gave their determination on 16th October 2013. The Tribunal determined that in respect of the s94 application, the Respondent should transfer the sum of £4,328.72 to the Applicant.
5. In arriving at that sum the Tribunal considered that at the date the Applicant acquired the right to manage, £12,128.72 was held by the Respondent as accrued uncommitted service charges, but that given that the Respondent's representative had stated that they had after that date transferred £7,800 to two tenants, that only £4,328.72 needed to be transferred.
6. The Respondent then sought permission to appeal on the basis that the Tribunal had failed to take into account ground rent that had been included in the figure of £12,128.72. By its decision dated 4th December 2013, the Tribunal refused permission to appeal on the grounds that the Respondent had not raised this issue at the hearing of the s94 application and there was no good reason for not having done so.
7. Subsequent to that, sometime between 7th January 2014 and 18th February 2014, in the course of correspondence with the Respondent, the Applicant discovered that in fact the Respondent had not returned

the sum of £7,800 to two tenants, but had transferred that amount to another of its accounts. Further, whilst the Respondent stated that it intended to repay the tenants, it was first going to deduct its own costs and expenses from that sum before doing so. That prompted the Applicant to make this application.

8. The Tribunal asked the Applicant why they had not sought to appeal the decision instead on the grounds of fresh evidence. The Applicant stated that they were out of time for appealing and considered that this was the better route to take. They seem not to have considered applying out of time to appeal the decision on the basis that they had only discovered what had happened to the sums in about January 2014.
9. In making this application, the Applicant pre-empted the issue of jurisdiction and this hearing was convened to address that point. The hearing was proceeded with on the basis that the Respondent had materially misled both the Tribunal and the Applicant. No determination has been made on that point and the Respondent has not had an opportunity to state why that was not the case.

The Applicant's submission on jurisdiction

10. The Applicant contended

“The only jurisdictional bar which arguably applies to this application arises out of the doctrine of issue estoppel ... However, it is submitted that issue estoppel is not an absolute jurisdictional bar. It is subject to an exception of special circumstances, namely, where 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 by reasonable diligence have been adduced in those proceedings.”

11. The Applicant relied on *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 in which Lord Keith of Kinkel stated the following:

“Cause of action estoppel arises where the cause of action in the later 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 reasonably diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.

...

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 re-open that issue.

...

But 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. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been put but was not. Given that further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not with reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. 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 appoint involved in 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.”

12. They also relied on *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2013] UKSC 46, in which Lord Sumption set out some of the general principles of Res Judicata, he stated

“The first principle is that 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. This is “cause of action estoppel”. ...

*Secondly, there is a principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v. Boot* [1928] 2 KB 336.”*

13. The Tribunal was concerned that in fact this was a case of cause of action and not issue estoppel. The Applicant sought to distinguish this matter on the basis that it was only a narrow issue that the Tribunal was being asked to re-visit; viz. the £7,800, it was not asking the Tribunal to look afresh at the whole matter.
14. The Applicant clarified that there was no attempt to challenge the original decision. They accepted the quantum of the amount to be transferred, all they challenged was the reduction in the amount due to the representation that those sums had been paid to the tenants.

15. The Applicant contended that if this was cause of action estoppel, then there was still jurisdiction to set aside the decision on the grounds of fraud.

The Respondent's submissions

16. The Respondent wanted the matter to be heard again in order to consider whether ground rent had been included. They had no view on whether this was a case of cause of action estoppel or not.

Discussion

17. The difficulty the Tribunal faced in this application was whether or not this application was the same cause of action as the first; thereby giving rise to a cause of action estoppel. If it was, then the Tribunal was unable to see how it could be allowed to proceed. Cause of action estoppel is an absolute bar.
18. Alternatively, if this was a case of issue estoppel, then the Tribunal considered that it would have fallen within the exception outline in *Arnold* and would find no difficulty in allowing it to proceed.
19. The Tribunal considers that cause of action estoppel applies in this case for the following reasons:
 - a. Both applications are applications under s94;
 - b. Both applications are between the same parties;
 - c. Both applications arise out of the Applicant acquiring the right to manage on 27th February 2013.
20. Further, the Applicant has not applied to set aside the decision and so should this application be allowed to proceed, there will be two inconsistent determinations on the s94 sum arising out of the same exercise of the right to manage.
21. The Tribunal also considered the extract from Lord Keith's speech above, in particular '*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'. This is a direction that the earlier judgment should be set aside for fraud or collusion, not that in those circumstances, the matter can be re-litigated without first dealing with the original decision.

22. Finally, although this application relates to the sum to be transferred and therefore not the actual establishment of a cause of action, it is akin to seeking the *'further damages'* referred to in the extract from Lord Sumption's speech above.

Conclusion

23. Whilst the Tribunal is reluctant to prevent this application from proceeding as it potentially permits a party to gain from misleading the Applicant and the Tribunal, cause of action estoppel, being an absolute bar, means that the Tribunal does not have jurisdiction.



Judge D Dovar

Chairman

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.