What's coming up in 2021?

Joanne Wicks QC and Zoë Barton QC give a preview of cases moving through the higher courts

The year 2020 has proved to be eventful in more ways than one. Here we look at some cases where judgment is awaited and what their likely implications will be.

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Getting around rates

Local authorities will have their eyes peeled for the appeal decision in *Rossendale Borough Council v Hurstwood Properties* when it comes. The case was heard by the Supreme Court on 26 October 2020 and judgment is now awaited.

Schemes to avoid the payment of non-domestic rates on empty properties have become increasingly common and the one under scrutiny in this case was surprisingly simple: the owner of vacant property simply granted a lease of it to a special purpose vehicle, which was subsequently wound up or allowed to be struck off the register, and thereafter dissolved. Despite the efforts of the council to pin the rates liability on the owner rather than the SPV, in 2019 the Court of Appeal held that the liability for rates was that of the SPV alone and that the landowner could not be made liable either by piercing the corporate veil or by application of the *Ramsay* principle developed in the context of tax avoidance schemes.

The *Ramsay* principle concerns the purposive interpretation of statutes. The concept that a statute will be interpreted so as to give effect to Parliament's purpose is well-established and, as a number of cases make clear, all the House of Lords did in *WT Ramsay Ltd v Inland Revenue Comrs* [1982] was apply this approach to an area, namely tax law, which had previously taken a stubbornly literalist stance. The *Ramsay* principle involves giving a purposive construction to an Act of Parliament to determine the nature of the transaction to which it is intended to apply, and then deciding whether the actual transaction answers to the statutory description. If the Act treats particular steps in a transaction as irrelevant, because they have been inserted for no commercial purpose, then those steps will be ignored.

Applying these principles, the Court of Appeal held that, properly and purposively construed, the rating legislation makes the person with immediate legal possession of a property liable for non-domestic rates and that person was the SPV, which had the right to possession under its lease. If the Supreme Court decides otherwise, that will be very important for councils and their collection of non-domestic rates, but it will be a decision on the meaning of the rating statutes and of little impact outside that sphere.

Of potentially much more significance is the argument based on piercing the corporate veil. If the Supreme Court were to allow the appeal on that ground, that would have significant ramifications for many property transactions and owners. Property transactions are often structured so as to make use of the different legal personalities of limited companies, and SPVs are very commonplace across all forms of property ownership. If the shareholder in an SPV, or the person who sets up a property-owning structure using limited liability companies with a view to distancing themselves from liability, can be made liable for the SPV's debts, that will come as a real shock to many in the property world.

The 1954 Act – again

While property litigators are still working through the consequences of the Supreme Court's decision on the business tenancies legislation in *S Franses Ltd v The Cavendish Hotel (London) Ltd* [2019], another case threatens to put the cat amongst the 1954 Act pigeons.

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd [2019] is concerned with the process by which landlords and tenants contract out of the security of tenure provided to business tenants by the Landlord and Tenant Act 1954. For this purpose, the tenant must complete a form of declaration – either a simple declaration if the tenant has had the landlord's warning notice for more than 14 days, or otherwise a statutory declaration.

There are various blanks in the form to be completed, including one which requires the tenant to state that it is proposing to enter into a tenancy '*for a term commencing on...*'. What is the date which the tenant should write in? This may seem a matter of tiny detail, but on it hangs the whole validity of the contracting out process. If the tenant does not complete the declaration in the form, or substantially in the form (required by the regulations), the contracting out process is invalid, and the tenancy has 1954 Act protection.

The *TFS* case concerns six leases of fragrance shops in discount retail centres. The leases of two shops were the subject of agreements for lease; under the agreements, the length of the lease term was calculated from an 'Access Date', which was the date on which the tenant would be allowed into the premises under licence, in advance of the grant of the lease itself. The judge held that the forms were properly completed because they stated that the term would commence on the Access Date. In the other four cases, the declarations were vague or meaningless; the term was said to commence on 'a date to be agreed' or on 'the date on which the tenancy is granted'. The judge held that these formulations were not in the prescribed form, but were 'substantially' in the prescribed form, so as to satisfy the regulations.

Whether the judge was right will be considered by the Court of Appeal in April 2021, with the tenant arguing that what must go into the blank on the form is the date on which the term of the tenancy commences and the tenant acquires a proprietary interest in the premises. As a

matter of law, this cannot be earlier than the date on which the lease is executed (the case was due to be heard in June 2020 but was held to have been automatically stayed by the stay of possession proceedings introduced during the Covid-19 pandemic).

There are clearly significant consequences for many landlords and their business tenants if the tenant succeeds in persuading the court that the contracting out processes were not properly completed and the six leases have 1954 Act protection.

Whatever the ultimate decisions in the Cornerstone cases may be, there looks to be plenty of scope for further litigation between operators and landowners about the new code.

The Cornerstone cases

There has been lots of activity on the telecommunications front in recent years, with the introduction of a new Electronic Communications Code in 2017 and some telecoms operators keen to stress-test its boundaries and create precedents for the future. Under this code, operators have rights to install, repair and upgrade apparatus, to carry out works on land for that purpose, and other similar rights. The operator acquires code rights by a written agreement with the relevant occupier of land or by an agreement imposed by a court order.

In *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019], Cornerstone (a joint venture between Vodafone and Telefonica) was attempting to acquire code rights over a mast already leased to Vodafone and served a notice under paragraph 20 of part 4 of the code on the freeholder, Compton Beauchamp Estates. The Upper Tribunal held that the freeholder was not the relevant person to confer code rights, as Vodafone was in occupation of the site, and the Court of Appeal upheld that decision.

The Compton Beauchamp case was followed by *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2019]. There, it was Cornerstone that was already in occupation of the site, this time under a protected business tenancy granted before the code was enacted. The Upper Tribunal found that it had no jurisdiction to impose a code agreement on the landowner under part 4 of the code since Cornerstone, not the landowner, was in occupation of the site and also that Cornerstone could not use part 5 of the code to obtain a new tenancy: it had to go to the county court under the 1954 Act. That was highly significant because the 1954 Act provides for a different way of ascertaining the rent payable under a new tenancy, likely to lead to a higher rent, than the code does.

Compton Beauchamp is now on its way to the Supreme Court and *Ashloch* to the Court of Appeal. The appellants in both cases will be buoyed by the judgment of Judge Elizabeth Cooke in *Arqiva Services Ltd v AP Wireless II* (UK) Ltd [2020] in which she politely, but pointedly, said that '*a wrong turn may have been taken*' by the Court of Appeal in *Compton Beauchamp*.

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The unbroken lease

Probably on its way to the Court of Appeal, since permission to appeal was granted by the Chancery Division Judge, is the tenant's conditional break case of *Capitol Park Leeds Plc v Global Radio Services Limited* [2020].

Conditions attached to tenant's break clauses in leases are a rich source of dispute and a source of anxiety for tenants, their lawyers and their surveyors. This stems from a lethal combination: the law's strict application of conditions imposed on options (including options to determine or renew a lease or to purchase the freehold) and the fact that the very time that a tenant wants to hand the property back is most likely to be the time the landlord wants to keep the lease, and therefore its rental income stream, in place.

In *Capitol Park*, a tenant's break clause was conditional upon the tenant 'giving vacant possession of the Premises to the Landlord' on the relevant date in 2017. 'The Premises' were defined to include the original building and landlord's fixtures. Preparing to carry out some dilapidations works before the break date, the tenant stripped out various features of the building and/or its fixtures, rendering the property 'an empty shell of a building which was dysfunctional and unoccupiable'. It paused the works while it tried, unsuccessfully, to negotiate a surrender deal with the landlord and had not reinstated the removed parts by the time the break date arrived. The court held that what the tenant gave back to the landlord on the break date was not 'the Premises', as defined by the lease, and the break condition was not satisfied. As a consequence, the lease runs on to its term date in 2025.

There are a number of cases which consider whether a break condition is fulfilled when the tenant leaves something behind on the break date, but none previously have considered what happens when the tenant takes parts of the building away. Many tenants who have been hit hard by the pandemic will be anxiously waiting for the arrival of break dates in their leases and we can expect to see more and more landlords trying to prevent their exercise by the strict application of conditions.

Covid-19 and commercial property

Finally, we flag the 'business interruption' insurance test cases which have rocketed to the Supreme Court with extraordinary speed. In July 2020, the Divisional Court heard a series of cases brought by the Financial Conduct Authority with a view to testing whether the wording of certain business interruption policies would cover losses caused by the Covid-19 pandemic and the associated closure of businesses and premises in response to informal government announcements and primary and secondary legislation. Judgment was given by the Divisional Court on 15 September 2020 and final orders sealed on 18 October 2020 – and the appeals are due for hearing in the Supreme Court between 16-19 November 2020.

Although the cases themselves are not concerned with property law issues, they have the potential to impact on landlords and tenants who hold policies containing the relevant wording: some of these are 'disease clauses', some 'prevention of access' clauses and some are a hybrid of the two. Of particular interest for the future – but not under consideration in these cases – is the question whether a tenant might have the right to a rent holiday under its lease if their

landlord holds one of these policies and has charged the tenant an insurance rent to cover the premiums paid for it.

Given that we write this piece in lockdown, with shops and businesses once again closed by law, these issues are pressing and timely. No doubt the Supreme Court will hope to give judgment fairly shortly after the hearing; perhaps a welcome early Christmas present for the winners.

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These insurance test cases are most probably just the tip of the iceberg. We are likely to see plenty more litigation about where the financial burden of the pandemic should fall, particularly in the commercial property sector, given that premises in some cases have been required to close or at least suffered impaired trading. These cases are likely to include interesting arguments about the circumstances in which leases may be terminated, or at least the liability for rent under them suspended, as a result of Covid-19. ■

Arqiva Services Ltd v AP Wireless II (UK) Ltd [2020] UKUT 195 (LC)

Capitol Park Leeds Plc v Global Radio Services Limited [2020] EWHC 2750

Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd [2019] UKUT 338 (LC)

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

Rossendale Borough Council v Hurstwood Properties [2019] EWCA Civ 364

S Franses Ltd v The Cavendish Hotel (London) Ltd [2019] AC 249

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd [2019] EWHC 1363 (Ch)

WT Ramsay Ltd v Inland Revenue Comrs [1982] AC 300