

Admas Habteslasie

The Supreme Court's decision in *Rossendale BC v Hurstwood Properties*

The legal framework

- National non-domestic rates (NNDR) liability for unoccupied property arises on basis of s.45 of the Local Government and Finance Act 1988 (“**the 1988 Act**”) and attaches to “*the owner of the whole of the hereditament*”
- The owner is defined as “*the person entitled to possession*” of the land: s.65(1), 1988 Act

Rossendale: background

- Owners of properties located in the areas of Rossendale Borough Council and Wigan Council sought to transfer liability for unoccupied rates to SPVs by grant of leases
- The schemes took two forms:
 - **V1**: SPV immediately put into members' voluntary liquidation
 - Exemption from liability where owner is a company subject to a winding up order or being wound up voluntarily
 - **V2**: SPV is dissolved and lease + associated liability for NNDR passes to the Crown

Rossendale: the appeals

- Legal basis for the schemes is that:
 - One of the essential ingredients for a lease = grant of a right to exclusive possession of the land subject to the lease
 - Therefore, on grant of a lease and passing of entitlement to exclusive possession, SPVs were “owners” for purposes of s.45
 - SPV scheme operated on basis of prolonging liquidation and keeping SPV as lessee while in process of liquidation for as long as possible
 - Dissolution scheme operated on basis of billing authority’s delay in finding out that SPV had been dissolved

Rossendale: the appeals

- Billing authorities argued (actual) owners liable on two bases:
 - (1) ‘owner’ under s.65(1) meant someone with a “real” entitlement to possession, i.e. the defendants
 - (2) court should pierce the corporate veil of SPVs so defendants treated as true owners
- Defendants sought to strike out the councils’ arguments
- Test cases representative of 55 similar cases

The schemes

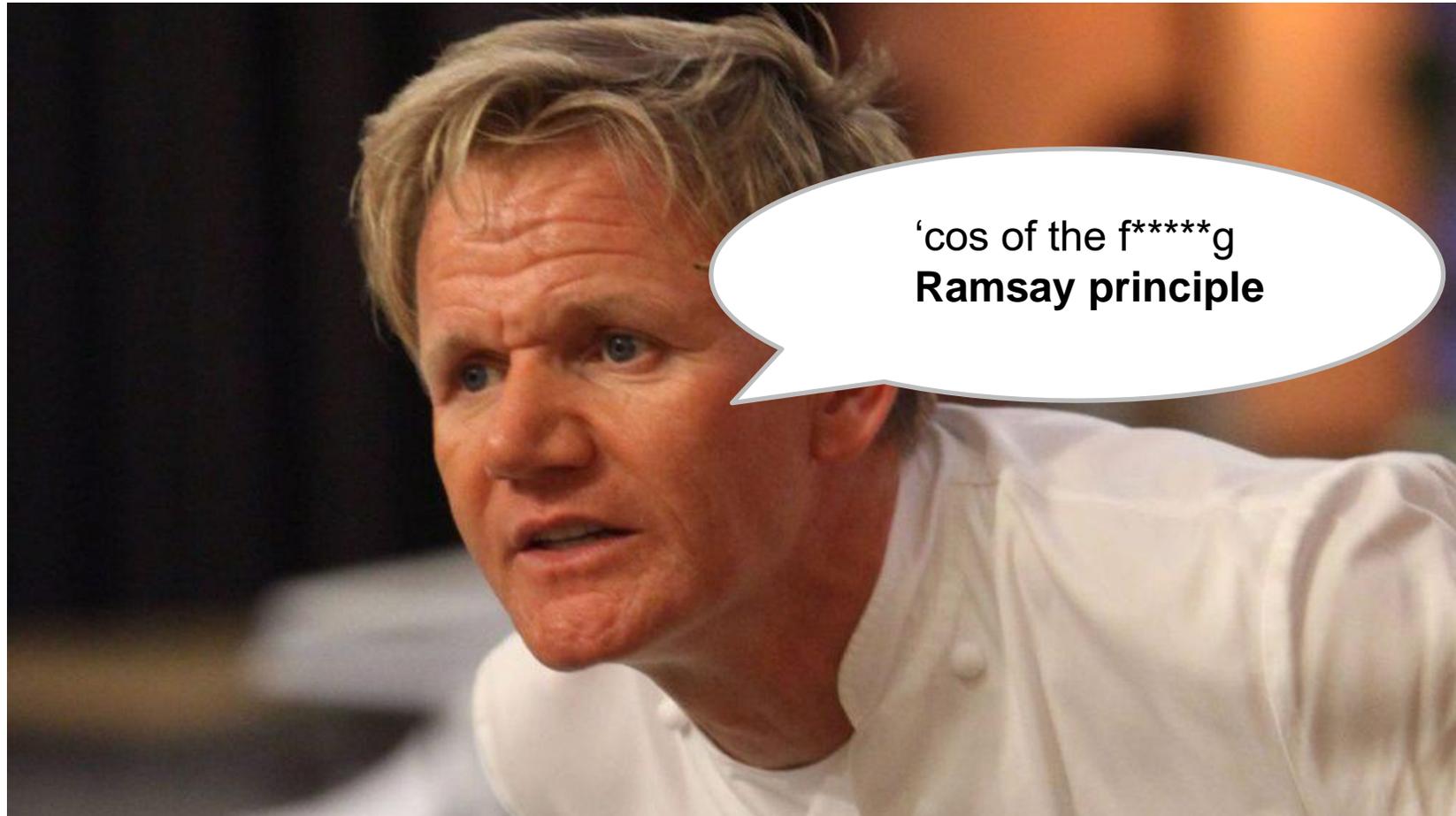
- The Supreme Court noted certain features of the schemes:
 - Dissolution scheme:
 - Reserved a rent that was not intended to be demanded or paid;
 - Lease contained business user and break clause provisions which also were not intended to be implemented
 - Relied on billing authority not becoming aware of dissolution and asking Crown to disclaim lease
 - Appeared to require unlawful conduct by directors and possibly commission of criminal offences
 - Insolvency scheme required nominal liquidators who dragged their feet to artificially prolong period in which SPV was lessee, and involved misuse of insolvency process

The schemes

- Further, and more relevantly to the question of statutory interpretation:
 - The leases were not “shams” and created genuine legal rights and obligations
 - They were entered into solely to avoid NNDR liability
 - The leases were not granted with the intention of allowing SPV to make use of the property, or to allow SPV any role in bringing property back into use – SPVs had no monetary or human resources to do anything with their rights under the lease
 - Practical ability to leave property unoccupied remained with the landlord, who could terminate the lease and really had control of letting the property
 - Not intended that SPV would actually pay any NNDR

The main question

- The main question was: who was the person entitled to possession?
 - Was it the SPVs, as intended under the schemes?
 - Or was it the landlord?
- The Supreme Court concluded, contrary to the first instance judge and the Court of Appeal, that it was **the landlord**
- Why?



The *Ramsay* principle

- Relevant to the Supreme Court's analysis and central to the billing authorities' submissions was decision of House of Lords in ***WT Ramsay Ltd v Inland Revenue Comrs*** [1982] AC 300
- In ***Ramsay***, the House of Lords concluded that, on the basis of a purposive approach to capital gains tax legislation, losses produced by artificial tax avoidance schemes had not produced any losses for the taxpayers and were properly to be disregarded for the purposes of applying the legislation
- Until ***Rossendale***, Ramsay principle had made limited inroads into questions of NNDR liability; generally considered a complicated and difficult principle: “*what has been called the Ramsay principle... which I will not attempt, at my peril, to paraphrase*” (Kerr J in ***Principle Offsite Logistics v Trafford***)

The *Ramsay* principle

- Supreme Court made it clear that Ramsay principle *“is an application of general principles of statutory interpretation”* (see [10] to [17]):
 - 1) In construing legislation, the court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose
 - 2) Transactions/elements with no business purposes are disregarded because not expected that Parliament intends to exempt from tax a transaction solely concerned with avoiding tax
 - 3) Where a scheme aimed at avoiding tax involves a series of steps planned in advance, scheme as a whole to be considered; facts to be looked at in the round, and a *“formalistic insistence on examining steps separately”* to be avoided

Statutory purpose

- In order to interpret the 1988 Act, the Supreme Court sought to identify the purpose of the statutory scheme; noting it had had little assistance from the parties on that issue ([52]):
- In relation to equivalent provision in predecessor General Rate Act 1967, Court noted earlier judgment in which mischief identified as follows: *"Parliament wanted to stop the owners of premises ... leaving them unoccupied to suit their own convenience and to their own financial advantage"*.

Statutory purpose

- In relation to 1988 Act, Minister responsible for Bill that became the 1988 Act said: *"historically, the purpose of empty property rating has been partly to reflect the fact that empty properties do benefit from some local authority services - police, fire and so forth - and partly to encourage owners to bring empty property back into use."*
- As to question of why liability falls on owner, Court at [30]:

"...in relation to the central purpose of providing an incentive to bring unoccupied property back into use, the intention is clear. It focuses the burden of the rate precisely on the person who has the ability, in the real world, to achieve that objective."

The Supreme Court's conclusions

- “Owner” under s.65(1) *“is to be interpreted as denoting in a normal case the person who as a matter of the law of real property has the immediate legal right to actual physical possession of the relevant property”*: [47]

BUT

“In the unusual circumstances of this case, however, identifying “the person entitled to possession” in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation.” [48]

Main principle

- Key extract is at [59]:

“...we consider that the words "entitled to possession" in section 65(1) of the 1988 Act as the badge of ownership triggering liability for business rates are properly construed as being concerned with a real and practical entitlement which carries with it in particular the ability either to occupy the property in question, or to confer a right to its occupation on someone else, and thereby to decide whether or not to bring it back into occupation.”

Caveat?

- Note potential caveat at [61]:

“It may be that other factual situations may demonstrate that this test needs some further adjustment. For example the letting of unoccupied business property by a parent company to a wholly owned and controlled subsidiary would not of itself cause the subsidiary to fail to satisfy the ownership test merely because the management of the affairs of the subsidiary (including whether to bring the premises back into occupation) rested with the parent's board.”

Summary

- 1) Who is, as a matter of property law, entitled to possession?
- 2) Does that person have a real and practical entitlement which carries with it:
 - the ability to occupy the property in question; or
 - to confer a right to its occupation on someone else;
 - Put another way, who has the ability to decide whether or not to bring it back into occupation?
- In many cases, first and second question will lead to same answer; but where they do not, answer to second question will have primacy

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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