Business tenancies—motive behind ground (f) works immaterial (S Franses Ltd v Cavendish Hotel)

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Property analysis: Dellah Gilbert, partner in Maples Teesdale LLP, and Nic Taggart, barrister at Landmark Chambers, who acted for the Cavendish Hotel, examine S Franses v the Cavendish Hotel (London) Ltd and explain why there are still twists and turns in store.

Original news

S Franses Ltd v Cavendish Hotel (London) Ltd [2017] EWHC 1670 (QB), [2017] All ER (D) 95 (Jul)

The case related to the ground of opposition to the renewal of a business tenancy in section 30(1)(f) of the Landlord and Tenant Act 1954. The court held that the landlord had made out its intention to carry out substantial works to the property at the end of the relevant tenancies and that it would be impossible to do so without obtaining vacant possession. The court confirmed that it did not matter that the scheme of works was artificial and purely a device to satisfy the relevant ground—the court was only concerned with the landlord's intention to carry out the works, not its motive in doing so.

What is the background to the case?

LTA 1954 has been in force for over 60 years but still manages to raise interesting issues for the courts to consider, as this case shows.

This was an appeal from the County Court at Central London. The Cavendish Hotel (London) Ltd, is the long-lessee of a hotel in Jermyn Street, London. S Franses Ltd is its sub-tenant, occupying a retail unit on the ground floor and basement as a dealer in antique tapestries and carpets. The landlord made no attempt to hide the fact that it wished to regain possession from the tenant to give itself a freer hand if it decided to undertake a more extensive redevelopment of the hotel as a whole in the future. Disarmingly, the landlord's evidence accepted much of the scheme of works it relied on for refusing the tenant a new tenancy under LTA 1954, s 30(1)(f) was being undertaken because it wished to undertake works which would satisfy LTA 1954, s 30(1)(f), but served no other commercial purpose.

The trial judge, HH Judge Saggerson, accepted the landlord's evidence on all points and accepted that, as matter of law, the landlord's motives for undertaking the works were immaterial. The question for the court was whether the landlord's intention to undertake them was settled and capable of implementation. The judge laid significant weight on the landlord's offer of an undertaking to do the works, once possession was obtained. He duly held that the landlord's intention was settled and capable of implementation and ordered the tenant be refused a new tenancy.

While the landlord's case was advanced with particular transparency, practitioners adept in the dark arts of LTA 1954, s 30(1)(f) would have found the story unsurprising—there are few of us who have not uttered the time-honoured phrase, 'I think we need to do some more works'.

On that point, the decision of the High Court, Jay J, upheld the orthodox approach, but for less orthodox reasons. Jay J then made some orders which will create new rafts of uncertainly for those practising in this area.

What issues arise from the intention to carry out works?

Before the County Court and the High Court, the tenant argued the landlord's intention was 'conditional', in the sense that the landlord would not do the works if they were not necessary to obtain an order under LTA 1954, s 30(1)(f). Both courts rejected this—in the real world, there was no doubt that the tenant was in fact relying on its rights under LTA 1954, so the landlord's intention, fortified by the undertaking, was settled.

The tenant next argued that the landlord's actual intention was not a permissible intention within LTA 1954—Parliament had not intended to allow landlords to subvert the legislation by carrying out work solely in order to evict tenants, so an intention to undertake such work was not an 'intention' within LTA 1954, s 30(1)(f). The landlord argued it was settled under LTA 1954 that the court must make findings about the landlord's intentions, not its motives. See:

- *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd (No 1)* [1959] AC 20, 1958] 1 All ER 607
- *Decca Navigator Co v GLC* [1974] 1 WLR 748 (CA), [1974] 1 All ER 1178
- *Turner v Wandsworth London Borough Council* [1994] 1 EGLR 134, and
- *Dolgellau Golf Club v Hett* [1998] 2 EGLR 75

Jay J held that he was not bound by those authorities to agree with the landlord, as they did not address the precise question before him. He did, however, follow the orthodox approach of regarding intention and motive as different concepts. He accepted a landlord's motives might illuminate whether his intention to undertake the works he said he would undertake was genuine, but in this case the landlord's unambiguous undertaking was very strong evidence that it would carry out the works. Jay J emphasised the importance of the sanction of contempt of court as underpinning the settled nature of the landlord's stated intentions.

If it had stopped there, Jay J's decision would be interesting, but a little like the apocryphal newspaper headline, 'Small earthquake in Chile; not many dead', his was the orthodox view, albeit derived as a matter of statutory construction rather than applying the well-established *Betty's Cafés* line of cases. However, Jay J concluded that this point on the nature and quality of the landlord's intention was of sufficient public importance that he granted a certificate for a 'leapfrog' appeal to the Supreme Court. The Supreme Court has also to give permission, but for now, 'watch this space'.

What are the practical points on the intention to carry out works?

It is rather unfortunate that Jay J has called the established way of conducting LTA 1954, s 30(1)(f) cases into question by granting the certificate. Until the outcome of the appeal process is known (which may take some time) the law is in a state of uncertainty.

For landlords, the beneficial points in Jay J's judgment are two-fold. First, the motives for undertaking the work remain immaterial. The fact that the scheme may involve rather more work than is strictly necessary remains irrelevant. However, as there is now some doubt as to whether this will remain the law, it would be worth considering whether some or all of the intended works could be challenged as only being undertaken to improve the landlord's prospects of success on LTA 1954, s 30(1)(f). Second, the established view that the giving of an undertaking is a powerful way of proving the intention to undertake the works has been yet further reinforced.

For tenants, Jay J's judgment has less immediate benefits—any hopes of reducing the landlord's proposed scheme of works by reference to them being without commercial benefits will have to await the outcome of any appeal. For now, the benefit of Jay J having emphasised the importance of an undertaking for the landlord's position will provide some interesting ammunition in any cases where the landlord is rash enough not to offer an undertaking.

What will be the impact concerning rights of entry?

The landlord did not get it all its own way. The leases in question contained wide rights for the landlord to enter onto the demised premises to undertake works. The judge in the County Court accepted even the widest rights of entry have limits and the landlord's proposed works were so extensive that undertaking them would be a derogation from grant and a breach of the covenant for quiet enjoyment. On this point, Jay J upheld the judge.

The County Court judge then considered that the works which would constitute the derogation from grant were also within LTA 1954, s 30(1)(f). On this, Jay J declined to uphold him, essentially on the basis that he did not consider it sufficiently clear in the judgment below that the judge had only considered works which fell within LTA 1954, s 30(1)(f), rather than the totality of the works he considered to be a derogation.

Insofar as it goes, this does not seem much of an interesting point. Jay J's actual decision essentially turns on his reading of the judgment below. LTA 1954, s 30(1)(f) itself makes clear that the landlord must prove that the works it relies upon are works which it 'could not reasonably do...without obtaining possession of the holding'. The point is also well established by the cases Jay J referred to:

- *Cerex Jewels Ltd v Peachey Property Corporation plc* (1986) 52 P & CR 127, [1986] 2 EGLR 65
- *Romulus Trading Company Ltd v Trustees of Henry Smith's Charity (No 1)* (1990) 60 P & CR 52, [1990] 2 EGLR 75

However, an interesting point arises. The tenant persuaded Jay J to remit the matter to the County Court as a series of narrow questions in a prescribed order, directing the County Court to accept the trial judge's finding that the landlord's proposed works, when considered as a whole, would constitute a derogation from grant, but asking itself whether each item of work, considered individually could be undertaken under the right of entry.

If this approach is right, it would be open to the County Court to find that the works, considered as a whole, could not be undertaken 'without obtaining possession of the holding', but the very same package of works, if each step was considered separately, could be so undertaken. Given that the landlord's intention was to undertake all of the works as a single programme, it seems unreal to approach the question in this way. It amounts to this—even if it is a derogation from grant for the landlord to demolish the holding with a ball and chain, it is not if the landlord does so brick-by-brick.

Are there any practical implications concerning rights of entry?

The reservation of wide rights of entry is a problem for both parties in LTA 1954, s 30(1)(f) cases. The wider the right, the more extensive and intrusive the landlord's works need to be to exceed the width of those rights. However, the tenant has to be careful what it wishes for—the more it has to argue the landlord can undertake its proposed works without the need for retaking possession, the greater the risk that it will then suffer the consequences of the landlord deciding to do the works even though the tenant retains occupation.

Both sides need to give anxious and careful consideration to any reservations of rights of entry to undertake works in the lease, and choose the position they propose to take very carefully.

For tenants, if they are prepared to risk the landlord doing the works anyway, the approach undertaken by Jay J is the one to promote at court—even in less extreme cases, it is likely to reduce the works which the landlord may rely on.

For landlords, the argument is that Jay J's order asks the questions in the wrong order. They should seek to argue the correct approach is to first identify the works which the landlord intends to undertake which satisfy all the elements of LTA 1954, s 30(1)(f), apart from the requirement relating to possession. In other words, are the intended works 'to demolish or reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding, or part thereof'? Having extracted from the landlord's proposals all work that is outside the scope of LTA 1954, s 30(1)(f), the court should then ask itself whether the remaining works, if undertaken as part of a single programme, could be undertaken under the right of entry without there being a derogation from grant. If the answer is yes, then LTA 1954, s 30(1)(f) is not made out—if the answer is no, LTA 1954, s 30(1)(f) is made out.

The landlord in this case is seeking permission to appeal from the Court of Appeal on this issue so, once again, stay tuned to this station.

Interviewed by Julian Sayarer.

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