

BRIEFING

UK SUPREME COURT - NO MORE  
BUILDING CASTLES IN THE SKY

DECEMBER 2018

- UK SUPREME COURT HANDS DOWN ONE OF THE MOST EAGERLY ANTICIPATED PROPERTY DECISIONS OF THE YEAR
- NEW TEST FOR LANDLORDS SEEKING TO RELY ON REDEVELOPMENT GROUND TO OPPOSE GRANT OF NEW BUSINESS TENANCY



*S Franes Ltd (Appellant) v The Cavendish Hotel (London) Ltd (Respondent)*<sup>1</sup>

“THE UK SUPREME COURT HAS HELD THAT A LANDLORD CANNOT RELY ON A SCHEME OF WORKS SPECIFICALLY DESIGNED TO FORCE A TENANT TO VACATE ITS PREMISES IN ORDER TO CIRCUMVENT THE TENANT’S RIGHT OF RENEWAL UNDER THE LANDLORD AND TENANT ACT 1954.”

In one of the most eagerly awaited property decisions of the year, which will be of interest to landlords and tenants alike, the UK Supreme Court has held that a landlord cannot rely on a scheme of works specifically designed to force a tenant to vacate its premises in order to circumvent the tenant’s right of renewal under the Landlord and Tenant Act 1954.

**The Facts**

The tenant, S Franes Ltd (“Franes”), took a 25 year lease from the landlord, The Cavendish Hotel (London) Ltd (“Cavendish”), of the ground floor and basement of 80, Jermyn Street, London (the “Premises”) from 2 January 1989. In keeping with other trade at Jermyn Street, Franes used the premises as a showroom for the sale of vintage textiles and a gallery for antique tapestries. On 16 March 2015, Franes attempted to initiate a lease renewal by serving notice on Cavendish pursuant to section 26 of the Landlord and Tenant Act 1954 (“LTA 1954”).

On 15 May 2015, Cavendish served a counter notice on Franes opposing the grant of a new tenancy, relying on section 30(1)(f) of the LTA 1954. This section provides that a landlord may oppose renewal where:

<sup>1</sup>[2018] UKSC 62 on appeal from the High Court (leap frog)

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“CAVENDISH CANDIDLY ADMITTED THAT THE SUBSTANTIAL WORKS WHICH IT PROPOSED WERE BEING CARRIED OUT SOLELY TO ENABLE IT TO INVOKE GROUND F.”

“on the termination of the current tenancy the landlord intends 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 and that he could not reasonably do so without obtaining possession of the holding” (“Ground F”).

At trial, Cavendish candidly admitted that the substantial works which it proposed were being carried out solely to enable it to invoke Ground F and so oppose Franes' request for a new lease. It was not disputed that Cavendish would only carry out the works if Franes refused to leave the Premises and relied on its security of tenure under the LTA 1954.

At first instance before the County Court, HHJ Saggerson held that Cavendish had successfully made out Ground F and that no new lease would be granted. Franes appealed to the High Court on twelve grounds. The first and most significant was as follows: “given that the Landlord's intention to carry out Scheme 3 [the works] was conditional on these works being necessary in order to satisfy ground (f), this was not sufficient intention within the meaning of this provision” (the “Intention Point”).

#### The High Court decision

The High Court upheld the County Court ruling and rejected Franes' appeal on the Intention Point while upholding its appeal on other points which are not relevant for the purposes of this note. This ruling permitted Cavendish to successfully rely on Ground F and refuse to grant Franes a new lease.

The High Court re-stated the well-established principle that in order to demonstrate the relevant intention the landlord must show that:

1. it has a genuine intention to carry out the relevant works; and
2. it is able to carry out the works.

Counsel for Franes argued that Cavendish needed to have a genuine and unconditional intention to carry out the works and that this requirement was not satisfied because Cavendish's intention was conditional on the tenant demanding a new lease and Cavendish needing to satisfy Ground F. As discussed above, it was accepted that if Franes moved out of the premises of its own accord, Cavendish would not carry out the works. This, counsel for Franes argued, did not amount to a genuine and unconditional intention to carry out the works.

It is another well-established point that a landlord's intention to carry out the works is assessed at the date of the hearing<sup>2</sup>. Relying on this, the court held that it was irrelevant that Cavendish's intention to redevelop the premises had previously been conditional. By the time of the hearing, Cavendish's intention was genuine and unconditional as reliance on Ground F was the only way to regain possession of the premises at that stage.

The High Court emphasised that a landlord's motives for carrying out works are not relevant to whether a landlord genuinely intends for the works to be carried out. The court did, however, note that the circumstances surrounding a landlord's motives

<sup>2</sup> *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20

may evidence a lack of genuine intention to carry out works, although this was not relevant on the facts of this case.

In the circumstances, the High Court considered that Cavendish did have a genuine intention to carry out the works. Evidentially, this finding was supported by Cavendish giving an undertaking to the court that it would proceed with the works in the event that the court found in its favour and Franes was refused a new lease.

Recognising the significance of the issues raised in the case, the High Court then granted a certificate for a leapfrog appeal to the Supreme Court, bypassing the Court of Appeal.

### The Supreme Court decision

The Supreme Court disagreed with the lower courts' decisions and ordered that Cavendish grant Franes a new lease.

The Supreme Court did not disturb the two stage test for assessing whether a landlord has a genuine intention to carry out the works. Further, the Supreme Court agreed that the motivation of Cavendish in carrying out the works was not relevant to the test although, in certain circumstances, its motivation may constitute evidence of a lack of genuine intention. Nor did the Supreme Court disagree that the landlord's intention should be assessed at the date of the hearing.

“WHERE THE SUPREME COURT DEPARTED FROM THE HIGH COURT DECISION WAS ON THE QUESTION OF THE CONDITIONALITY ATTACHED TO CAVENDISH'S INTENTION TO CARRY OUT THE WORKS.”

Where the Supreme Court departed from the High Court decision was on the question of the conditionality attached to Cavendish's intention to carry out the works. Whereas the High Court had concluded that by the time of the hearing Cavendish's intention to carry out the works was settled because by then it was clear that Franes would not move out voluntarily, the Supreme Court decided that Cavendish's intention at the date of the hearing remained conditional. This was because Cavendish would not carry out the works if either:

1. at any time Franes decided to leave voluntarily; or
2. the court found that the works could be carried out by Cavendish exercising its right of entry such that it would not need to regain possession.

In deciding whether a landlord has a genuine intention to redevelop, Lord Sumption said that “the acid test is whether the landlord would intend the same works if the tenant left voluntarily”. If the answer to this question is, as it was in this case, that a landlord would not carry out the works, then the landlord cannot be said to have a genuine intention to carry out the works and cannot, therefore, invoke Ground F.

### Conclusion

The decision is, in some ways, unsurprising as it seeks to prevent landlords from circumventing a tenant's security of tenure by contriving a scheme of works purely in order to force a tenant to leave its premises. The previous decision would have allowed a landlord with sufficiently deep pockets to effectively ignore the protection which the LTA 1954 is intended to provide.

However, in the decision, Lord Briggs recognised that a landlord's intention to redevelop premises may well be influenced by commercial considerations which require the departure of the tenant. The landlord may, for example, wish to re-let to a different tenant willing to pay a higher rent and redevelopment may be required in

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“PROSPECTIVE DEVELOPERS OF PREMISES PROTECTED BY THE LTA 1954 SHOULD TEST THEIR CASE BY ASKING THEMSELVES: WOULD MY PLANS CHANGE DEPENDING UPON WHETHER THE TENANTS’ LEASES WERE TERMINATED UNDER GROUND F OR VOLUNTARILY?”

order to achieve this commercial goal. This comment underlines that the Supreme Court has not disturbed the principle that the motivations of the landlord in coming to their decision to redevelop the premises are not relevant. The question is whether the landlord would still carry out the works if the tenant were to leave voluntarily. If the answer to this question is yes then the landlord may rely upon Ground F.

#### **WFW Recommendations**

On the back of this case, prospective developers of premises protected by the LTA 1954 should test their case by asking themselves: would my plans change depending upon whether the tenants’ leases were terminated under Ground F or voluntarily (such as a tenant’s break notice)? If not, *Franses v Cavendish* will not be relevant. If the answer is yes, the developer is likely to be unsuccessful in terminating the tenant’s lease because a court is likely to regard its plan as an artificial scheme of works that does not meet the statutory test for Ground F. Landlords should remember that documents (such as internal emails and communications with agents and other non-legal professionals) which are relevant to the question of the landlord’s development plans will be disclosable (and seen by the tenant) if the dispute became litigious. In order that communications regarding plans attract legal privilege, developers should consider involving their solicitors in discussions at a very early stage.

Tenants with security of tenure would be well-advised to investigate the true scope and nature of their landlord’s redevelopment plans. They should also closely scrutinise information that their landlord discloses and any changes in the landlord’s plan. A tenant should ask oneself: are there any elements of the landlord’s plans which could be carried out without terminating the lease and regaining possession? Are the other elements of the works (which require the tenant to vacate) of practical benefit and value to the premises?

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## FOR MORE INFORMATION

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