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Ground (f) – Franses applied and the relevance of a threatened injunction (London Kendal Street No3 Ltd v Daejan Investments Ltd)

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Towards the end of last year, the Supreme Court decision in *S Franses Ltd v Cavendish Hotels (London) Ltd [2018] UKSC 62* caused quite a stir. In that case, a landlord devised a scheme of works with no practical value solely to obtain possession of valuable space. The Supreme Court ruled that to oppose a statutory lease renewal under section 30(1)(f) of the Landlord and Tenant Act 1954 (the redevelopment ground), a landlord's intention to do the works in question cannot be conditional on whether its tenant chooses to seek a new lease. The acid test is whether the landlord would do the works if the tenant left voluntarily.

Although only a County Court decision, this case is the first reported decision in which a court has had to apply the Franses test. Arguments based both on the Franses test and on the possibility of other tenants in the building obtaining an injunction to stop the works on the grounds of nuisance or breach of quiet enjoyment were unsuccessful – the landlord had the requisite intention required by ground (f) to carry out its works.

London Kendal Street No3 Ltd v Daejan Investments Ltd (Central London County Court)

What are the practical implications of this case?

Arguments raised by the tenant based on the Franses test were rejected by the Judge.

Of greater interest is the tenant's argument that the landlord could not show a reasonable prospect of being able to carry out the works (a requirement to rely on ground (f)) because other tenants in the building (admittedly part of the same group of companies as the tenant) would seek an injunction to prevent the works proceeding. Although that argument was also not successful on the facts, this case does show the importance of considering the effect of the landlord's proposed works on third parties when advising a landlord or a tenant on the prospects of success under ground (f).

This case is also interesting for the Judge's conclusion that, as a very rough rule of thumb, to rely on ground (f), a landlord needs to show that it will be able to start its works within six months and 21 days from the date of the court's judgement. Under section 64 of the 1954 Act, a tenant's lease does not end until three months after the application is "finally disposed of". An application is "finally disposed of" when the 21 day period for making an appeal has come and gone. The extra three months on top of that comes about because a court will give a landlord a reasonable period of time after a lease ends to 'get its house in order'.

What was the background?

The landlord in this case served a section 25 notice on the tenant indicating that it would oppose the grant of a new lease on the basis of ground (f). This ground applies where (paraphrasing) on the termination of the current tenancy, the landlord intends to demolish or reconstruct the property (or a substantial part of it) and could not reasonably do so without obtaining possession.

This lease was one of four leases on the ground floor of the same building held by a group of companies (IWG). IWG's business was the granting of short-term licences to office occupiers and the property in question (Suite C2) comprised facilities available for common use by those occupiers. The building had a large disused basement and the landlord wanted to restore the basement so it could be let on a commercial basis. On Suite C2 specifically, the landlord wanted to create a new front entrance and lobby with a new lift and staircase to the basement. The landlord had previously started works on the basement, but these works had stopped when IWG threatened an injunction because of high noise levels.

Whilst the tenant accepted that the landlord had a subjective intention to carry out the works, it argued that, objectively, the landlord had no reasonable prospect of being able to do so. IWG would seek an injunction to stop the works proceeding based on noise nuisance and on breaches of covenants for quiet enjoyment and non-derogation from grant. In addition, the fact that there were residential tenants on the upper floors of the building would make it impossible to do the works outside of office hours.

What did the court decide?

The Judge decided that even if an injunction were to be granted (a question for another day and certainly not automatic), it would be unlikely to be absolute. A court would be reluctant to create a situation where one party is prevented from carrying out works to its own property. Instead, for example, an injunction might limit the times when works can be carried out or contain other provisions limiting any potential disruption. The tenant could not therefore definitively show that the landlord had no real prospect of being able to do the works in question.

As discussed above, the generally accepted long-stop date for starting works is six months and 21 days (or thereabouts) from the date of the court's judgement. As a building contract for the works was already in place and this contract included an eight week lead-in time, the Judge was satisfied that even if the works were to be delayed (e.g. by the threat of an injunction), there was still ample time for them to start within this time-frame.

So what about the Franses test? The Judge ruled that the test was satisfied here. The landlord had no difficulty funding the works, no difficulties with planning, contracts were in place (the building contract was for £1.6m plus standing charges), timescales for starting were realistic and the landlord needed to start the works because of the problems in the basement that needed resolving (damp and corrosion needed attention to maintain the integrity of the building). In addition, the landlord had given an undertaking to the court to carry out the works after vacant possession had been given (subject to an injunction not being granted) and there was evidence that the landlord's intention to carry out the works was reached at an early stage well before the section 25 notice was served (and so that intention was untainted by this dispute).

Practitioners will have to wait another day for a case where the Franses test has to be applied in more finely balanced circumstances.

Case details

Court: Central London County Court
Judge: His Honour Judge Saunders
Date of judgment: 16/07/2019

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