“All change at the Cavendish Hotel?”

Property Litigation Association Essay Competition 2020

Submission by Tom Dobson, Farrer & Co

Word Count: 1,498 (including references and excluding front sheet)

Address: Farrer & Co LLP, 66 Lincoln’s Inn Fields, London WC2A 3LH

Email: tom.dobson@farrer.co.uk

As any subscriber to Practical Law or Lexology updates will tell you, the Supreme Court ruling in *S Franses Ltd v The Cavendish Hotel (London) Ltd* generated the sort of feverish commentary and analysis normally reserved for the true controversies of our age, like an inflammatory tweet from Donald Trump or the Gregg's vegan sausage roll. Quite understandably too – it was a big deal, a significant statement by the highest Court in the land as to the nature and purpose of the Landlord and Tenant Act 1954 and how it should function.

The judgment re-drew the battle lines for redeveloping landlords and their tenants, causing both parties (and those advising them) to reconsider their approach to ground (f). It has yet to be truly tested in the Courts and so it's too early to analyse the ongoing jurisprudential impact (although many will see the Judge's decision in *London Kendal Street No 3 Ltd v Daejan Investments Ltd* not to consider whether the timing of the works in that case depended on the need to satisfy ground (f) as an opportunity missed). The really intriguing question though is how the decision is affecting landlords, particularly their strategic approach towards redevelopment cases and the wider implications for the property disputes arena.

The Intention of Parliament

Much of the analysis published in the immediate aftermath of the judgment focussed on Lord Sumption's "acid test". This was, after all, the crucial question – would the landlord have done the works had the tenant left voluntarily? However, Sumption's reasoning in setting his test must be seen in the context of the Court's broader objective, conveyed more explicitly in Lord Briggs' closing remarks:

"I can see no other way of giving effect to what seems to me always to have been the plain intention of Parliament…"

Once a piece of legislation is enacted by Parliament, it is the role of the Courts to ensure that the law is applied as intended – that it doesn't drift or become distorted over time. A proper examination of the effect the ruling might be having on landlords must therefore consider what it was that Parliament was actually trying to achieve...

The Landlord and Tenant Bill was presented by the then Home Secretary, Sir David Maxwell Fyfe. On its second reading in the Commons on 27 January 1954, Maxwell Fyfe said:

"The essence of our scheme can be put this way. We say that if at the end of the tenancy the landlord needs to occupy the premises himself for his own business or to pull them down and rebuild, the tenant must leave and the landlord is perfectly entitled to refuse a new tenancy…Whatever our political views, we must all, surely, be glad to share the belief that what we are doing is to put into a statutory code the practice which a reasonable and good landlord would naturally follow. We encourage the parties to proceed by agreement."[1]

[1] Hansard, House of Commons: http://bit.ly/2S6UiP3

Later, in the Upper House on 29 June 1954, Lord Silkin said:

"The objections which I have put forward…are all designed with the object of carrying out the purpose for which this Bill is introduced, of providing greater equity for a number of people who find themselves handicapped in the negotiations that take place as between themselves and a person who is in a superior position. We are endeavouring to adjust the balance…"[2]

From these extracts, we see the fundamental principles of the 1954 Act emerging: support for reasonable and good landlords with legitimate intentions who need to occupy or redevelop their asset whilst, at the same time creating a level playing field to ensure the protection of good tenants. It is clear from these debates that Parliament never envisaged that a landlord could manipulate and exploit the carefully drafted grounds in section 30 to procure the removal of a good tenant through contrived and otherwise unnecessary works of redevelopment. The *Franses* decision therefore restored Parliament's intended standards for both landlord conduct and tenants' statutory protection.

Make your case and make it early

The most important effect for landlords of this affirmation of the Act's core principles is clarity. Where previously there were grey areas within the structure of ground (f) for landlords without the requisite quality of intention, they now understand that they are bound by Maxwell Fyfe's "necessity principle" embodied in the judgment by Sumption's acid test. Consequently, redeveloping landlords know that they will be held to an even higher evidential burden than previously and cannot manufacture a position nor leave anything to chance.

So, in practical terms, *Franses* is forcing landlords to evaluate and evidence their motivation for redevelopment sooner and in far more depth. Landlords know that any chink in their intention or any hint of conditionality will be seized on by tenants desperate to remain in their premises and lead to challenge, further cost and delay – just as Lord Briggs predicted. Instead, the higher standard imposed on landlords has encouraged an approach of "case building" in order to discourage tenants from incurring the cost and hassle of running weak "lesser scheme" arguments. Landlords able to demonstrate, by way of early and extensive pre-action disclosure, that they have secured the appropriate planning consents, have sufficient funds available, a feasible programme of works with the relevant contracts in place and a workable future business plan are far more likely to convince their tenants that continued resistance will be nothing but an expensive exercise in futility – as Lord Sumption said in his judgment, tenants will "recognise defeat and leave voluntarily".

Of course, early disclosure in an attempt to reach agreement is nothing new but *Franses* has brought the point into sharp focus in ground (f) cases particularly. Anxious lawyers like me, terrified at the prospect of their landlord clients doing a "Cavendish", are making it clear that anything less than an unconditional intention supported by strong evidence is simply not worth the fight. The result, in a world

[2] Hansard, House of Lords: http://bit.ly/2UuWPEi

of eye wateringly expensive legal battles, is that parties in business renewal matters have more incentive than ever to proceed, just as Maxwell Fyfe envisioned, by agreement where possible. Of course, there will still be those landlords who, despite being on shaky ground in terms of intention, will try it on and seek to bluff their way through in the hope that their tenants roll over. However, in the post-*Franses* age, they are likely to find tenants more than happy to justify Lord Briggs' concerns by jumping on any hint of weakness.

It's early days and maybe I am caught up in a post *Franses* afterglow of optimism but, from my experience so far, the judgment has fostered an atmosphere of hyper-caution amongst landlords which has led to a far more reasoned and sensible approach to ground (f) disputes. This can only be a good thing for the continuing function of the 1954 Act and for all parties within the context of the overriding objective – long may it continue. If it does, Lord Briggs' needn't ever have worried.

Contracting Out

Ultimately, it may be that the most substantial long-term effect and perhaps one felt more keenly by our transactional colleagues, is that landlords will just pull the section 38A exclusion ripcord and save everyone the hassle. There will of course be those that argue there is little benefit in upholding the will of Parliament and creating "greater equity" if the end-product is the complete bypass of the statute's intention and effect by powerful landlords at the expense of weaker tenants! However, the Courts cannot be drawn into these concerns – they can only seek to enforce and uphold what's in front of them. If that creates further policy concerns down the line, that is for Parliament to address.

Other Grounds?

Looking ahead to what might await landlords down the track, we're all keeping an eye out for the first case in which *Franses* is properly examined. My feeling is that the first major test might come not in the context of redevelopment but through ground (g). Whether Sumption's acid test can be applied in the same way and the evidential basis on which a landlord could demonstrate an unconditional intention to occupy could make for exciting times ahead.

Just as for every Trump tweet posted, there are likely several others which his advisors manage to prevent, for every game-changing judgment, there are countless disputes we see settle through early disclosure and analysis of the points in dispute. As much as we would all love to have our day in the Supreme Court, what we really want is for our clients, landlords and tenants alike, to achieve their objectives. My view is that *Franses*, by drawing a line in the sand for the standards of landlord conduct, has upheld the intention of Parliament and cleared the way for a smoother and more harmonious approach to ground (f) cases. All change at the Cavendish Hotel? I think so – let's just hope it's not #FakeNews.