S Franses v The Cavendish Hotel

Cutting through all the opinions, how do you now demonstrate a "genuine intention" to redevelop? What will sway the court?

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Introduction: what did Franses decide?

1. In S Franses Ltd v The Cavendish Hotel (London) Ltd [2018] 3 WLR 1952, the Supreme Court allowed the tenant's appeal in a case where the landlord had succeeded with a ground of opposition to a new tenancy, on the footing that it intended to carry out substantial works of construction. (Readers will recall that the relevant test in section 30(1)(f) of the 1954 Act is "that 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 …").

2. The trial judge had found that the proposed scheme of works was designed with the material intention of undertaking works that would lead to the eviction of the tenant regardless of the works' commercial or practical utility and irrespective of the expense. It was common ground that the words had no practical utility; their sole purpose was to enable the landlord to obtain vacant possession. As a result, had the tenant left voluntarily, the landlord would not have carried out the works.

3. Although the Court agreed that it was not for them to consider the landlord's motive in assessing the necessary intention, they did consider that a

conditional intention of the sort held by the landlord did not engage the statutory ground. The reason for this is that section 30(1)(f) presupposes that the landlord's intention to do works must exist independently of the tenant's claim for a new tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. In this case, there was no such independent intention: the landlord proposed to carry out the works purely in order to secure the vacation of the tenant. Summarising the point, Lord Sumption said: "*The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily*."

4. This acid test may have some interesting applications. Let us suppose that, during the passage of Franses up through the appeal system, another landlord, Wannabe Ltd, had devised a closely similar scheme of works to another set of premises, relying upon the orthodox learning that, in order for landlords to assure themselves of success, they should make their schemes as substantial as possible, regardless of the commercial purpose to the works. So, Wannabe provides for a scheme that involves the entire destruction of the subject matter of the premises (which let us say for the sake of this example is an internal skin demise). Thus, wall plaster is to be entirely stripped away back to the bare brick; floors are to be taken up; ceilings are to be removed; doors and windows are going; and services are all to be stripped out. Left to its own devices, Wannabe would have done none of this work, since the premises were only recently refurbished, and the finish would have been perfectly marketable had the tenant left voluntarily. However, Wannabe has a bad relationship with its tenant, and wants to be rid of him at all costs.

5. Wannabe is saved from defeat in court, because the decision in Franses is published before its claim gets to trial, and it chooses to cut its losses. Just as it is about to withdraw its ground of opposition, however, along comes Apocalypse Wear Ltd, which is looking to acquire a second set of premises from which to sell its Derelicte range of industrial chic menswear. Apocalypse's premises style is dystopian: think World War Z meets Book of Eli. As it happens, Wannabe's scheme is ideal, because it will create exactly the stripped-out look which Apocalypse is after, although Apocalypse will add a few naked lightbulbs to enhance the atmosphere. Wannabe sells to Apocalypse, which simply adopts Wannabe's ground of opposition, and the matter proceeds to court.

6. In court, the tenant of course attacks the scheme, on the footing that it is just a stunt to get rid of him. That tactic would have worked against Wannabe, but it fails against Apocalypse, for the simple reason that Apocalypse would do the scheme even if the tenant left; it passes Lord Sumption's acid test, because that is what Apocalypse really, really wants. So, *exactly the same* scheme of works achieves entirely contrasting results in the hands of different landlords.

7. This example is not fanciful. Experience of any High Street shows that different tenants have entirely different ideas for their retail experience – and although the work involved may often be part of a tenant's fit-out, there is no reason why it could not be incorporated into a winning landlord's scheme of works.

8. As the Court drily pointed out in Franses, "*more complex issues would arise*" where the works are hybrid – that is to say, part of them are works which the landlord would want to carry out in any event; while others are works which the landlord has included purely to bolster its position ("*spurious additional works added for the sole purpose of obtaining possession*").

9. Landlords will now need very careful advice concerning the purpose for which the works are being done. Tenants, conversely, will need similarly careful advice as to what may be open to challenge. Trials in the county court henceforth may well become significantly more contentious. Prospective landlords may well as a result seek to avoid the bother by insisting upon business tenancies being contracted out of the security of tenure provisions of the 1954 Act.

10. Following Franses, parties in ground (f) cases must bear in mind that the old two part test ((i) do you really intend to do the works?; and (ii) can you show that you have the practical means of putting your intention into effect?) has now been joined by a third limb: (iii) would you do those works even if the tenant moved out voluntarily?

Decisions since Franses

11. Franses has clearly left an impact upon case preparation, although it has yet to play a full role.

12. I am still waiting for my example to materialise (where a landlord wants to carry out what most would regard as entirely pointless work, in order to suit its proposed new industrial chic fashion retailer tenant, which likes that sort of thing) – but signs of strategic thinking in other guises are reaching the courts and tribunals.

13. Two decisions came to online prominence this July. On closer analysis, neither turned upon conditionality (although Franses was cited), but each is interesting in its own right as an example of 1954 Act tactics at play, and each will no doubt be used as a practice model for future occasions.

Case (1): London Kendal Street No 3 Ltd v Daejan Investments Ltd

14. The first, London Kendal Street No 3 Ltd v Daejan Investments Ltd was a decision of HH Judge Saunders, sitting in the County Court at Central London on 16 July 2019. The claimant tenant occupied a ground floor unit in a large 10 storey mixed use building containing many units, part of which the defendant landlord intended to redevelop. The tenant applied for a new tenancy in 2017, and the landlord opposed its application on the ground that it proposed to demolish or reconstruct its unit (or a substantial part of it) and could not reasonably do so without obtaining vacant possession.

15. This claim therefore started life as a pre-Franses case: all that the landlord would have to do, it then seemed, was to prove that it intended to do the necessary works, and had the wherewithal to do so. Equipped with the decision in Franses, however, the tenant contended (among other things) that the works would not be commenced within the required three-month period of the end of the lease (or any other reasonable period required by law), because the landlord would not carry out the works other than as part of a much bigger project which it was not yet ready to do. So, the issue was whether the landlord had the current intention to carry out the works at the termination of the tenancy.

16. As we lawyers like to say, cases turn on their own facts, and it is relatively rare for a principle to emerge which might be of use in other cases. In this case, ultimately, the issue was whether the landlord would be in a position to carry out the works at all, rather than the more interesting question (which ultimately did not arise) whether, had the tenant volunteered to leave early, the landlord would have carried out the works there and then, or waited until it was ready to carry out the other works. In the end, the landlord maintained that it would carry out all the works together, and given that it had placed a works contract to that effect, it was effectively common ground that all the works would proceed together – to the extent that the landlord could do them at all. As to that, the Judge accepted that it was likely that the works would proceed.

Case (2): EE Ltd v Chichester (Trustees of the Meyrick 1968 Combined Trust)

17. Our second case in which Franses was cited is the decision of the Upper Tribunal (Lands Chamber) in EE Ltd v Trustees of the Meyrick 1968 Combined Trust [2019] UKUT 164 (LC), decided a week earlier on 9 July. The claimants were tenants of a mast site; their lease (excluded from the security of tenure provisions of the 1954 Act) had expired; and they had therefore to seek rights to remain in possession pursuant to paragraph 20 of the Electric Communications Code. The defendant landlords were opposed to the claim under paragraph 21(5)

("*the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made*"), ostensibly because they proposed to install their own mast in place of the tenants' mast. Had they been able to do so, they would have been able to charge the tenants a substantial rent, in place of the meagre amount available under a Code Agreement. The reason for that is that a right to place telecommunications apparatus on other apparatus, such as a mast, cannot in itself be a Code right, and does not therefore attract the restrictive rental valuation provisions under the Code.

18. A cunning plan indeed – and one which could well have worked. In this case, it did not, because the Tribunal held that it was wholly implausible that the landlords, as trustees with fiduciary duties to their beneficiaries (and also as landowners who claimed to be committed to the welfare of their land and their tenants) would waste their resources on it, given the poor return available. In reality, as the Tribunal held, the landlords' redevelopment plans had been conceived in order to defeat the claim for Code rights. Franses appeared therefore to play a role – but ultimately the Tribunal just did not believe that the landlords would carry out the works at all. Its opposition would therefore have failed in a pre-Franses world as well.

19. The decision is interesting, because it shows that the Tribunal had no difficulty, despite the difference in the statutory language, in applying the authorities on the redevelopment ground of opposition, including Franses, in a telecoms context.

Lessons for the future for landlord's advisers

20. Start at the beginning: try to ensure that the lease excludes the security of tenure provisions in Part II of the Landlord and Tenant Act 1954.

21. Failing that, when the end of the term is in prospect, and your client wants possession, resist the temptation simply to ask "What works do you intend to do, and how?" At the forefront of your minds should be the new question: "Why (of for what purpose) do you intend to do these works?" If the premises are not in need of work (beyond simple repairs, which will not engage ground (f)), then you must explain that the court is going to scrutinise works which have no apparent commercial purpose – other than to secure the removal of the tenant.

22. Caution your client that if the tenant is determined to resist, it can expect to be tested not merely about the feasibility of the works, but also their point. We can expect to see valuers express views about whether the landlord's proposed investment in the works makes any commercial sense. We can also expect

evidence to be led about why it would not make better sense to wait for the next economic cycle, or to do different works that would achieve the same end, but leave the tenant in situ.

23. Advise your client that the more it changes its mind about the scope of the proposed works, the more opportunities it will give the tenant to accuse it of being engaged in a stunt to get rid of it, rather than a genuine intention to do the works for their own sake.

24. Suggest, therefore, that it will be in your client's interest to work hand in glove with you, to ensure that all involved in the project are on-message, and that the message remains the same.

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