Ref. CH-2018-000072

Neutral Citation Number: **[2018] EWHC 2193 (Ch)**
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Fetter Lane
London

Before MR JUSTICE ZACAROLI

IN THE MATTER OF

SANTANDER UK PLC (Applicant)

- v -

LPC ESTATES LIMITED (Respondent)

MR CHRISTOPHER PYMONT QC appeared on behalf of the Applicant

MS JOANNE WICK QC appeared on behalf of the Respondent

JUDGMENT
12th JUNE 2018, 14.01-14.15
(AS APPROVED)

MR JUSTICE ZACAROLI:

1. This is a renewed application for permission to appeal by Santander UK PLC, the tenant of premises of which the landlord is LCP Estates Limited. The appeal is against the decision of Recorder Cheryl Jones dated the 28th of February 2018. The relevant facts are set out in her judgment at paragraphs 15 to 22 which I incorporate by reference.

2. The case concerns the construction and application of section 30(1)(f) of the Landlord and Tenant Act 1954 which contains one of various grounds upon which a landlord can refuse to enter into a new tenancy upon the expiry of an existing agreement with the tenant. That ground 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.

3. The sole issue for decision before the Recorder was whether the landlord had established the requisite intention. The focus of the tenant's argument has shifted somewhat, on its learning that there is a decision pending before the Supreme Court in which the issue of intention within the subsection is to be investigated. The case is *S Franses Ltd v Cavendish Hotel (London) Ltd* 2017 Bus. L.R. 1941. The circumstances were that the tenant had served a request for a new lease on the landlord prior to expiry of the term, which the landlord had opposed under section 30(1)(f). It was accepted by the landlord that it would not go ahead with the reconstruction works if the tenant left voluntarily. In other words it was only doing work to satisfy the section.

4. As Jay J put it at [45]: "…in the paradigm case a landlord is deploying ground (f) as the means of achieving his separate commercial objectives, whereas in the present case the Landlord's sole or predominant commercial objective is to undertake the works in order to fulfil ground (f)."

5. Jay J rejected the tenant's arguments in that respect on the grounds that questions of motive are separate from, and irrelevant to, questions of intention save for providing a potential evidential bridge. But he certified the question as fit for a leapfrog appeal to the Supreme Court, which the Supreme Court has accepted. The two grounds of appeal being pursued in that case are as follows: first, whether a landlord which intends to carry out works

if and only if those works are necessary to satisfy ground (f) and which offers an undertaking to carry out those works has the requisite intention for the purposes of the subsection and, secondly, whether a landlord whose sole or predominant commercial objective is to undertake works in order to fulfil ground (f) and thereby avoid the grant of a new lease to the tenant and which offers an undertaking to carry out those works has the requisite intention for the purposes of the subsection.

6. The appeal is due to be heard in October this year. Mr Pymont QC, for the tenant, says that the issue in this case is closely aligned to that in the *Franses* case, or at least it is likely that the Supreme Court's decision as to the meaning of intention in that case will be relevant to the determination in this case. He submits that permission should be granted and that the appeal should be listed for a time after judgment has been handed down by the Supreme Court.

7. In my judgment the *Franses* appeal raises a substantially different point. The issue in the *Franses* appeal is whether the requisite intention is satisfied where it is the intention to do any works only if and insofar as that is necessary to comply with the section, ie where the works are themselves a contrivance to get within the section. There was, and is, no authority on that point. The issue here, on the other hand, is whether the requisite intention is satisfied where the landlord does intend that the work be carried out, but has chosen that the work is done through the means of a building lease deliberately for the purposes of getting around section 30(1)(f). On that, as Mr Pymont accepts, there is authority, in particular two Court of Appeal cases, *PF Ahern and Sons Ltd v Hunt* [1988] 1 EGLR 74, and *Spook Erection Ltd v British Railways Board* [1988] 1 EGLR 76. This means that: (1) the issue raised by this appeal will not be determined by the appeal pending in *Franses*; and (2) there is no certainty that anything said in the Supreme Court judgments would have a material bearing on the decision in this appeal.

8. It seems to me, in the light of the argument developed this morning, that this application raises two distinct questions. First, whether there is a real prospect of this court (as the appeal court) being satisfied that the decisions reached in *Ahern* and *Spook* can be distinguished on the facts. Second, if not, such that there is binding authority against the tenant, whether there is a real prospect of the Supreme Court overturning that Court of

Appeal authority, or whether the fact that there is a possibility of this combined with the fact of the pending appeal in the *Franses* case means that there is some other compelling reason for giving permission.

9. As to the first point, I am not persuaded that there is a real prospect of persuading the appeal court that the decisions in *Spook* and *Ahern* do not apply here. In *Ahern* the landlord who wished to extract the development value from its land had initially considered selling its property to someone who would carry out development works, but, specifically because it was impossible to get vacant possession, had followed the advice of its surveyors to enter into a building lease because that, but not an outright sale, would satisfy section 30(1)(f).

10. In *Spook* the landlord wished to redevelop land which was surplus to its requirements. It had in mind the sale of the freehold to Budgens. But, in the words of Mann LJ, it became plain that the appellants, that is the tenants, would not leave the site. Accordingly, in order to sustain a ground of opposition under section 30(1)(f) it entered into a building agreement with Budgens with a term to the effect that a 99-year lease would be granted on completion of the works.

11. In both cases there was a firm intention that the works be carried out but the choice of a building lease was made, expressly or implicitly, in order to get around the problem created by section 30(1)(f). While I accept that every case is fact specific I do not think that there is a real prospect of persuading the appeal court that the facts of this case cause it to fall outside the principle to be derived from those cases. Mr Pymont submits that the section requires the landlord to do the work, and the landlord has to show that the work being done is its, whereas here the proposed tenant will be doing the work and the creation of the building lease is a contrivance to make it look as if the works are the works of the landlord.

12. In circumstances where there is clear Court of Appeal authority, not itself challenged or proposed to be challenged, that it is not necessary for the landlord itself to do the works – see *Gilmore Caterers v St Bartholomew's Hospital Governors* [1956] 1 QB 387 – I do not think there is a real prospect of persuading the appeal court that this fact is sufficient to distinguish the case from the *Spook* and *Ahern* decisions. Whilst it is true that the landlord only decided to do the works when they were proposed by the new tenant, it is common ground that the

question of intention is to be determined at the date of the trial. I do not see how the genesis of the idea has any bearing on the existence of the intention as at the later date.

13. As to the second point, which arises if there is binding Court of Appeal authority (which I have held there is) it is not, I think, unfair to say that the argument that there is a real prospect of persuading the Supreme Court to overturn *Ahern* and *Spook* is based principally, if not solely, on the fact of the pending appeal in the *Franses* case. I note in particular in this regard that the *Ahern* and *Spook* decisions are of relatively long standing, dating from the late 1980s, and that no material has been placed before the court, such as academic criticism or any other authorities doubting the result in those cases, which one might ordinarily rely upon to suggest a real prospect of their being successfully appealed to the Supreme court, in support of the applicant's submissions.

14. In my judgment, for the reasons I have already outlined, I do not think that the fact the Supreme Court has accepted an appeal in the *Franses* case provides sufficient prospect to mean that an appeal in this case, involving overturning the decisions in *Spook* and *Ahern*, would succeed. In short, there seems to me to be a fundamental and not merely a nuanced difference between a) the obvious contrivance of undertaking building works for no commercial purpose other than to satisfy the subsection; and b) a landlord genuinely wishing to enhance the rental and capital value of its building through works being carried out, but deciding to do so through the means of a building lease in order to avoid the subsection. Accordingly, while I see the merit in the first argument, that does not in my judgment provide any support for the latter.

15. I am conscious of the fact that a refusal of permission means the end of the road for the applicant, whereas if permission were granted and the appeal subsequently dismissed then that would leave open the door procedurally and potentially for a further appeal. Mr Pymont cited *Derby v Weldon* [1989] 1 WLR 1244, a decision of Vinelott J, as an example of a case where the court refused to strike out a claim because there was a pending appeal in another case to the House of Lords which was likely to be heard before the trial of the action. In that case, however, the House of Lords case was likely to be directly relevant to the issue in the case before Vinelott J. For the reasons I have already explained I do not believe that is the case here.

16. Accordingly, and while I have taken time to reflect my decision in light of its finality, in circumstances where I do not believe there are real prospects of establishing that the binding Court of Appeal authority is either wrong or distinguishable, I have concluded the appropriate course in this case is to refuse permission.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge