Lease Renewals under the 1954 Act – Case Law Update

By Eleanor d'Arcy

INTRODUCTION

1. The purpose of this talk is to provide an update in respect of some recent decisions relating to lease renewals under the Landlord and Tenant Act 1954.

2. During the course of this talk, bearing in mind the time-limited nature of this seminar, I am going to consider the following authorities:

   (i) *S Franses Limited v The Cavendish Hotel (London) Limited* [2017] EWHC 1670 (QB);

   (ii) *Pembury Estates & Lettings Limited v Panzer Properties Limited and others* (January 2017, before HHJ Faber at Central London, unreported).

3. The first authority, *S Franses Limited v The Cavendish Hotel (London) Limited* [2017] EWHC 1670 (QB) involves consideration of an opposed lease renewal.

4. As you will all be aware, where a lease grants security of tenure, a landlord can only oppose a tenant's application for a new lease if it can prove one of the statutory grounds of opposition.
5. The most common of these grounds is the landlord's intention to redevelop the premises (ground (f)). In order to rely on ground (f), a landlord must be able to show, amongst other things, an unconditional intention to carry out the redevelopment works.

6. I consider below the reliance placed upon ground (f) by the landlord in *S Franses Limited v The Cavendish Hotel (London) Limited* [2017] EWHC 1670 (QB) and the decision of the County Court and High Court in that case.

7. The second authority, *Pembury Estates & Lettings Limited v Panzer Properties Limited and others* (January 2017, before HHJ Faber at Central London, unreported) considers an important question in relation to the amendments of a lease renewal claim, namely what is the test on an application to amend a 1954 Act lease renewal claim after the expiry of the section 25 or section 26 notice?

8. This authority provides a salutary lesson for a proposed Claimant to give proper and careful consideration to the case it wishes to advance before issuing its Claim at Court.

9. Finally, on a practical note (and, strictly speaking, falling outwith the "Case Law Update" title of this talk but also of interest), I consider the new Pilot Scheme operating out of the Central London County Court in relation to unopposed lease renewals.

CASE LAW

1. S Franses Limited v The Cavendish Hotel (London) Limited [2017] EWHC 1670 (QB)

Overview

10. One might have thought that it would take a brave landlord indeed who, opposing the grant of a new lease on development grounds (ground (f) of section 30(1) of the Landlord and Tenant Act 1954), would stand in the witness box to state that their

scheme of redevelopment works had been contrived purely to satisfy ground (f) in order to oppose a tenant's application for a new lease. However, in the *Franses* case the landlord in essence did just that and the Court refused the tenant's application for a new tenancy.

Facts

11. The tenant ("**Franses**") carried on a business specialising in antique tapestries and textile art on the ground floor and basement of the Cavendish Hotel (in the heart of a district well known for its art galleries).

12. Franses occupied the premises under two leases, each of which expired in January 2016. Both leases benefited from security of tenure under the Landlord and Tenant Act 1954 ("**the 1954 Act**"), which, as we know, meant that Franses had a statutory right to renew the leases. Franses' landlord could only oppose that renewal and regain possession if it could prove one of a limited number of statutory grounds for objection in respect of each of the leases.

13. Franses served requests to renew its leases, under section 26 of the 1954 Act.

14. Both requests were opposed by the landlord under section 30(1)(f) of the 1954 Act. This allows a landlord to oppose a tenancy on the grounds:

'*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*'.

15. Following receipt of counter-notices from its landlord opposing renewal, Franses applied to the court for new leases.

16. The landlord admitted that the proposed works would not be carried out if the tenant left voluntarily, but nonetheless gave an undertaking to the court to carry out all the works if vacant possession were ordered. The works would ready the premises for conversion into two retail units but had, in reality, little practical utility because planning permission would be needed to use the new units and the landlord intended to proceed with the works regardless of whether it could obtain that permission (at the time of the hearing, no permission had been applied for).

17. In addition, the landlord planned to lower the basement floor (for no practical reason) and to demolish an internal wall and replace it with a similar one.

18. The sole purpose of such proposed works appear to have been to demonstrate to the Court that the works were of a sufficiently 'substantial' part of the premises or were sufficiently 'substantial' works of construction.

19. In reality, it was likely that all or part of the works would have to be reversed within a short time after they had been completed.

20. The landlord made no secret of the fact that it had put together an artificial scheme of works with the specific intention of defeating the tenant's 1954 Act protection, regardless of the "commercial or practical utility" of the works which, the tenant argued, meant that the landlord could not show the necessary genuine intention to redevelop.

21. HHJ Saggerson at the County Court at Central London ruled that the landlord had made out its intention to carry out substantial works to the property at the end of the tenancies and that it would be impossible to do so without obtaining vacant possession.

22. Franses appealed. At the High Court, Mr Justice Jay allowed the appeal – but not in relation to the ground (f) argument - and sent the claim back to the County Court for further findings of fact.

23. The County Court had made a finding that the scheme of works had '*been 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 [and] some aspects of the intended works have been contrived only for the purposes of ground (f).*'

24. On appeal, Franses argued that, in view of this, the landlord's intention under ground (f) was not properly made out because Parliament had not intended '*to allow wealthy landlords to subvert the protection which it was conferring on business tenants, by promising to do works for the sole purpose of getting the court to make an order under the Act dismissing the tenant's claim for a new tenancy*'.

25. But the High Court disagreed and dismissed this ground of appeal. Crucially, it held that the court was only concerned with the landlord's intention to carry out the works, not its motive in doing so. The court only has to look at what the landlord intends to do and whether he intends to do it, not at why he intends to do it.

Issue

26. Should a contrived scheme of works fall within the scope of ground (f)?

Decision on ground (f)

27. Ground (f) requires an examination of what the landlord intends to do and whether it intends to do it, not why the landlord may intend to do it.

28. However, the court confirmed that as long as a landlord can show a firm and settled intention to carry out the works (which the landlord demonstrated in this case by its undertaking to the court to carry out the works when the lease ended) and a reasonable prospect of being able to carry out the works (bearing in mind that planning permission was not needed for the works themselves), its motives for doing those works are irrelevant. The 1954 Act is not concerned with the wisdom or viability of projects.

Appeal

29. Mr. Justice gave the tenant permission to make a "leapfrog" appeal direct to the Supreme Court under the Administration of Justice Act 1969, section 12 on those points: this has been a cause for significant excitement for property lawyers across the country. The Supreme Court has now granted permission to appeal.

30. Interestingly, the Court of Appeal (Patten LJ) has granted the landlord permission to appeal in respect of the decision of Mr. Justice Jay to remit certain matters to the County Court, the appeal to be adjourned pending the decision of the Supreme Court.

31. So….watch this space! Any decision on appeal is likely to be extremely significant for both landlords and tenants of business premises.

2. Pembury Estates & Lettings Limited v Panzer Properties Limited and others (January 2017, before HHJ Faber at Central London, unreported)

Facts

32. On 21st September 2015 the Claimant issued a Part 8 Claim Form seeking a new lease relying on s.24 of the 1954 Act. The Claimant pleaded a lease created by deed in 2002 and relied on a s.26 notice in which it requested a new lease to commence on 29th September 2015. It had issued with 8 days to spare.

33. The Defendant's evidence in reply explained that, amongst the Claim's problems, the 2002 Lease was excluded from the Act.

34. On 10th December 2015, the Claimant filed and served Particulars of Claim pleading a new and factually inconsistent case, without seeking or obtaining permission to amend. The Claimant now averred it had the benefit of an express oral or implied monthly periodic tenancy arising in 2005. The Claimant's Director filed evidence to the effect that he was mistaken in pleading a different lease between different parties.

35. The Defendant applied to strike out the second inconsistent statement of case (CPR PD 16 para 9.2) and for summary judgment on the flawed un-amended case.

36. At the hearing of the Defendant's application, on 26th July 2016, the Claimant made an oral application without notice to amend to its new case.

37. The Defendant opposed the application, arguing it was made 10 months after the expiry of a relevant limitation period and therefore the more stringent test in CPR 17.4 must be met.

38. The first instance judge decided: s.29A was a limitation period for the purposes of the CPR 17.4 test; the new case was not founded in the same or substantially the same facts; permission to amend was refused; the new and inconsistent case was struck out; and judgment for the Defendant was given on the un-amended case.

39. The Claimant was granted permission to appeal on 4 grounds, all were dismissed, only one is relevant for the purposes of this talk: *CPR 17.4 did not apply:* the ground was in two parts:

Issue

40. What is the test on an application to amend a 1954 Act lease renewal claim after the expiry of the section 25 or section 26 notice?

Part 1: The LTA 1954 does not allow amendment

41. Dyson LJ had decided in ***Parsons v George*** [2004] 1 WLR 3264 that the limitation period in the 1954 Act fell within the provisions in CPR 19.5(c), the rule providing for the substitution of parties after the expiry of a limitation period. CPR 19.5 is drafted in materially the same terms as CPR 17.4.

42. The Claimant sought to overcome that authority by relying on ***San Vicente v Sec State for Communities and Local Government*** [2013] EWCA Civ 817 which, it argued, was authority for the proposition that only a limitation period which prescribes a procedural bar falls within CPR 17.4(1)(b)(iii) and that s.29A operated as a substantive, rather than procedural, bar. ***San Vicente*** was concerned with public law proceedings under the Town and Country Planning Act and CPR 17.4, while ***Parsons v George*** was concerned with the 1954 Act and CPR 19.5.

43. The Claimant's argument did not succeed, aside for the distinction between public and private law proceedings, the House of Lords had decided in ***Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*** [1971] AC 850 that the limitation periods in the 1954 Act are procedural rather than substantive.

44. HHJ Faber on appeal applied the reasoning in ***Parsons –v- George*** [35]. The limitation period at s.29A of the 1954 Act falls within CPR 19.5 and 17.4(1)(b)(iii) because the 1954 Act is an enactment which allows an amendment, or under which an amendment is allowed, because*: 'it is a legitimate use of language to say that something is allowed merely because it is not prohibited'.*

Part 2: No new claim

45. New claim is a term defined in the Limitation Act 1980 as involving the addition or substitution of a cause of action or party.

46. The Claimant's point was that the Defendant relied on a limitation period under the 1954 Act, not the 1980 Act, therefore the Defendant: '*could not rely on the restrictive definition contained in the [1980 Act]: 'claim' was to be given its ordinary and natural meaning"*. By the Claimant's construction the '*ordinary and natural meaning'* of claim was remedy and because the Claimant applied for a new lease under the 1954 Act in both its un-amended and amended statements of case there was no new claim.

47. The Claimant's argument did not succeed. CPR 17.4 is drafted to reflect and has the same meaning as s.35 of the 1980 Act (***HMRC v Begum*** [2010] EWHC 1799 (Ch), paras 28-30; ***Ballinger v Mercer Ltd*** [2014] 1 WLR 3597, para 1). New claim means new cause of action, which term carries the meaning given to it by Diplock LJ in ***Letang v Cooper***[1965] 1 QB 232 at 242 – 3, it is: "*simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person … [as distinct from] a form of action … used as a convenient and succinct description of a particular category of factual situation".*

<u>Relevance of the decision</u>

48. Frequently a 1954 Act lease renewal claim will be issued shortly before the date in the notice and problems with it may not be identified before the expiry of the period, by which time it will be very difficult to get permission to amend. The consequences for

the party seeking a continuation of the lease are very serious, the effect of s.26(5) is that the tenancy will have determined immediately before the date in the notice. The un-amended claim may be unsustainable; the original lease will have expired; there will be no continuation under the provisions of the Act; and they will have a substantial costs liability.

PILOT SCHEME

49. Unopposed proceedings do not usually involve complex legal arguments and very few reach trial, but they can take a long time. The main issues in dispute tend to be the rent payable under the new lease, the length of term and whether the tenant should have a break option. These questions are often determined by looking at market comparables - evidence of similar leased properties in the local market.

50. To date, the main forum for resolving these issues has been the court and the only real alternative has been Professional Arbitration on Court Terms (PACT)

51. HM Courts & Tribunals Service has initiated a pilot scheme for an alternative means of resolution.

<u>The Pilot Scheme</u>

52. Lease renewal claims can be issued at any County Court. However if they are not issued at the court closest to the property concerned, they will usually be sent to the court closest to that address.

53. From 1st December 2017, unopposed lease renewal claims issued in the Central London County Court (which are not sent elsewhere) will be transferred to the First-tier Tribunal (Property Chamber) for determination. After transfer, the Civil Procedure Rules which govern court proceedings will continue to apply and the tribunal will have the same powers as the court for awarding costs.

54. The aim is that all cases proceed to a final determination as smoothly and quickly as possible.

55. The main differences will be as follows:

- The parties will have the option at the start of the process to postpone the process for three months, but only if they confirm that they are going to PACT or another recognised dispute resolution service, not just for general negotiations. If they do not take this option, they will only get the chance to refer the matter to PACT in exceptional circumstances once directions have been issued;

- Draft standard directions have been produced, designed to progress the case to trial within 20 weeks, under which:

    - The tenant only has one chance to comment on the draft lease;
    - Experts must begin work on their reports while the draft lease is being negotiated between the parties. This means that experts will be engaged much earlier than is currently the case in Court proceedings;

- There is no provision for disclosure, witness statements or Scott Schedules;

- If the case reaches trial, then it will be listed along with a number of other cases over a two day period, and will be heard as soon as there is a tribunal available to hear it. Priority may be given to parties who have complied with directions and delivered hearing bundles on time;

- At trial, the tribunal judge will be assisted by a tribunal valuer.

56. Theoretically, therefore, a case should progress through the tribunal much more quickly than through the court and at less cost.

Commentary

57. Initiatives to speed up the lease renewal process are, broadly speaking, to be welcomed but some concerns I have and can foresee arising from these changes are as follows:

(i) Sometimes issuing proceedings at the last minute is unavoidable. A postponement of one three month period does not give the parties much time to gather evidence and negotiate constructively;

(ii) Often, the real issues in dispute are not clarified until the draft lease has gone back and forth; asking for experts reports during this process may be premature;

(iii) From a tenant's perspective, the purpose of the lease renewal process is to protect the tenant's interest and yet, under these changes, the tenant will have only one chance to comment on the draft lease. That process seems inherently unsatisfactory;

(iv) The proposals appear to assume only rent will be in dispute given that there will be no Scott Schedule or witness statements. However, how or when will parties disputing more legal issues be able to explain and justify their positions without these ways of bringing evidence? For example, valuation experts will not be qualified to attest as to how a certain clause should be interpreted;

(v) The parties will have to apply for bespoke directions to allow for such provisions but again, they may not know that this will be necessary until negotiations are at an advanced stage;

(vi) Listing hearings in short sequence places pressure on the tribunal to make a quick determinations. Potentially, this may lead to the risk of dissatisfaction amongst the parties and a greater number of appeals;

58. On a positive note, however, having a valuer assist the tribunal judge should ensure that the dispute is determined by someone with appropriate industry expertise.

CONCLUSION

59. Hopefully the above has been of some interest as regards recent developments in relation to lease renewals under the 1954 Act. The appeal before the Supreme Court in relation to the *Franses* case is potentially of importance for landlords and tenants across the country. I await the outcome of that appeal with interest.

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