SUPREME COURT CLARIFIES BASIS FOR LANDLORD TO OBJECT TO NEW BUSINESS TENANCY FOR RE-DEVELOPMENT.

On 5 December 2018, the Supreme Court gave Judgment in the case of S Franses Ltd (Appellant) -v- The Cavendish Hotel (London) Ltd (Respondent) leapfrogging the Court of Appeal from a decision of the High Court Judge which affirmed the decision of the County Court Judge that The Cavendish Hotel genuinely intended to carry out works which satisfied ground (f) of Section 30(1) of the Landlord and Tenant Act 1954, thereby denying the Tenant the opportunity of renewing its business lease as a retail art gallery showroom and archive for its textile dealership and consultancy, specialising in antique tapestries and textiles.

In short, The Cavendish Hotel designed a scheme of works, the sole purpose of which was to enable it to obtain vacant possession against the tenant. The scheme of works on which the hotel relied was designed to be sufficiently substantial to qualify under ground (f), too substantial and disruptive to be carried out by exercising the right of entry while the tenant remained in possession and to avoid the need for planning permission which would have enabled the tenant to argue that its likely refusal would make the project ineffective.

There were special reasons why planning permission would be likely to be refused because Westminster City Council has designated the St James's area of London in which the property is situate as a "special policy area" in which it seeks to protect and promote certain uses, namely private members clubs, art galleries and niche retail outlets. In accordance with that policy the tenant's premises were recognised as having a specific use for planning purposes, namely "mixed use, compromising retail, depository, research centre, archive library, publishing and conservation for historic tapestries, textile art and carpets" so that any material change, and use would require planning permission.

It was common ground between the tenant and the hotel that the scheme of works had no practical usefulness. This was because although the works themselves required no planning permission, it would be impossible to make any use of them at all without planning permission for change of use and the landlord did not intend to seek such permission.

The hotel's case was that all that they had to do was to have a genuine intention to carry out the works if they were necessary to get rid of the tenant even though the hotel did not intend to carry out the works if they were not necessary for the purposes of getting rid of the tenant e.g. if the tenant was to have vacated voluntarily.

In line with the long established two-part test that the landlord had to prove (1) that it had a genuine intention to carry out qualifying works and, (2) that it would be practically able to do so, the hotel argued that the hotel's motives, the reasonableness of its intentions or the objective usefulness of the works, whether for their own purposes or in the public interest, were irrelevant except as material from which the Court might infer that the intention to carry them out was not genuine.

Lord Sumption, in the lead Judgment sidestepped the approach taken by the Courts to tax-avoidance schemes and artificiality by deciding the case on cause and effect. He concluded that ground (f) assumes that the landlord's intention to demolish or reconstruct the premises is being obstructed by the tenant's occupation. The County Court Judge had decided on the facts that the tenant's possession of the premises did not obstruct the hotel's scheme of works because if the tenant gave up possession voluntarily, the hotel had no intention of carrying out the works.

Similarly, the hotel did not intend to carry out the works if the tenant persuaded the Court that the works could reasonably be carried out while it remained in possession. In other words, the hotel's intention to demolish or reconstruct the premises had to exist independently of the tenant's statutory claim to a new tenancy so that the tenant's right of occupation under a new lease would obstruct it and he concluded that the acid test was whether the hotel would intend to do the same works if the tenant left voluntarily.

Accordingly, although a landlord's motive or purpose, although irrelevant in itself, may be investigated at trial as evidence of the genuineness of its intention to carry out the works in the same way as it may be relevant as evidence of the conditional nature of that intention. Lord Briggs, who also gave a Judgment agreeing with Lord Sumption clarified that the Supreme Court's ruling does not change the rule that the landlord's intention has to be assessed at the date of the hearing and not beforehand.

I was fortunate to instruct Michael Briggs (as Lord Briggs was previously known) as Counsel in the case of Shelley and Others -v- United Artists Corporation Limited on behalf of Bevesco Ltd as proposed second defendants which was also a case under Part II of the Landlord and Tenant Act 1954 where the High Court Judge, Mr Mervyn Davies continually referred to him as "Potato Briggs" - apparently because he had heard a previous case involving potatoes in which Michael Briggs appeared before him. My clients were not, however, involved in the subsequent Court of Appeal hearing of the United Artists case.

Peter Burfoot

6 December 2018