Freehold Covenants and Landlord's Intention – the Acid Test

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What we are talking about today

- It is always a bit disturbing when what you were told was the law in law school is turned upside down, but that is what the Supreme Court is for. We will look at what the Supreme Court said in Franses (*S FRANSES LTD v CAVENDISH HOTEL (LONDON) LTD (2018)* [2019] AC 249 and its implications.
- *89 Holland Park Management Ltd v Hicks* [2020] EWCA Civ 758 – lessees and the freeholder successors in title of the vendor's land able to enforce a restrictive covenant under s78 of the LPA 1925 and whether aesthetic or environmental grounds are relevant considerations to granting or refusing consent under a covenant.

A Landlord's Intention Post Franses

The "acid test"

Betty's Café, 42-44, Darley Street, Bradford.

The case

- The case of *S Frances Ltd v Cavendish Hotel (London) Ltd* (2018) [2019] AC 249; [2018] UKSC 62 raised (in the Supreme Court) a single issue, namely whether a landlord who at the hearing of a tenant's application for a new tenancy pursuant to section 24 Landlord and Tenant Act 1954 satisfies the court that it genuinely 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 it could not reasonably do so without obtaining possession of the holding also has to persuade the court that it would have that intention even if the tenant left voluntarily.

The law as it stood

- So far as the law was thought by many to be pre *Franses* is concerned, the most memorable case was that involving *“Betty’s café” Betty's Cafes Ltd v Phillips Furnishing Stores Ltd (No.1)* [1959] A.C. 20.
- That case concerned the situation where a landlord wanted to reoccupy the holding but could not rely on section 30(1)(g) of the Act because it had not held the reversion for enough time (5 years). Thus, the landlord instead sought to oppose the application on the ground set out in section 30(1)(f) namely the intention to carry out works as described above.

- The House of Lords held, firstly that the date on which the intention was to be assessed was the date of the hearing and, secondly that the fact that the landlord was not in a position to use section 30(1)(g) was irrelevant.
- In the course of his speech Viscount Simonds approved the definition of intention from the judgment of Asquith LJ in *Cunliffe v Goodman* [1950] 2 KB 237

- "An 'intention to my mind connotes a state of affairs which the party 'intending' - I will call him X - does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."

- From that day forth it was axiomatic that the landlord's motives were irrelevant save for the purpose of examining whether its protestation of intention was genuine.
- In fact, the question of the genuineness of the intention was frequently, if in question, dealt with by the expedient used in *Betty's Cafes*, namely the landlord gave an undertaking to do the work within a reasonable time of the termination of the tenancy.

What Franses did

- In the *Franses* case, the landlord was disarmingly frank. It made it clear that the works proposed had no commercial utility and were designed with the sole purpose of satisfying section 30(1)(f) and that, if the tenant left voluntarily, the works would not be carried out.
- Notwithstanding (or perhaps because of) that frankness the first instance judge, HHJ Saggerson sitting at the County Court at Central London accepted that the landlord's intention to carry out the work was genuine, backed up, as it was, by an undertaking and that the landlord's motive was irrelevant.

- The first appeal was to Jay J [2017] EWHC 1670 (QB) who upheld the first instance decision concerning intention both as to its genuine nature and the irrelevance of the fact that the work would not have been done if the tenant left voluntarily (though he only did so with regard to the issue of genuineness with hesitation).
- He allowed the appeal on other grounds which would have required a further hearing in the County Court.

- In the Supreme Court Lord Sumption gave the lead judgment.
- He accepted that motive was irrelevant save for the purpose of establishing the genuine nature of the intention (paragraph 16) but then went on to state that that was not the end of the matter because the appeal turned on what was *"the nature or quality of the intention that ground (f) requires"* (paragraph 17).
- One might have been forgiven for thinking that that was plainly set out in the words of the sub-section and that further elaboration was unnecessary.

- At paragraph 19 he said:
- “The problem is not the mere conditionality of the landlord’s intention, but the nature of the condition. Section 30(1)(f) of the Act Page 10 assumes that the landlord’s intention to demolish or reconstruct the premises is being obstructed by the tenant’s occupation. Hence the requirement that the landlord “could not reasonably do so without obtaining possession of the holding”. Hence also the provision of section 31A that the court shall not hold this requirement to have been satisfied if the works can reasonably be carried out by exercising a right of entry and the tenant is willing to include a right of entry for that purpose in the terms of the new tenancy. These provisions show that the landlord’s intention to demolish or reconstruct the premises must 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 serve to obstruct it. The landlord’s intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily.”

- His reasoning appears to be that section 30(1)(f) requires the tenant's occupation to obstruct the landlord's *intention.*
- That, though, is not what the sub-section says.
- It says:
- "that he could not reasonably do so without obtaining possession of the holding"
- In other words, the landlord is obstructed as a matter of fact from carrying out the works not that the landlord's intention is so obstructed.

- Lord Briggs gave a separate judgment, though he agreed with Lord Sumption's reasoning.
- He did so principally because of HHJ Saggerson's expressed concerns about the implications of having to explore the hypothetical situation of what the landlord would have done if the tenant left voluntarily at a hearing where it was perfectly obvious that the tenant was not going to leave voluntarily.

- His solution is found at paragraph 30:
- “There is nothing hypothetical or counter-factual about testing the type or quality of the landlord's intention, as at the time of the hearing, by an analysis of the purpose or motive behind it. The disqualifying underlying purpose (just to get rid of the tenant) is a continuing aspect of the landlord's then current intention, even if the direct question whether, in other circumstances (the tenant going voluntarily), the landlord would have intended to do the relevant works appears hypothetical and even counter-factual.”

- He also dealt with the issue of whether the landlord would be defeated if its intention would be to do lesser works if the tenant left voluntarily, works that could be done without getting possession.
- He said:
- “I also agree with Lord Sumption's view that the same acid test will have to be applied where the landlord asserts an intention to carry out works which, as a whole, would require the tenant to vacate, but where it is alleged that the landlord would only carry out some lesser scheme, not justifying the refusal of a new tenancy, if the tenant were to leave voluntarily. Cases of that kind may be more likely than the stark facts of the present case, and they will probably give rise to factual questions of some nicety, incapable of resolution by the proffer of a simple undertaking to the court, as happens at present. This may introduce an element of complexity and expense into proceedings in the County Court which, for many years, have yielded to a simple technique for speedy resolution.”

Where next?

- The Supreme Court has spoken and we must adjust to the new reality and henceforth it will be open to a tenant to assert that a landlord is only proposing to carry out the works to get a possession order and would not do them if the tenant left voluntarily.
- Indeed, such a case could have been put forward in the *Betty's cafes* case, and no doubt in others since and who knows what the result would have been.

- Franses was followed in *London Kendal Street No3 Ltd v Daejan Investments Ltd* in the County Court at Central London (where the issue did not seem to arise) and applied also with regard to works that were intended that would prevent a telecommunications operator from acquiring rights under the Electronic Communications Code in *EE v Chichester* [2019] L. & T.R. 21; [2019] UKUT 164 (LC)
- The latter case did involve an examination of whether the intention was conditional but it seems that the ground covered was the same as that covered to establish that it existed and was genuine.

- In the result, the landowner lost, the tribunal holding that the scheme was so financially inviable that the intention to carry it out was not genuine and that it was conditional anyway in the sense that if EE did not want to assert Code rights, it would not be carried out.

- Clearly, this presents tenants with a new avenue to explore to defend against opposition on section 30(1)(f) grounds.
- Landlords, on the other hand will want to make sure that in their deliberations about the proposed scheme, there is nothing that suggests that the true, ulterior, motive is to get rid of the tenant.
- One can envisage more disclosure sought from a landlord and closer scrutiny of the landlord’s motives.
- Also, the simple use of an undertaking may no longer be enough to satisfy the court's requirements.

- What about section 30(1)(g).
- “that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.”
- Can the reasoning in *Franses* be extended to this sub-section?
- On the face of it, it is unlikely as the intention is not qualified expressly by the requirement that the landlord could not occupy without gaining possession. But that is clearly implied.

- At the end of his judgment, Lord Briggs at paragraph 32 said:
- “(It) seems to me always to have been the plain intention of Parliament, that a tenant's statutory right to a new tenancy should not be circumvented by proposed works which, viewed as a whole, would not have been undertaken by the landlord if the tenant had left voluntarily.”
- Could it not be said that, equally, Parliament could not have intended a tenant's statutory right should be circumvented by a landlord’s intention to occupy which it would never had possessed if the tenant had left voluntarily?

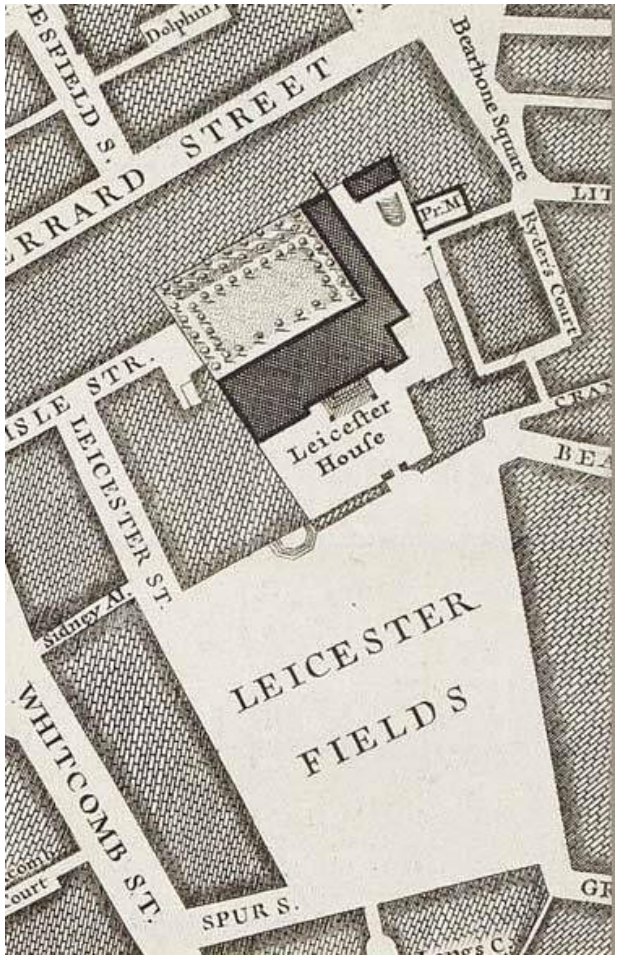
89 Holland Park Management Ltd v Hicks [2020] EWCA Civ 758

- *Freehold covenants*
- *Consent not to be unreasonably withheld*
- *Can consent be reasonably refused on aesthetic or environmental grounds?*
- *A good reason and a bad reason*

The neighbours at *89 Holland Park*

The proposed development

Leicester Square in 1848



Tulk v Moxhay

[1848] EWHC Ch J34
(1848) 41 ER 1143

- In 1808, Charles Augustus Tulk sold one of his various plots of land in Leicester Square to another who made a covenant to keep the Garden Square "uncovered with buildings" such that it would remain a pleasure ground. It was subsequently sold several times over and eventually to Moxhay in a contract which did not include any reference to the covenant.
- Moxhay was aware of the covenant at the time of purchase but refused to recognise the enforceability of the covenant as he claimed he was not bound by privity of contract.

Held:

- “That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing part of it, that the latter shall either use or abstain from using land purchased in a particular way, is what I never knew disputed ... It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased.

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- “It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken ...
- That the question does not depend on whether the covenant runs with the land is evident from this, that if there was a mere assignment and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”

The basics

- Original parties to covenant or successors in title to original parties?

Benefit: Can the successor of the covenantee show:

- That the covenant touches and concerns land of the covenantee;
- That he has the benefit of that covenant passed to him by annexation or assignment.
- When considering the question of annexation, one has to ask two questions:
- Is the language sufficient to achieve annexation?
- Is the benefitted land sufficiently identifiable?

The basic (continued)

Burden:

- Title registered at H.M. Land Registry?
- Is the covenant restrictive or negative in nature?

E.g.

- It was held in the case of *Powell v Hemsley* [1909] 1 Ch. 680, (affirmed on appeal [1909] 2 Ch. 252) that a covenant by the purchaser that he will before the commencement of any building submit the plans thereof for the approval of the vendor, involved a negative contract that no building shall be commenced until plans had been submitted to and approved by the vendor. In that case, no plans were ever submitted and no approval obtained, and the erection of the building in question was therefore a breach of covenant.

Should a term be implied term that consent/approval should not be unreasonably withheld?

- It is a question of construction as to whether a covenant not to build without consent, or except in accordance with approved plans, is subject to an implied term that consent/approval should not be unreasonably withheld: see *Emmet & Farrand on Title*, para 19.050. In *Price v Bouch* (1986) 279 E.G. 1226, Millet J. took the view that there was no general principle of law that such a term should be inferred; he said:
- "In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* the covenants were imposed not as part of a building scheme or scheme of development, but by a common vendor as he sold off the estate piecemeal, and they were enforceable not by the mutual covenantors but by the common vendor and his successors in title. I am prepared to assume, without in any way deciding, that, in such circumstances, a term is to be implied that consent shall not be unreasonably refused. That, however, was a very different case from the present.
- In the present case the decision to approve the plans or not is vested not in a common vendor or his successors in title but in the mutual covenantors themselves, who have delegated the decision to a majority of a committee elected by themselves. It was conceded that the committee had a duty to inspect and consider any application submitted to them, to reach a decision themselves and not to delegate it to others, and to act honestly and in good faith and not for some improper or ulterior purpose. It was also accepted that, if the committee took into account irrelevant considerations or failed to take into account relevant considerations, or reached a perverse decision such that no reasonable committee could possibly reach, then their decision could be impugned, for it would be ultra vires"(p.1227).

Hicks v 89 Holland Park (Management) Ltd

The facts:

- 1965/1968 covenants:
- “2. The Building Owner hereby covenants with the Adjoining Owner that she will complete the development of the [Site] … not later than the expiry of 18 months after the date hereof.
- (a) In lieu of the drawings referred to in [the 1965 Transfer] the Adjoining Owner hereby approves the general layout drawing no. 163/13 dated April 1968 prepared by Holmes and Gill.
- (b) The Building Owner shall make no applications to the appropriate planning authority nor apply for any other necessary permissions from the local or any other body or authority in respect of any plans drawings or specifications which have not previously been approved by the Adjoining Owner PROVIDED ALWAYS that if the Adjoining Owner shall approve the same but The Building Owner shall be required to modify or amend the same by the Planning Authority or any other authority or if the Building Owner shall herself desire to amend the same then no further application shall be made by her to any such Authority unless the revised or amended drawings and specifications have first been approved by the Adjoining Owner
- 3 No work shall be commenced upon the [Site] before the definitive plans drawings and specifications of the said buildings have first been approved by the Adjoining Owner of his surveyor.”

- Ms Hicks acquires site in 2011 at auction and company owns freehold.

The planning applications

- Planning permission granted on appeal in October 2015.
- Revised proposal sought in November 2016
- a single storey entrance pavilion, which is described by the Company as being a glass cube structure, located at the eastern end of the Site, leading to a subterranean structure that covers most of the Site. Natural light is provided by a series of skylights and light wells. The design is uncompromisingly contemporary and it is common ground that it shares "… none of the design language of the listed buildings of Holland Park …".
- The planning inspector who granted planning permission described the entrance pavilion as being "more noticeable at night as a gently glowing glass box" that was "… a somewhat unusual feature". The 2016 scheme differed from that proposed in 2013 by being smaller in overall size, a change from king post to contiguous piling for the construction of the basement, the incorporation of a birch tree to the rear of the Site and some other minor alterations.
- Ms Hicks submitted this material to the Company before applying to the local planning authority for approval to the revised scheme.

- Company refuses consent: "… our decision is to refuse consent for aesthetic reasons and the loss of the amenity of the trees, but in any event … we must withhold consent unless and until you satisfy the serious concerns raised by Capita."
- Capita – engineering and hydrology experts

A glass cube glowing at night

- The covenantee (successors) complained:

- “at night it might appear strange as it would emit a glowing light; the sense of privacy for the basement flat would be harmed. It commented on the proposed light wells which it said would be intrusive features, and would facilitate overlooking into the Building. Some of the objectionable features could be controlled by covenants, but policing them would be a burden. The proposal would require the felling of three mature sycamores which were said to be a valued amenity in screening the Building from the modern houses in Woodsford Square. The Company’s arboricultural expert said that the loss of one particular mature tree would be “catastrophic” in terms of amenity for the Building.”

- There was also concern as to the length of time the development would take to complete.

Round 1- the first dispute

- Deputy Judge decision is at [2013] EWHC 391 (Ch).
- He decided that both the Company and the leaseholders were entitled to enforce the covenants. The intention of the covenants was to benefit the owners for the time being of the Building. The entitlement of the leaseholders to enforce the covenants came about because of the effect of section 78 of the Law of Property Act 1925.
- He next decided that Ms Hicks was bound by the covenant.
- Finally, he decided that it was necessary to imply a proviso to the effect that consent (whether under clause 2 (b) or under clause 3) was not to be unreasonably withheld.

The High Court trial

- The Judge's approach:
- Consider background circumstances: “"I accept the claimant's submission that [Brigadier Radford's] only interest in [the Building] at the time when the 1968 Deed was entered into was in preserving the structure, capital value and revenue generating capacity of his property.
- Consider general purpose of covenants; "Generally, the sole purpose of a covenant requiring approval by a covenantee is to protect the property interests of the covenantee – see *Iqbal v. Thakrar* [2004] EWCA Civ 592 per Peter Gibson LJ at [26(1)]. If what is proposed has no impact on the covenantee's property interests then it is generally not entitled to refuse consent – see *Iqbal v. Thakrar* (ibid.) per Peter Gibson LJ at [26(2)]. There is nothing within either the language used or the documentary factual or commercial context of this case that suggests that the parties to the 1965 Transfer and the 1968 Deed had any intention other than to protect [Brigadier Radford's] property interest in [the Building]. It follows that the general principle set out in *Iqbal v. Thakrar* (ibid.) by Peter Gibson LJ at [26(2)] applies to both the covenants in issue in these proceedings."

The Judge’s approach (continued)

- Having decided that "the covenants were concerned exclusively" with the protection of Brigadier Radford's property interest, the judge next considered what that interest was. He held that by the time that the Company came to consider Ms Hicks' application for consent, its only relevant interest was in the structure of the Building and the freehold reversion
- Having decided that the Company's interest lay in the common parts and external structure of the Building the judge held at [40] that it was not entitled "… to refuse approval based on aesthetics, disruption caused by construction or the risk of damage to or destruction of trees, other than to the extent that the risk of such damage or destruction might adversely affect the structure of the building or the value of the defendant's reversion. Refusal on those grounds has nothing to do with protection of the defendant's property interests as I have found them to be.”

- **No decision on aesthetics**

The judge then considered the engineering advice that the Company had received. He held that the concerns that had been raised were insufficient to justify refusal of consent under clause 2(b); but were potentially good grounds for refusal of consent under clause 3. Accordingly, he granted a declaration that consent under clause 2 (b) had been unreasonably withheld. He refused to make a declaration to like effect as regards clause 3

- **No engineering issues sufficient to entitle covenantee to refuse consent**

The Court of Appeal

- The Judge was wrong to hold held that the Company was only entitled to take into account matters that affected its own reversionary interest and that it was not entitled to take into account any interest of the leaseholders (whether or not they were property interests).
- The proper approach was to is to identify the land for the benefit of which the covenant was given. The general purpose of the covenants was to control the development of the Property for the benefit of No. 89 and the leaseholders were among those who benefitted from the covenant.
- Furthermore, the effect of section 78 of the Law of Property Act 1925 is to write certain words into the covenant:

Section 78 deems a covenant to be made with the covenantee and (a) his successors in title and (b) the persons deriving title under him. What is more, the covenant has effect as if those words were expressed. The expression "successors in title" includes the owners and occupiers for the time being of the land of the covenantee intended to be benefitted.

If one adds together
(a) the general purpose of the covenants and
(b) the class of person entitled to their benefit and with whom the covenant is deemed to have been made, … the inescapable conclusion is that the decision-maker considering whether or not to approve plans is entitled to take into account the interests of those with the benefit of the covenant. Those persons include both the owners and the occupiers of the land. If it were otherwise the general purpose of the covenant would be undermined.

Aesthetics?

- “The covenant in our case was a covenant between neighbours; and in my judgment a neighbour has a legitimate interest in the appearance of what is built next door to him.
- Approval under clause 2 (b) had to be obtained before making an application for planning permission. If all that mattered under the covenant was the effect on bricks and mortar; and the capital and rental value of Brigadier Radford's interest, it is difficult to see why clause 3 on its own was not enough. Clause 5 of the 1968 Deed contemplated that the Building Owner might engage an architect in connection with the approval of plans and drawings, which also suggests that aesthetics were at least potentially contemplated as being within the scope of the covenant.”

Good reasons and bad reasons

- Where approval is not to be unreasonably withheld, and the decision-maker refuses consent for a mix of reasons, some good and some bad, the question arises whether the whole decision is vitiated: *West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] EWCA Civ 250, [2018] 1 WLR 5682
- The trial Judge was wrong to rule out aesthetic and environmental grounds
- But he was right in his conclusion that the construction issues were relevant to clause 3 rather than to clause 2 (b)
- So: CA remitted it to the Chancery Division for the judge to consider whether the aesthetic and environmental reasons were reasonable ones.

- On the basis of the judge's findings, the aesthetic reasons were the most important. It could therefore fairly be said that if the construction issues had not been put forward consent would still have been refused on aesthetic grounds.

Thank you for attending

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Thank you for attending

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