Neutral Citation [2021] EWHC 2847 (Ch)

Claim No: 11BS023C

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)

On appeal from the order of His Honour Judge Gore, QC, dated 17 February 2021
County Court at Exeter

Sitting at:
Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 29 October 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

TERENCE JAMES MACEY

Appellant
(Claimant in the proceedings below)

-and-

PIZZA EXPRESS (RESTAURANTS) LIMITED

Respondent
(Defendant in the proceedings below)

- -

- -

Mr Richard Fowler and **Mr Joseph Bunting** (instructed by the Appellant) appeared for the Appellant

Mr Wayne Clark (instructed by Lewis Silkin LLP) appeared for the Respondent

Hearing dates: 13 and 14 October 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. The Respondent to this appeal, Pizza Express (Restaurants) Limited (**Pizza Express**) occupies premises at 2 Broadgate, Cathedral Yard, Exeter (the **Premises**). It did so pursuant to a 25-year lease dated 22 August 1995 (the **Lease**). Mr Macey, the Appellant, is the landlord according to the terms of the Lease.

2. The term of the Lease expired on 22 August 2020, but continues on the same terms pursuant to Part II of the Landlord and Tenant Act 1954 (the **1954 Act**).

3. By a notice dated 8 April 2020, and served under section 25 of the 1954 Act, Mr Macey sought to terminate the tenancy, with effect from 22 October 2020. By the same notice, Mr Macey opposed the grant of a new tenancy, relying upon section 30(1)(g) of the 1954 Act.

4. Section 30(1) sets out various grounds on which a landlord may oppose the grant of a new tenancy. It is appropriate to set out, not only section 30(1)(g) (on which Mr Macey relied), but also section 30(1)(f) (on which Mr Macey did not rely, but which contains a reference to intention which is common to both sections 30(1)(f) and 30(1)(g)). Essentially, the non-continuation of a lease may be justified on grounds:

> "…
>
> (f) 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;
>
> (g) subject as hereinafter provided, 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…"

5. By an order of Deputy District Judge Berrett dated 20 July 2020, it was ordered that the trial of the issue as to whether section 30(1)(g) was satisfied be tried as a preliminary issue. The hearing of this preliminary issue came before His Honour Judge Gore, QC on 16 and 17 December 2020. The Judge heard argument and evidence from two witnesses, Mr Macey himself and a Ms Carbone, a surveyor and Pizza Express' head of estates. In a reserved judgment (the **Judgment**) dated 17 February 2021, the Judge determined the preliminary issue against Mr Macey. His order – of the same date – reflected this outcome, and (amongst other things) ordered that Mr Macey pay Pizza Express' costs (the **Order**).

6. Mr Macey seeks to appeal the Order, and he does so with the permission of Henshaw J. The grounds of appeal are somewhat discursive, running to some 12 pages. However, counsel for Mr Macey helpfully distilled the grounds of appeal into six grounds of appeal (Grounds A to F) in Mr Macey's written submissions on appeal, and it was these very helpful submissions that formed the structure on which the parties' submissions were

made. Additionally, in a Respondent's Notice, Pizza Express contended that the Order and the Judgment could be upheld on other grounds.

7. It is helpful if I begin with an articulation of the law in this area. The points arising out of the grounds of appeal cannot really be understood without a clear statement of the relevant legal principles, which I set out in Section B below. I should say at once that my exposition of the law is significantly more detailed than that of the Judge. No criticism is intended by this. The fact is that the Judge had before him a series of agreed propositions of law, which (quite rightly) he used as the basis for the Judgment.

8. Since, however, the grounds of appeal, to an extent at least, contend that the Judge misapplied these principles, it is necessary to articulate them.

B. THE LAW

9. The question central to the preliminary issue – and so to this appeal – is whether Mr Macey held the requisite intention. In the case of section 30(1)(g), that intention must be to occupy the Premises for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence. In the case of section 30(1)(f), that intention must be to demolish or reconstruct the Premises. (As I say, Mr Macey did not rely on section 30(1)(f).)

10. In terms of <u>what</u> is intended, sections 30(1)(f) and 30(1)(g) are poles apart. But the nature of what is the landlord's intention must be the same in each, and neither party sought to contend otherwise before me. It is therefore right to have regard to authorities relating to both section 30(1)(f) <u>and</u> section 30(1)(g).

11. The following propositions represent the material law:

(1) Intention is a common English word, to be given its ordinary and natural meaning.[1]

(2) Intention means more than merely contemplating that a course of action or bringing about a certain state of affairs might be desirable. In *Cunliffe v. Goodman*,[2] Asquith LJ spoke of a project moving "out of the zone of contemplation – out of the sphere of the tentative, the provisional and the exploratory – into the valley of decision". That is a nice articulation of the borderline, but Asquith LJ also gave a fuller and more nuanced consideration earlier on in his judgment:[3]

> "The question to be answered is whether the defendant (on whom the onus lies) has proved that the plaintiff, on November 30, 1945 "intended" to pull down the premises on this site. This question is in my view one of fact. If the plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was no evidence of a positive "intention", or that the word "intention" was incapable as a matter of construction of applying to anything so tentative, and so indefinite. An "intention" to my mind connotes a state of affairs which the party "intending" – I will call

[1] *Humber Oil Terminals Trustee Ltd v. Associated British Ports*, [2011] EWHC 2043 (Ch) at [99]. *Humber Oil* was affirmed on appeal ([2012] EWCA Civ 596, but the decision at first instance contains a valuable and detailed review of the authorities.

[2] [1950] 2 KB 237 at 254.

[3] At 253. Cited with approval in *Humber Oil* at [100].

> 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.
>
> X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will. Nor, short of this, can X be said to "intend" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X "intended" that result."

Thus:

(a) The question of intention is one of fact.

(b) Intention involves a decision in the landlord to bring about a certain state of affairs. That decision may not be tentative or indefinite, but – to use the language of later cases – must be "a firm and settled intention".[4] I shall – as did the parties before me – refer to this as the "subjective" element or "subjective" intention.

(c) Although it might be said that intention is entirely subjective, it is quite clear from Asquith LJ's judgment that it has what may be called an "objective" element. As Asquith LJ noted, one cannot intend a result wholly beyond the control of one's will. Although I shall – as the parties did before me – refer to this as an "objective" element or "objective" intention, it is really no more than an expression of the fact that, in order for an intention to be rationally held, it must be capable of achievement. Whilst an intention may be thwarted by circumstance but be an intention nonetheless, an intention to bring about a state of affairs must be rooted in reality.

(d) For that reason, it goes too far to treat the requirement of "intention" to oblige a landlord to undertake – in the sense of actually actioning – all of the steps necessary to realise his or her intention. That would amount to a requirement that there be a realised intention or an intention in fact executed to the extent of the landlord's ability. This was stressed in *Betty's Café v. Phillips*, where it was noted that the language of intention could not:[5]

> "…be treated as having (in effect) substituted for the word "intends" in paragraph (f) (as in paragraph (g)) of the section the words "is ready and able" so as to impose upon the landlord the onus of proving that, at whatever be the proper date, he has not only finally determined upon the course proposed but has also taken all necessary steps for the satisfaction of any requisite conditions to which the course proposed is subject. The relevant word is "intends", a simple Engish word of well-understood meaning. The question whether the intention is at the relevant date

[4] E.g., *Reohorn v. Barry Corporation*, [1956] 1 WLR 845 at 849 to 850; *Humber Oil* at [101].

[5] [1957] 1 Ch 67 at 99; *Humber Oil* at [103].

> proved has, in my judgment, to be answered by the ordinary standards of common sense…"

(3) It follows that what a landlord does or does not do in pursuit of his or her intention may cast light on the nature and existence of that intention. But it is no requirement for the satisfaction of either section 30(1)(f) or section 30(1)(g), merely potential evidence as to the existence of the intention that is required. Neither party disputed that a court could (in theory, at least) properly conclude that there was the requisite intention on the landlord's evidence alone, unsupported by any other evidence or any outward attempt to bring that intention about.

12. In *S Franses Ltd v. Cavendish Hotel (London) Ltd*,[6] the Supreme Court articulated a gloss to the foregoing, making it clear that a firm and settled intention under section 30(1)(f) (and, by a parity of reasoning, section 30(1)(g)) would not be sufficient where that intention was "conditional". If a landlord had, say, a firm and settled intention to demolish the building the subject of a lease, but only so as to ensure the termination of the lease, such that if the tenant surrendered the lease, the demolition would not proceed, then such an intention – albeit firm and settled – would not satisfy the demands of section 30(1) of the 1954 because it was "conditional". As Lord Sumption (with whom Lady Hale, Lady Black and Lord Kitchin JJSC agreed) noted:[7]

> "This appeal does not, as it seems to me, turn on the landlord's motive or purpose, nor on the objective reasonableness of its proposals. It turns on the nature or quality of the intention that ground (f) requires. The entire value of the works proposed by this landlord consists in getting rid of the tenant and not in any benefit to be derived from the reconstruction itself. The commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession. Indeed, in many cases, apart from the statutory compensation, landlords with proposals like these will not even have to spend the money. They need only supply the tenant with a schedule of works substantial and disruptive enough to be inconsistent with his continued occupation…"

C. THE JUDGMENT

13. I turn to the Judgment, whose structure I propose to describe in general terms:

(1) Paragraphs [1] to [6] set out the background facts.

(2) Paragraph [7] states – correctly – that the relevant point in time to test Mr Macey's intention is the date of the hearing.

(3) Paragraph [8] articulates Pizza Express' case regarding section 30(1)(g). It is clear that Pizza Express was contending that there was: *(i)* an absence of a "subjective" intention; *(ii)* an absence of an "objective" intention; and *(ii)* that any intention was "conditional" in the *Franses* sense described above.

(4) Paragraph [9] sets out, in *staccato* form, the relevant law. No criticism is made of the Judge's exposition. I have already noted that the Judge was appropriately brief in his statement of the law, because he drew upon the agreed statement of the law that the parties had placed before him. Paragraphs [10] and [11] set out in greater

[6] [2018] UKSC 62.

[7] At [17].

detail parts of *Franses*, and the parties' submissions in relation to *Franses*. Both parties, in their submissions to the Judge on *Franses*, seemed (going simply on the description of those submissions in the Judgment) to be drawing from *Franses* propositions that do not (as it seems to me) emerge from that decision. The Judge, however, correctly stated the law. If either party made a complaint about these passages – and I do not think that they did – then such complaint is without foundation. Whether the Judge correctly applied the principles he had articulated is a different matter, and certainly forms a part of the grounds of appeal, which I shall consider in due course.

(5) Paragraphs [13]*ff* deal with the evidence. The Judge describes the witnesses before him (paragraph [14]), beginning with the evidence of Mr Macey.

(6) It is evident that the Judge did not regard Mr Macey as a particularly satisfactory witness, and was looking for independent information or "corroboration" of what Mr Macey was telling the court. The Judge noted – adversely – on the absence of such "corroboration". Thus, by way of example:

(a) In paragraph [15], the Judge noted that "[Mr Macey] in his written statements makes many factual assertions or expresses opinions for which no independent evidence or corroboration is provided."

(b) In paragraph [18], the Judge noted that "[Mr Macey] also makes bald assertions with a singular lack of particularity or analysis or explanation". In paragraph [19], the Judge says this:

> "Some of the assertions [of Mr Macey] and related documentation raise an index of suspicion. Thus, for example, he says (section 13 of his first witness statement) that he developed a business plan, which included projections prepared by his accountants RSM and on which they advised him. One business plan is dated June 2020. It contains no such projections. Another is an undated document headed "Tinley's Bistros Projections Profit & Loss and Balance Sheet Years 1 to 3". Neither document was disclosed in the undated List of Documents signed by [Mr Macey] on 4 August 2020. In that he now relies on both, they were clearly relevant documents that should have been disclosed…"

(c) In paragraph [20], the Judge noted a "suspicious moving of the goal posts".

(d) In paragraph [21], the Judge looked for "any other pieces of evidence that might inform what was the intention here". He found very little, and made the factual finding that "it is only from [receipt of a letter sent by Mr Macey to Pizza Express dated 31 March 2020] that the outwardly declared intention of [Mr Macey] appears to have become his presently declared intention. That raises in my mind a substantial index of suspicion".

(e) In paragraph [22], the Judge noted:

> "There are other features that also invite suspicion. Neither do the business plan documents from the accountants explain or demonstrate, nor could [Mr Macey] when cross-examined on the detail of them, explain the profit and loss and balance sheet projections nor demonstrate how and why the stated assumptions on which they were based were arrived at or were either justifiable or reasonable…".

(f) In paragraph [25], the Judge stated:

> "A great deal of reliance was placed by [Mr Macey] on the fact that he and his children, who were to support the business, had procured or obtained as much licensing, authorisation and training as he could achieve at this time, including, by way of examples, the acquisition of personal licences as a precursor to the eventual transfer of authorisation to manage licensed premises, clearance for being suitable persons from the Disclosure and Barring Service, certificates in food safety and hygiene, including as regards safety during the Covid 19 health emergency, and the like. I remind myself, however, that Lord Briggs in *Franses* at [27] identified that a marker of relevance in determining whether a proposal had moved out of the zone of contemplation into the valley of decision was the incurring of substantial costs…There is, in fact, no evidence that [Mr Macey] has incurred, to any degree that is significant, costs that demonstrate a commitment to move beyond contemplation into the valley of decision. I accept that some costs will have been incurred in that [Mr Macey], as a litigant in person as he was for most of the history of this litigation, would have had to incur court fees, and he is at risk as to an adverse costs order in favour of [Pizza Express] if this claim fails, and also that some cost (but probably modest) will have been incurred to gain access to the training and obtain the qualifications represented by the various licences and certificates to which I have referred. But there is no evidence that truly significant costs have been incurred from which one could infer on objective grounds the relevant intention. That in my judgment is significant."

(g) The Judge did not accept Mr Macey's assertion that "he had crossed as many bridges as he could without committing himself" (at paragraph [26]).

As regards the evidence of Mr Macey, the Judge found (at [28]) that "[f]or these reasons, I do not accept the evidence of [Mr Macey] unless it is confirmed from other evidence or sources or is undisputed".

(7) In paragraph [29], the Judge described the second witness to give evidence before him, Ms Carbone. He rightly noted that Ms Carbone could say little, directly, about Mr Macey's state of mind (paragraph [30]), but the Judge listed, in paragraph [30], a series of points on which Ms Carbone relied in support of her evidence that "I have very serious reservations as to whether Mr Macey…would, in fact, seek to operate a business from the Property if Pizza Express had agreed to vacate voluntarily". Although Ms Carbone's point concerned the question of conditional intention, it is obvious that the Judge regarded the points he listed as relevant to intention generally. He noted, in paragraphs [31] and [32], that:

> "[31] It is no answer in my judgment to reflect on the fact, as is well documented and not challenged, that [Mr Macey] has been so successful in his business and professional lives and dealings to be awash with liquidity such as to enable him to indulge, if he so wishes, his desire in later life to host a relaxed wine bar, oblivious to the pressures and challenges of the hospitality business in the current times.
>
> [32] Where there is a conflict between the evidence of [Mr Macey] and the evidence of Ms Carbone, I prefer the evidence of Ms Carbone. As already indicated, where there is no conflict but what I have called a disturbing index of suspicion, I reject the evidence of [Mr Macey] unless it is confirmed for other evidence or sources or is undisputed."

(8) In paragraph [33] of the Judgment, the Judge referred to the law regarding the drawing of adverse inferences from evidence not adduced. He stated (paragraph [34]) that whether he drew such an inference "is a matter for me to decide on the evidence". He drew adverse inferences from Mr Macey's failure to call his children and his accountant (paragraph [34]).

(9) The Judge's conclusion at the end of his Judgment was as follows:

> "[35] For all these reasons, I am not satisfied that [Mr Macey] has proved the necessary subjective element that the project had moved out of the zone of contemplation into the valley of decision, and this is a matter on which the burden of proof lies upon him…I am also not satisfied as to the objective element, in that I am not satisfied that he has demonstrated a real prospect of overcoming or surmounting the obstacles facing the hospitality industry in the centre of the City of Exeter at the height of the Covid 19 health emergency, or indeed, beyond it, given the wider challenges faced by the hospitality industry. I reach those conclusions despite attaching less weight to the apparent lack of financial viability because of the resources available to [Mr Macey]. I also ignore his age for this purpose, and I do not attach great weight to his lack of meaningful experience. At the end of the day, I am simply not satisfied of the genuineness of his intentions given that they were not foreshadowed and only arose during the timeline and in the circumstances that I have now set out fully in this Judgment. I am suspicious as to motive, given the history I have detailed. Also, given the singular lack of preparedness for moving this project from contemplation to decision and action, I am also not satisfied that the proposal was capable of being implemented within the reasonable period of time required to satisfy the relevant test.
>
> [36] There remain other issues of fact and law that were disputed between the parties, but I am not obliged to determine each and every matter in dispute, but only those necessary and sufficient for me to reach my decision. That is what I have done and therefore I make no further findings or observations on other matters that in my judgment were really rather peripheral to the issues I have decided."

D. THE APPEAL

14. On this appeal, Mr Macey accepted that "as a general rule, this court will be cautious in reversing findings of fact".[8] This statement was rightly made, and contains within it two important points:

(1) First, that the Judge's conclusion on intention is, indeed, a question of fact. Obviously, what facts are found is informed by the relevant law,[9] but here neither party considered that the Judge had misstated the law he had to apply. This is, therefore, an appeal directly against findings of fact by a judge at first instance who heard the totality of the evidence, including two witnesses of fact. More to the point, given that the question at issue was intention, it is quite obvious that the Judge's evaluation of Mr Macey is of particular importance and is one only he could undertake.

(2) Secondly, and following on from this, an appellate court will be extremely slow to overrule a judge at first instance unless it is very clear that the judge has erred. This

[8] Paragraph 9 of Mr Macey's appeal skeleton.

[9] As to which, see Section B above.

point is put variously in the cases. In *McGraddie v. McGraddie*,[10] the Supreme Court set out the law in the following terms:

> "[1] In the sets of *Session Cases* in the Advocates Library, the volumes for 1947 fall open at *Thomas v. Thomas*, 1947 SC (HL) 45, [1947] AC 484, where one finds in the speech of Lord Thankerton at 54 and 487–488 what may be the most frequently cited of all judicial dicta in the Scottish courts:
>
> > "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."
>
> [2] The principles stated in *Thomas v. Thomas* had, even then, long been settled law: the speech of Lord Shaw of Dunfermline in *Clarke v. Edinburgh & District Tramways Co Ltd*, 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong", is almost equally familiar. Accordingly, as was said by Lord Greene MR in *Yuill v. Yuill*, [1945] P 15, 19, in a dictum which was cited with approval by Viscount Simon and Lord Du Parcq in *Thomas* at 48, 62–63, 486 and 493 respectively, and by Lord Hope of Craighead in *Thomson v. Kvaerner Govan Ltd*, [2003] UKHL 45, 2004 SC (HL) 1, [17]:
>
> > "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.""

15. The burden on Mr Macey in this appeal is, therefore, a high one. Before I come to articulate the grounds of appeal in a little greater detail, I should briefly mention and deal with two interlocutory matters that were, in the end, uncontentious:

(1) During the course of this appeal, Pizza Express applied to have Mr Macey's grounds of appeal re-written on the basis that they were too discursive. The application needed to be pursued (if it was to be pursued) well before the hearing of the substantive appeal. It was not, and Mr Clark (rightly) did not pursue it before me.

[10] [2013] UKSC 58. Although this was a Scottish appeal to the Supreme Court, the statements are of similar force to proceedings in England and Wales.

(2) Mr Macey sought to admit further evidence. That was not opposed by Pizza Express, and I am prepared to admit this evidence. However, I should be clear that I do not consider this evidence to be relevant to the question of whether the Order of the Judge should be set aside or varied. Since that question must be resolved by reference to the reasons for the Order as set out in the Judgment, such additional evidence could, generally speaking, only be relevant if it showed some appealable error or misunderstanding by the Judge. Of course, if I were to set aside or vary the Order, such that the substance of the preliminary issue before the Judge arose for reconsideration, then that reconsideration would entail consideration of all relevant material, including this further evidence. However, that is a matter for later consideration and does not arise where the question is whether the Judge erred to such a degree that his Order must be set aside or varied.

16. As I have noted, Mr Macey advanced six grounds of appeal, Grounds A to F. These grounds are as follows:

(1) *Ground A.* The Judge misapplied the decision of the Supreme Court in *Franses*, in particular in relying on a statement of the law by Lord Briggs in what was a minority opinion.

(2) *Ground B.* The Judge erred in determining the question of intention on the basis of Mr Macey's failure to discharge the burden of proof.

(3) *Ground C.* The Judge erred, in a number of ways, in his treatment of the evidence. In particular:

(a) The Judge was wrong to reject the evidence of Mr Macey.

(b) The Judge's use of the term "index of suspicion" was not merely unfortunate, but showed an error of approach.

(c) The Judge erred in requiring corroboration and/or in drawing inferences from Mr Macey's failure to call his children and/or his accountant.

(4) *Ground D.* The Judge had no grounds for reaching the conclusions that he did on the question of "subjective" intention, and wrongly discounted the evidence of Mr Macey and wrongly dismissed relevant material as irrelevant.

(5) *Ground E.* The Judge's conclusion on the question of "objective" intention was wrong.

(6) *Ground F.* The Judge failed to give adequate reasons for his decision.

17. I propose to consider these six grounds of appeal in the following Sections. However, they are, to an extent, inter-related, and so it is not completely possible to keep these grounds separate, nor deal with them exactly in sequence.

E. GROUND A: *FRANSES*

18. Neither party asserted an error of law on the part of the Judge. Indeed, given the agreed statement of law on which the Judge based himself, this would have been a difficult attack

to make good. The Judge's articulation of the relevant principles was – if understandably short – correct.

19. It is true that the Judge did quote extensively from the decision of Lord Briggs in *Franses*. However, as I have made clear,[11] he did so in order to address and deal with certain submissions that were made to him by the parties. At the end of the day, the Judge did not accept these submissions, and I do not accept that the Judge misdirected himself, at all, on the law.

20. More to the point, I do not consider that the Judge actually decided the preliminary issue on the basis of "objective" intention or "conditional" intention. It is true to say that the Judge's concluding paragraphs – which I have set out in paragraph 13(9) above – might be read as suggesting that he was deciding the preliminary issue not merely on the basis of an absence of "subjective" intention, but also on the basis of:

(1) An absence of "objective" intention. I refer in particular to the Judge's words in paragraph [35] of the Judgment:

> "I am also not satisfied as to the objective element…"

The fact is that the Judgment contains no conclusions of any sort as to the objective feasibility of Mr Macey's proposals. Indeed, such conclusions as the Judge did reach (notably on the question of Mr Macey's ability to finance the venture) strongly suggest that Mr Macey's "subjective" intention, if in fact held by him, was capable of achievement.

(2) A presence of a "conditional" intention in the *Franses* sense. I refer in particular to the Judge's words, again in paragraph [35], that:

> "I am suspicious as to motive given the history I have detailed…"

Again, there is no finding of fact in the Judgment capable of sustaining the conclusion that, if Pizza Express had voluntarily surrendered its tenancy, Mr Macey would have abandoned his plan for a bistro.

21. Reading the Judgment as a whole, it seems to me that paragraph [35] is badly put, and that Judge founded his decision on the preliminary issue solely on the absence of "subjective" intention. Reading the Judgment as a whole, this is clear. As I have described, the Judge's statement of his findings goes in its entirety to the question of "subjective" intention, and the Judge makes no findings, of any kind, sufficient to enable a conclusion either in relation to "objective" intention or "conditional" intention. In short, the entire thrust of the Judgment is that there was an absence of "subjective" intention and – the Judge having reached that conclusion – there was no need for the Judge to go any further or make any further findings.

22. Accordingly, I do not accept that the Judge reached any conclusion other than in relation to the question of "subjective" intention. Ground A must, therefore, fail: the Judge did not err in his articulation of the law; and his conclusions were in no way based upon the law regarding "conditional" intention as articulated by the Supreme Court in *Franses*.

[11] See paragraph 13(4) above.

F. GROUND E: ERROR IN RELATION TO "OBJECTIVE" INTENTION

23. It follows that Ground E does not arise. For the reasons I have given, the Judge considered only "subjective" intention and, if he erred in relation to this question, his decision cannot be rescued by any conclusion on his part that there was no "objective" intention either. As I have said, the Judge made no findings in relation to "objective" intention and so cannot have made any error.

G. GROUND F: FAILURE TO GIVE REASONS

24. There is, of course, a general duty on judges to give reasons for their decisions. Fairness requires that the parties – and in particular, the losing party – know the basis for the judge's order. Equally, reasons matter when that order is under appeal.[12]

25. Mr Macey contends that he "cannot understand from the judgment (even taken with the evidence and submissions) why he lost".[13] If, contrary to my reading of the Judgment, the Judge had indeed found that Mr Macey did not have the requisite intention because he lacked the "objective" element necessary or because his intention was a "conditional" one, then I consider that there would be considerable force in this point. As I have already described, the Judgment quite simply does not contain the findings necessary to support conclusions along these lines.

26. However I do not consider that the Judge did conclude that Mr Macey lacked "objective" intention or that his intention was a "conditional" one. Rather, the sole basis for the Judge's conclusion that Mr Macey did not meet the requirements of section 30(1)(g) was that Mr Macey lacked "subjective" intention.

27. Whilst I have no doubt that Mr Macey disagrees, and disagrees strongly, with large parts of the Judgment, I do not consider that it can seriously be said that the reasons for the Judge's conclusion are not clearly stated in the Judgment itself – without consideration of the evidence and the submissions before the Judge. I have set out – albeit briefly – the structure of the Judgment in Section C above. The Judgment is clear and the reasons for the Judge's conclusion on "subjective" intention are stated with sufficient clarity to enable Mr Macey to understand exactly why he has lost. Indeed, if this were not the case, the other grounds of appeal (Grounds B, C and D) would not be capable of formulation. The only reason they can be formulated is because the Judge set out the basis for his conclusions with some specificity. It is to these remaining grounds that I now turn. However, Ground F must be dismissed.

H. GROUND B: BURDEN OF PROOF

28. I accept that it is only the exceptional case that should be decided on the burden of proof.[14] Pizza Express did not contend to the contrary.

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[12] See, e.g., *Eagil Trust Co v. Pigott-Brown*, [1985] 3 All ER 119; *English v. Emery*, [2002] EWCA Civ 605; *Bassano v. Battista*, [2007] EWCA Civ 370; *Harris v. CDMR Purfleet Ltd*, [2009] EWCA Civ 1645; *Cook v. Consolidated Finance Ltd*, [2010] EWCA Civ 369; *Simetra Global Assets Ltd v. Ikon Finance Ltd*, [2019] EWCA Civ 1413.

[13] Paragraph 49 of Mr Macey's appeal skeleton.

[14] See, e.g., *Stephens v. Cannon*, [2005] EWCA Civ 222 at [46](a).

29. In my judgment, this ground of appeal must fail because the Judge did not decide the case on the burden of proof. The words that Mr Macey complains of, and which he says demonstrate that the Judge decided the case on the burden of proof, are contained in paragraph [35] of the Judgment:

> "…I am not satisfied that [Mr Macey] has proved the necessary subjective element that the project had moved out of the zone of contemplation into the valley of decision, and this is a matter on which the burden of proof lies upon him…"

30. I do not read this conclusion as a statement that the Judge was deciding the case on the burden of proof. Reading the Judgment as a whole, it is quite clear that the Judge regarded Mr Macey's evidence as deeply unsatisfactory for a number of reasons, which the Judge articulated with some specificity. It is quite clear that his conclusion was that Mr Macey did not have the requisite "subjective" intention; and it was for that reason that the Judge was "not satisfied" that Mr Macey had proved the necessary "subjective" intention.

31. Ground B is no more than an exercise in semantics and a spurious criticism of the words chosen by the Judge to state his conclusion, which appears clearly from the Judgment. For these reasons, Ground B must be dismissed.

I. GROUNDS C AND D: IMPROPER REJECTION OF MR MACEY'S EVIDENCE AND NO BASIS FOR THE JUDGE'S CONCLUSIONS

32. This is the essence of Mr Macey's appeal, and it is appropriate to consider these grounds last, having stripped away – by dismissing them – the other grounds of appeal. Having done so, it is quite clear that these grounds are actually a naked attempt to re-visit the factual conclusions of the Judge and to invite an appellate court to re-make a decision because the judge below should have attached different weight to the evidence before him.

33. For the reasons given in *McGraddie* – quoted in paragraph 14(2) above – an appellate court should be extremely careful when being invited to overrule or reverse the factual findings of the judge below. In this case, Mr Macey has advanced – under the guise of points of law – a series of suggestions that the Judge failed to attach sufficient and proper weight to the evidence that was before him. I am in no doubt that I should reject these grounds of appeal for this reason. However, out of deference to the care and skill with which Mr Fowler advanced these points on behalf of Mr Macey, I set out in greater detail below why Grounds C and D are no more than an attempt to re-argue points in relation to the evidence which the Judge rejected, and was within his rights to reject:

(1) *The Judge wrongly impugned the evidence of Mr Macey.*[15] The point, as I understand it, is that the Judge found Mr Macey to be dishonest and rejected Mr Macey's evidence without making proper or specific findings as to Mr Macey's credibility, character or honesty. As to this:

(a) In *Franses* at [29], Lord Briggs stated:

[15] See paragraphs 16 and 17 of Mr Macey's appeal skeleton.

> "The courts have until now restricted the forensic examination of the landlord's purpose or motive to a test of the genuineness of that intention. By "genuineness", I have no doubt that the court meant honesty".
>
> Lord Briggs was, of course, considering the question of "conditional" intention, and his words must be read in that context. He was not suggesting that a forensic examination as to whether a landlord had the requisite "subjective" intention – whether the landlord was in the "zone of contemplation" or the "valley of decision" – inevitably turned on questions of honesty. That would obviously be wrong, and was clearly not Lord Briggs' meaning.

(b) It is quite possible for a landlord honestly to assert that he has a "firm and settled" intention and stands firmly in the "valley of decision". It is equally possible for a judge to conclude – notwithstanding the landlord's assertions – that his intention is simply not of that order, and that the landlord stands in the "zone of contemplation".

(c) That, clearly, was the Judge's conclusion here. He simply did not accept – for the reasons he gave – that Mr Macey had the requisite "subjective" intention. That, as it seems to me, is a conclusion the Judge could properly reach on the evidence before him, and one which did not involve impeaching Mr Macey's honesty.[16] To be absolutely clear, Mr Clark (who acted for Pizza Express both before me and below before the Judge) expressly disavowed any intention to question Mr Macey's honesty, and no cross-examination along these lines took place. It was not open to the Judge to find that Mr Macey was lying about his intentions, and the Judge did not do so. Rather the Judge concluded that, although Mr Macey was asserting that he had a "firm and settled" intention, considering the totality of the evidence, Mr Macey had (perfectly understandably and innocently) mischaracterised his state of mind. His "intention" was insufficiently firm and settled to constitute "subjective" intention for the purposes of section 30(1)(g).

(2) *The index of suspicion.*[17] I readily accept that this is an unfortunate phase, and that the Judgment would have been better had a different phrase been used. The Judge used the term on multiple occasions, but as a shorthand for indicating why he did not accept that Mr Macey's intention was as firm or as settled as Mr Macey himself contended. As I have said, I do not regard this as a question of honesty: and neither did the Judge. In the context of this case, it would have been better had the Judge referred to the "firm and settled" nature of intention or (as he frequently did in other parts of his Judgment) referred to the distinction between the "valley of decision"

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[16] The Judge reached the conclusion on the basis of: *(i)* his view of Mr Macey's evidence; *(ii)* his view in relation to the evidence Mr Macey failed to call; and *(iii)* his view of Pizza Express' evidence, in the form of Ms Carbone. There was some suggestion on appeal that the Judge should have rejected Ms Carbone's evidence as inadmissible expert evidence. That point, however, was not taken before the Judge at first instance, and it is too late to take it now (even if it were right). But it is not right. Ms Carbone was not giving expert evidence: she was merely identifying points of fact that might justify a conclusion that Mr Macey lacked the requisite intention to fall within section 30(1)(g) of the 1954 Act.

[17] See paragraphs 18 and 19 of Mr Macey's appeal skeleton.

and the "zone of contemplation". These, of course, are Asquith LJ's words,[18] and they well express the line between intention and its absence. "Index of suspicion" is a poor substitute, but this attack upon the Judgment is not more than a suggestion that the Judgment could have been better expressed. That, doubtless, is a criticism that could be made of many judgments, at all levels. It does not give rise to a substantive ground of appeal.

(3) *Requiring further witnesses.*[19] The suggestion is that the Judge required corroborating evidence as an *ex ante* burden or obligation on Mr Macey, and that (absent such evidence) Mr Macey's case would fail for a lack of corroboration. That suggestion is misconceived:

(a) All that the Judge did – in referring to Mr Macey's failure to call his children and his accountant to give evidence – was to consider, as he was entitled to do, the significance of Mr Macey's failure to call evidence which he could have adduced in support of his case.[20]

(b) This was a course that was perfectly open to the Judge. In *Wisniewski v. Central Manchester Health Authority*,[21] Brooke LJ articulated the following principles:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in order words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence may be reduced or nullified."

(c) In this case, Mr Macey relied upon the involvement of his children in his proposed venture and the work done by his accountants (which he was himself unable sufficiently to explain, as the Judge found) to support his seriousness of purpose and the existence of an intention within the meaning of section 30(1)(g) of the 1954 Act. These persons could have given evidence on point of relevance to Mr Macey's case, and Mr Macey could

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[18] See paragraph 11(2) above.

[19] See paragraphs 20*ff* of Mr Macey's appeal skeleton.

[20] See paragraphs 13(6) and 13(8) above.

[21] [1987] PIQR P324 at P340.

have called them as witnesses. He did not. The Judge was entitled to draw the inferences he did. He concluded that the failure to call these witnesses lessened the weight of Mr Macey's own evidence.

(4) *Wrongly dismissing factors as irrelevant.*[22] Essentially, by this point, Mr Macey is seeking a re-evaluation of the weight that the Judge attached to certain factors like the steps taken by Mr Macey to develop his venture, his communications with Pizza Express and the business plans Mr Macey put forward. It is inappropriate, in an appeal, to review the Judge's evaluation of the evidence on a pure point of fact as if the appeal were a re-hearing. I am in no position to conduct such a re-evaluation, and I cannot properly do so unless the Judge is "plainly wrong". In my judgment, he was not, and there is no scope for me properly to review his findings.

34. For all these reasons, Grounds C and D are dismissed.

J. CONCLUSION AND DISPOSITION

35. All of the grounds of appeal fail, for the reasons I have given. The appeal must be dismissed. In these circumstances, it is unnecessary for me to consider the points raised in the Respondent's Notice.

[22] See paragraphs *33ff* of Mr Macey's appeal skeleton.