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The landlord's intention for the purposes of Ground (f) and (g) of the Landlord & Tenant Act 1954 (given the Court of Appeal decisions in Gulf Agency Ltd v Ahmed and Hough v Greathall Ltd)

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Introduction

1. Part II of the Landlord and Tenant Act 1954, which confers security of tenure on business tenants, is perhaps one of the most widely used and best understood pieces of legislation in the field of property litigation. It is therefore relatively rare for thOSE provisions to be considered at the level of the Court of Appeal.

2. However, in two recent decisions, the Court of Appeal has considered the issue of what a landlord must do to show that it has the requisite intention to make out the grounds of opposition specified in s. 30 (f) (redevelopment) and (g) (occupation by landlord) and when that intention must be established.

3. These two decisions do not, in fact, involve any real departure from established principles (indeed, the decision in Hough v Greathall, as we shall see, confirmed that the amendments introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 had not brought about any change in the law).

4. Nevertheless, these decisions offer some useful guidance to practitioners as to what a landlord must prove to resist the grant of a new tenancy. The case of Gulf Agency Ltd v Ahmed also provides an interesting example of some rather unwise judicial interventions leading to an appeal based on apparent judicial bias.

The scheme of the 1954 Act

5. The general operation of the 1954 Act will be familiar (probably over familiar) to many here. I hope I will be forgiven for what is probably an unnecessary reminder of its basic structure:

(1) The 1954 Act applies to any tenancy of premises which are occupied by the tenant for the purposes of its business, unless the parties have agreed to exclude the operation of the Act in accordance with the prescribed procedure;

(2) Where the Act applies the tenancy does not end on the contractual term date but is continued by the statute unless and until it is terminated in accordance with the provisions of the Act;

(3) Either the landlord or the tenant may invoke the provisions of the Act so as to terminate the existing tenancy, thus:

(a) A tenant can request a new tenancy by serving a notice under s. 26 of the Act. If the landlord wishes to oppose the grant of a new tenancy it must serve a counter-notice within 2 months of the service of the s. 26 notice specifying its grounds of opposition. In those circumstances the tenancy will end on the date specified in the s. 26 notice unless, before that date, one of the parties (in practice invariably the tenant) applies to the court for an order for a new tenancy.

(b) On the other hand, the landlord can terminate the tenancy by serving notice under s. 25 of the Act. The notice must be served not less than 6 months but not more than 12 months prior to the date specified for the termination of the notice and that date cannot be earlier than the contractual expiry date. The tenant is not now obliged to serve any counter-notice but must apply to court before the date specified in the s. 25

notice (or agree an extension of time), failing which the tenancy will terminate on that date.

(4) The landlord is entitled to oppose the grant of a new tenancy either in a s. 25 notice or in a counter-notice to the tenant's s. 26 notice. A landlord cannot amend the grounds of opposition and will be restricted at trial to the grounds specified in the relevant notice.

(5) The grounds upon which a landlord is entitled to oppose the grant of a new tenancy are those set out in s. 30 (1) of the Act. These include grounds (f) (redevelopment) and (g) (intention by the landlord to occupy the premises).

The grounds of opposition

6. S. 30 (1) of the Act sets out a total of seven grounds of opposition upon which a landlord can rely to resist an application for a new tenancy. The first three of these (grounds (a) – (c)) relate to breaches of covenant by the tenant (either non-payment of rent or other breaches). Ground (d) enables the landlord to offer suitable alternative accommodation. Ground (e), which is rarely encountered in practice, only arises where the relevant tenancy was created by the subletting of part of the property comprised in a superior tenancy and the landlord requires possession of that part to be able to dispose of the property as a whole.

7. The remaining two grounds, (f) and (g), both require the landlord to prove that it has a particular intention in respect of the property. Ground (f) says:

> *"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."*

8. Ground (g) in turn states:

> *"…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."*

9. The word "intends" therefore appears in both grounds (f) and (g) and, unsurprisingly, the courts have treated it as having the same meaning in relation to both grounds of opposition.

The two elements of intention

10. It is well settled that, for these purposes, intention has two aspects. The first aspect is an entirely subjective assessment of the state of mind of the landlord. The question is simply whether the landlord has formed an intention to do the redevelopment works or to occupy the property.

11. However, even in the case of the subjective aspect, it is not enough for a landlord simply to assert that it holds the relevant intention. The test, in the memorable words of Asquith L.J. in Cunliffe v Goodman [1950] 2 KB 237 at 254, is whether there is on the part of the landlord:

> *"a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved 'out of the zone of contemplation…into the valley of decision'.*

12. I will return to this subjective element of the test for intention when considering the decision in Hough v Greathall Ltd.

13. The second aspect of intention is usually much more contentious, probably because this is where the tenant has the opportunity to advance a positive case. Here the court carries out an objective assessment of the realistic prospects of implementing the

intention which the landlord holds. In order to succeed the landlord will have to show that a reasonable landlord would believe that he had a reasonable prospect of overcoming any hurdles in the way of carrying out his intention, such as for example obtaining sufficient financial resources or obtaining planning permission.

14. However, the threshold for a landlord to cross is not particularly onerous. As Laws L.J. said in Gatwick Parking Services v Sargent [2000] 2 EGLR 45, in the context of addressing the question of whether or not the landlord was likely to get planning consent for a proposed development:

> *"He does not have to demonstrate a balance of probability that permission will be granted. He has to show that there is a real, not merely a fanciful chance."*

The problems for a tenant faced with an opposed renewal

15. I think it is fair to say that when it comes to an application for a new tenancy which is opposed on grounds (f) and (g) a landlord holds most of the cards. The tenant can only seek to cast doubt upon whether or not the intention is genuinely held and seek to throw up hurdles which will prevent the intention being carried into effect.

16. However, the landlord will control all or most of the relevant evidence. Furthermore, a landlord does not have to establish that his proposals are economically viable (provided that they are genuinely held and implementable). Nor is the landlord's motive relevant. Provided that the landlord can prove he has a genuine intention to do the works proposed and there are no serious obstacles to his carrying them out, it matters not if the landlord is motivated solely by the desire to be rid of a particular tenant. The lack of commercial viability and any unsavoury motive will only be of assistance if it undermines the genuineness of the landlord's intention. In that sense the more spiteful the landlord is and the more desperate he is to get rid of a tenant, the greater the prospects of success!

17. The only feature of the Act which offers a counter-balance to this is the obligation of the landlord to pay compensation to the tenant if it successfully resists the grant of a new tenancy only on one of the compensation grounds (which includes both grounds (f) and (g)). That will often be little comfort, however, because that compensation (which is based on rateable value) will not always be particularly significant.

18. Furthermore, landlords commonly adopt the practice of specifying a non-compensation ground alongside grounds (f) or (g) in their s. 25 notice or counter-notice. When this is done, the tenant must either vacate and forgo compensation or, alternatively, put the landlord to proof on the non-compensation ground solely in order to secure payment of compensation, leading to unnecessary and costly litigation.

19. To make matters worse from the tenant's point of view, the relevant date for assessing whether or not the landlord holds the requisite intention is the date of the hearing of the application for a new tenancy. Accordingly, the tenant must enter into litigation without any real certainty as to the strength or otherwise of the landlord's case. Aside from possible adverse costs consequences, there appears to be nothing to prevent a landlord from changing or firming up his intentions (and the evidential basis for his case) right up until the trial.

20. This has been the position since the decision of the House of Lords in Betty's Cafes Ltd v Phillips Furnishing Stores Ltd in 1959. The first of the two recent cases with which this talk is concerned affirmed that the principle still holds good.

Hough v Greathall Ltd

21. In this case, the landlord of business premises served a s. 25 notice opposing the grant of a new tenancy under ground (f). The tenant applied for a new tenancy and argued that, as at the date the notice was served, the landlord did not have the requisite intention to carry out the works, in the sense I have just described.

22. The trial judge (Judge Ellis sitting at the Croydon County Court) held, applying Betty's Cafes, that the relevant date for the ascertainment of the landlord's intention

was the date of the hearing before him, the landlord had duly established its intention and the application for a new tenancy was accordingly dismissed.

23. The tenant appealed to the Court of Appeal arguing that the effect of an amendment to s. 25 (6) of the Act introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the 2003 Order") was that Betty's Cafes was no longer good law and that the landlord had to prove that its intention existed at the date of the service of the s. 25 notice.

24. The tenant's argument ran as follows. As originally enacted the 1954 Act required a tenant who received a s. 25 notice to serve a counter-notice stating whether or not he was willing to give up possession of the property on the termination date. This requirement was imposed by s. 29 (2) of the original Act.

25. It became apparent that the requirement for a tenant's counter-notice served little practical purpose and operated merely as a trap for the unwary tenant. The 2003 Order therefore removed the requirement for a counter-notice. The tenant was now only required to apply to court before the date specified in the s. 25 notice.

26. At the same time, the 2003 Order made amendments to s. 25. As originally enacted, s. 25 (6) said:

> *"A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court…for the grant of a new tenancy."*

27. Following the 2003 Order the amended s. 25 (6) now reads:

> *"A notice under this section shall not have effect unless it states whether the landlord is opposed to the grant of a new tenancy…"*

28. The tenant argued that the change of wording from *"would oppose"* to *"is opposed"* indicated a change to the date when the landlord had to show it had formed the requisite intention. The use of the present tense in the amended s. 25 (6) could only be explained, it was argued, by an express intention on the part of the legislature to focus on the date of the landlord's notice rather than the date of trial.

29. To buttress that argument, the tenant also pointed to the practical advantages to a tenant which would result from a finding that the landlord must have formed its intention before the issue of proceedings. This would, it was said, enable a tenant to ask for pre-action disclosure and engage in pre-action protocol correspondence to test whether or not the landlord was genuine. The tenant would therefore be relieved to some degree from having to embark upon litigation without knowing the strength of the landlord's case and without facing the prospect that the landlord's position would be improved during the course of the litigation.

30. The Court of Appeal was not impressed by the tenant's argument and dismissed the appeal.

31. McCombe LJ (who gave the only reasoned judgment) considered that there was nothing in the language introduced by the 2003 Order which required the landlord to have in place at the date of the notice all the elements that would enable him to prove that he had the requisite intention at that time. His Lordship explained:

> *"It seems to me that the change in wording in section 25…was precipitated by the abolition of the counter-notice procedure. The old subsection (6) used the conditional tense ("would oppose") for the case where the landlord was waiting to see whether or not a counter-notice would be served stating the tenant's unwillingness to give up possession. Once the counter-notice provisions fell out of play, there was no need for the conditional tense. That, in my view, was the sole purpose of the amendment."*

32. It is hard to quibble with the conclusion that there is nothing in the background to the 2003 Order (including the Law Commission consultation which preceded it) which suggests that Parliament intended to reverse the decision in Betty's Cafes. However, with the greatest respect, the linguistic analysis here may not be entirely perfect.

33. Even in the absence of the counter-notice procedure the landlord will still have to wait and see whether the tenant makes an application for a new tenancy. If no application is made there will be no need to oppose it just as was the case under the previous provision if no counter-notice was served. Accordingly, on strict linguistic analysis, the removal of the requirement to serve a counter-notice did not, necessarily and of itself require any amendment to s. 25 (6). It would remain accurate to have left the conditional tense unamended.

34. The tenant's argument based on practicality, the culture of co-operation between the parties and the use of pre-action protocols envisaged in the CPR also received short shrift. McCombe LJ eschewed the usual practice of giving lip service to the overriding objective and the value of the pre-action protocols in narrowing disputes. His Lordship adopted a view which might well chime with practitioners as more realistic when he said:

> *"I do not find it persuasive that new procedures are now available for pre-action disclosure and pre-action protocol correspondence under which a landlord might be required to produce his supporting material before the inception of proceedings. In my judgment, this flies in the face of the realities of this type of proceeding. The 1954 Act prescribes rigid time limits with which each party is to comply and an application to the court will normally be required to be launched before such niceties of civil procedure could usefully be deployed."*

35. This is true, no doubt, but it is rare to find such judicial candour about the general uselessness of the pre-action protocols as a mechanism for testing the strength of the other side's case.

The Gulf Agencies Limited v Ahmed

36. The second recent decision on the 1954 Act is the Court of Appeal's decision, handed down only a few weeks ago, in Gulf Agencies Ltd v Ahmed. In this case the Court of Appeal provided some useful guidance as to how s judge should approach the subjective element of intention (in this case, under ground (g)). However, the case is probably more notable for an unrelated and rare allegation of judicial bias.

37. This case concerned premises on Edgware Road, London. The landlord, Mr Ahmed, owned the whole of the building, the three upper floors being let to residential tenants. The ground floor and basement were let to Gulf Agencies Ltd pursuant to a tenancy which was protected by the Act.

38. The landlord is a solicitor practising under the name Freeman Solicitors from premises just around the corner from the subject premises, on Bell Street. In a possibly unusual diversification of his business interests, as well as being a solicitor, Mr Ahmed was also the owner and director of a minicab business which ran its business from a third property a little further up Edgware Road.

39. Mr Ahmed served a s. 25 notice on his tenant opposing a new tenancy on grounds (f) and (g), although ground (f) was dropped before the matter came to court. Mr Ahmed's plan was to use the premises for both his solicitors practice and his minicab business. This, he said, made more economic sense then paying rent for two commercial units.

40. The tenant issued an application for a new tenancy and the matter came on for trial before His Honour Judge Mitchell at Central London County Court.

41. Perhaps understandably, perhaps not, the proposed solicitor/mini-cab combination appears to have piqued Judge Mitchell's curiosity. So much so that at the start of the trial the judge raised a concern with Mr Ahmed's counsel that his client might not in fact be a qualified solicitor. The learned judge is recorded as saying:

> *"…the Law Society seem to be unaware that your client is a solicitor. They are aware of the Freeman Solicitors Ltd, but the search for Ahmed, Abdul Salem Seid returns nil results."*

42. The judge explained that he had carried out a search of the Law Society's website and that Mr Ahmed's name had not come up. Mr Ahmed's counsel (no doubt somewhat taken by surprise by this turn of events) explained that no-one had at any time questioned his client's credentials so there had been no reason to address that point in evidence. The judge allowed a short adjournment.

43. Thereafter, as the judgment in the Court of Appeal laconically records:

> *"counsel for the landlord was able to confirm that the landlord was a solicitor and gave his roll number. The judge had searched the Law Society website under the wrong name…"*

44. The judge appears to have accepted his mistake and the trial continued without further reference to Mr Ahmed's qualifications, until the following exchange took place during cross examination. Mr Ahmed was asked by his counsel to confirm he was a solicitor, which he duly did. Judge Mitchell then explained:

> *"I tell you, Mr Ahmed, the number of people who have come in here who aren't who they say they are is quite extraordinary.*

45. Mr Ahmed was eloquent in reply:

> *"I wouldn't do that for a million pounds, Sir. I am also a member of the highest and oldest legal profession. I am a notary public as well and I practise from the same address…"*

46. The judge expressed his acceptance of this before saying:

"the problem is that we get people who aren't who they say they are. Yes, even doctors. We've had two or three doctors that were not qualified. It's extraordinary."

47. The judge then proceeded to deliver a judgment in which he made no reference to his concerns over Mr Ahmed's qualifications or *bona fides*. The judgment did, however, conclude that Mr Ahmed had satisfied neither the objective nor the subjective elements of the test for intention. Put simply the judge did not accept either that Mr Ahmed genuinely intended to move his solicitors practice and mini-cab firm to the premises or that he would get planning permission to do this.

48. Mr Ahmed appealed on three grounds:

(1) Apparent bias on the part of the judge;

(2) On the subjective element of intention, that the judge had relied upon the burden of proof instead of making a positive finding that Mr Ahmed was lying about his intentions;

(3) As to the objective element of intention, that the judge's conclusion that Mr Ahmed had not established a reasonable prospect of being permitted to carry on his solicitors practice or his minicab business at the premises was wrong as a matter of planning law.

49. The Court of Appeal allowed the appeal on the second two grounds, but dismissed the ground based on bias.

50. As regards bias, Lord Justice David Richards (who gave the only reasoned judgment) was critical of Judge Mitchell's conduct but did not consider it gave rise to sufficient grounds to challenge the judgment. His Lordship said:

"[the judge] *had formed a jaundiced view generally of parties and witnesses at the Central London County Court* [I interpose to say that this is nothing

compared to the jaundiced view which parties have formed of the administration of that court, but that is another matter]

The judge continued:

"It hardly needs saying that generalised views of that type provide no basis for approaching the evidence of the parties or witnesses in any particular case with scepticism from the outset. Judges should form their views of the evidence in a case on the basis of the evidence and the circumstances of that case. It follows that the explanation given by the judge for doubting whether the landlord was in fact a solicitor, namely his experience in other cases, did not provide a legitimate ground for his doubts. In a case which clearly involved the credibility of the landlord, his online researches before the start of the trial unfortunately but inevitably gave the impression that he was looking for evidence adverse to the landlord. This impression was all the stronger as the tenant had no issue or doubts on this subject and it was aggravated by the judge's unwarranted references to his experience of prosecuting swindlers and to impersonation as a solicitor being a criminal offence."

51. However, having had the matter cleared up and the judge apparently being satisfied about Mr Ahmed's credentials, there was nothing in the judgment itself which suggested apparent bias. Accordingly, there was insufficient ground to set aside the judgment on that basis.

52. Perhaps fortunately for the Court of Appeal, it was satisfied that it had other grounds for remitting the matter for a new trial. It is therefore a matter of conjecture as to whether or not the bias ground of appeal would have been treated differently had it stood alone.

53. To return to the main focus of this talk, the landlord challenged the judge's conclusion that he had not made out the requisite intention. On the subjective element, the tenant challenged whether the landlord's proposal to use the premises for a shared solicitors/mini-cab office was genuine.

54. The tenant relied on a lack of evidence as to how the premises would be adapted to serve this purpose and how this arrangement could work in practice (for example, would clients of the solicitors be required to walk through a mini-cab waiting room/office). The tenant also pointed to inconsistencies in the landlord's evidence in respect of the lease or licence of the other premises presently occupied by the landlord for his two businesses and when these would come to an end.

55. The issue was squarely put to the judge by both parties as a straightforward question of whether the landlord was being truthful in his evidence. Was Mr Ahmed lying about his intention that his two businesses would share the premises, counsel asked the judge.

56. The landlord's ground of appeal was that the judge had failed to make any express finding on the question of the landlord's honesty. Instead, the judge simply said:

> *"I cannot find a firm and settled intention. Yes, the defendant asserts that he has that intention but it seems to me that the material is not there to support an intention to occupy the premises.."*

57. The Court of Appeal agreed that the judge's approach to this question was not appropriate:

> *"In view of the very clear evidence of the landlord, the task for the judge was to decide whether he believed the landlord and, particularly, if he did not believe him, to state clearly his reasons.,, The result is that while… a fair reading of the judgment suggests that the judge implicitly did not believe the landlord, there is no express finding to that effect and no clear reasons for that conclusions. That is an unacceptable way of deciding the case… It is a*

> *very serious concern for the landlord that he appears to have been disbelieved without any clear finding or any clear statement of the grounds for that finding."*

58. On this basis the judgment should be set aside and the matter remitted for a new trial.

59. The Court of Appeal also allowed the landlord's appeal on the issue of the objective element of intention. The issue here was whether the landlord had, or could reasonably hope, to get planning permission for his proposed use.

60. At the time of the trial there was a subsisting certificate for lawful use issued to the tenant and establishing Class A1 user (retail). The landlord had lodged an objection to that certificate, but it had not been determined by the date of the trial. The landlord's case was that as a matter of planning law, it would be lawful to use the premises under class A2 (financial and professional services) for a period of two years without the need to obtain permission. This was not disputed by the tenant as a matter of law.

61. Nevertheless, the judge considered that this was not sufficient to establish objective intention. The judge explained:

> *"I have no evidence at all from Mr Ahmed about what he would do in the event that change of use was not permitted after a period of 18 months or two years and what consideration he has given it. It seems to me to indicate that he has not and it is yet another issue that comes under (not under putting things into effect) the question of his intention."*

62. The judge therefore appears to have accepted that as a matter of law the use of the premises by the landlord for the purposes of his own business for a period of up to two years would be sufficient to satisfy the objective element of intention. If that is what the judge decided, it was in accordance with the decision in Patel v Keles [2010] Ch 332 where Arden LJ said that the intended occupation of the landlord "*must not be fleeting or illusory"* and *"must be more than short term".*

63. However, the Court of Appeal considered that the judge's decision on this issue was also unsatisfactory. The passage quoted above suggested that the judge may have considered that the lack of evidence as to what Mr Ahmed would do after a period of two years meant that he could not establish intention in the objective sense, albeit that it was not altogether clear what finding the judge had reached on this issue.

64. Citing the decision in Patel v Keles, Richards L.J. explained if the judge had concluded a period of two years occupation was insufficient for ground (g) then he was wrong. A period of two years was more than short term occupation and, in any case, it would be very difficult for the court to speculate as to whether a permanent permission for change of use would be given at the end of the period of two years. The factors bearing on that decision by the local planning authority in two years' time would be largely a matter of speculation at the time of the trial.

65. Accordingly, the judge's findings on the objective element of the test (to the extent he had made any) also had to be set aside.

66. Leaving aside the unusual circumstances of this case and the idiosyncratic approach to the landlord's evidence taken by the trial judge, the Court of Appeal's judgment serves as a useful example of how, in practice, the court should approach the question of landlord's intention. The first element is genuinely subjective and must, therefore, depend on an assessment of whether or not the landlord is truthful. The tenant can seek to rely on inconsistencies and lack of evidence to cast doubt on that, but ultimately the question which the judge must address is whether or not he or she believes the landlord. Whilst unavoidable, this hardly makes it any easier to advise a tenant as to whether or not they have prospects of success.

67. As for the objective element, the case illustrates once again that the landlord is in a powerful position. The landlord does not need to demonstrate that the occupation under ground (g) will be anything like permanent or amount to a viable business model. Provided that the landlord genuinely intends to occupy the premises for

anything more than a period which can be described as short term, fleeting or illusory, that will be sufficient.

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