Browne Jacobson

Duval v 11-13 Randolph Crescent Ltd [2018] EWCA Civ 2298

A landlord breached an obligation to enforce lease covenants by licensing a flat tenant to carry out alterations despite an absolute prohibition.

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Facts

The leases of flats in a building all contained absolute covenants by the tenants not to cut into any walls or ceilings. They also contained covenants by the landlord (L) that all leases granted in the building would contain similar covenants and that, at the request of a tenant in the building (and subject to security for costs), L would enforce those covenants.

One tenant (W) asked L for consent to carry out works (removing about seven metres width of load-bearing wall at basement level) that fell within the terms of W's absolute covenant. L was willing to grant consent, but another tenant in the building (D) objected.

Issue

Was it implied in the way the covenant was drafted that L's enforcement covenant prevented it from giving consent to W to carry out her proposed alterations?

Decision

L would be in breach of its enforcement covenant to D by giving W a licence to do an act that would otherwise be in breach of W's lease since, to hold otherwise, would defeat the whole purpose of the covenant. There was a long line of authority in which the courts had consistently held that where an obligor undertook a contingent or conditional obligation, it could not prevent the contingency from occurring or put it out of its power from complying with the obligation if and when the contingency arose.

If a tenant was entitled to require L to enforce the absolute prohibition in the face of a threatened breach, it followed that L could not put it out of its power to do so by licensing what would otherwise be a breach of covenant. The lease would not have practical or commercial coherence if L had complete freedom to vary or modify the covenants or to authorise what would otherwise be a breach of them.

Points to note/consider

1. Given how common mutual enforcement covenants are in long residential leases, this case shows how careful landlords have to be if they are asked to licence something that is prohibited under the terms of the lease in question. Ironically, L would have been in a better position had the relevant alterations covenant been a qualified one (i.e. not to carry out the alterations without L's consent). In that situation (as the court conceded in this case), L would not have been in breach of covenant by giving consent.
2. The court did hold that L had no obligation in advance to inform the tenants of what it proposed to do and that if L had already granted the licence and it had been acted upon, a tenant's only remedy would have been damages, which might be insubstantial if the tenant

were acting unreasonably. An injunction would be a possibility if the licence had not been granted (or had not been acted upon), but a court may well refuse to grant an injunction if the objections to the grant of the licence lacked substance.

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