

Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18

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Facts

The leases of flats in a building all contained a qualified covenant preventing the tenant from making any alteration, improvement or addition to the demised premises without the landlord's (L) consent (clause 2.6). They also contained an absolute covenant by the tenant not to cut, maim or injure any roof, wall, ceiling or service media within the demised premises (clause 2.7). They also contained a covenant by 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 (clause 3.19).

One tenant (W) asked L for consent to carry out works (removing a substantial part of a load-bearing wall at basement level) that fell within the terms of clause 2.7. L was willing to grant consent, but another tenant in the building (D) objected.

Issue

Did clause 3.19 of D's lease prevent L from permitting W to act in breach of the terms of clause 2.7 of W's lease?

Decision

Clause 2.6 was concerned with routine improvements and alterations by a tenant to their flat whereas clause 2.7 (when read in conjunction with clause 2.6) was concerned with activities which may be damaging to (or destructive of) the building. In the light of that distinction, it was entirely appropriate that works of the kind that W wished to carry out should require the consent of all the other tenants in the building, including D.

Clause 3.19 performed an important protective function for all the tenants in the building. It would not therefore give practical content to the obligation in clause 3.19 if L could vary or modify clause 2.7 or authorise what would otherwise be a breach of it.

A term should be implied into D's lease that L would not put it out of its power to enforce clause 2.7 in the leases of other tenants in the building by licensing what would otherwise be a breach of that clause. It would be uncommercial and incoherent to allow clause 3.19 to be deprived of practical effect by permitting L to give a tenant of a flat consent to carry out works in breach of clause 2.7 before another tenant in the building made an enforcement request (and provided the necessary security). The parties cannot have intended that such a valuable right could be defeated depending on who happened to act first.

Points to note/consider

1. Given how common mutual enforcement covenants are in long residential leases, the outcome of this case will make management of blocks of flats more complex for landlords in the future. Landlords will have to be very careful if they are asked to license something

that is absolutely prohibited under the terms of the lease in question where other tenants in the block may object to it and will need to ensure that any mutual enforcement covenant is at the forefront of their thinking when coming to a decision. It is also important for landlords to remember that although this case concerned an absolute covenant against alterations, the same principle is likely to apply to other absolute covenants in a lease where the landlord is considering licensing what would otherwise be a breach of one of those covenants (e.g. a covenant restricting use for any purpose other than as a private residence by a single family, a covenant not to keep a pet, a covenant not to lay wooden floors etc.).

2. This decision could also have repercussions for tenants. Landlords are much less likely in the future to agree to a tenant doing something perfectly reasonable and well-intentioned that would technically be in breach of an absolute covenant in the tenant's lease. It now seems likely that a well-advised landlord will refuse any request for consent unless it can obtain approval from all the other tenants in a block, which will not be practical in a large block or where the tenants do not get along. Alternatively, the landlord may require an indemnity from the tenant requesting consent for any potential liability it may incur to other tenants in the block. It also means that tenants in a building may well find their actions more heavily scrutinised and policed in the future by other tenants – a situation hardly conducive to neighbourly goodwill.
3. When drafting new long residential leases, assuming landlords are still prepared to enter into mutual enforcement covenants at all as a result of this case, it would seem sensible to include express wording in a mutual enforcement covenant making it clear that a landlord is free to license what would otherwise be a breach of an absolute covenant without needing approval from all the other tenants in the block.

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