Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18[1]

Landlords and Lessees beware

by David de Jéhan

1. Issue: mutual enforceability covenants of the type nearly inevitably found in leases of, here, residential properties. The same classes of clauses are usually found in commercial property agreements.

2. The question was whether the landlord of a block of flats is entitled, without breach of covenant, to grant a licence to a lessee to carry out work which, but for the licence, would breach a covenant in the lease of his or her flat, where the leases of the other flats require the landlord to enforce such covenants at the request and cost of any one of the other lessees

3. The premises, 11-13 Randolph Crescent, had been two mid-terraced houses in Maida Vale, knocked into one and converted into 9 flats – the irony will become apparent.

4. Each flat, in what was now described as a block, had a common incorporated landlord, in which each of the lessees was a shareholder (the typical management Company arrangement in which title to the freehold is held for each of the lessees). Each flat was let on a 125 year-long lease which contained, at clause 2,6, a covenant "not without previous written consent (of the landlord) to make alterations,

[1] https://www.bailii.org/uk/cases/UKSC/2020/18.html

improvements, or additions to the demised premises", and at clause 2.7, an absolute covenant by the lessee "not to commit waste, nor to cut, maim or injure any wall within or enclosing the demised premises". At clause 3.19, the lease contained a covenant by the landlord to enforce any covenant entered into by another lessee in the block of a similar nature to the covenant contained in clause 2.7, if the tenant so requested and provided security for the landlord's costs.

5. Dr Duval owned two of the nine flats. Her neighbour, Martha Winfield, wanted to modernise her flat; as part of the programme of improvements she had in mind, she would remove a substantial part of a load bearing wall at basement level – her Architects and structural Engineer had proposed a scheme of works that would ensure that this could be done without compromising the integrity of the building. The works would be insured.

6. The eventual finished interior of Ms Winfield's flat, you would have thought, would be of no consequence to Dr Duval – but Ms Winfield had not factored in her neighbour's intransigence.

7. Having asked for permission from the landlord and received a positive indication, Ms Winfield found herself dragged into a whirlwind of litigation that would land her eventually in the SC.

8. Lewison L.J. in the Court of Appeal had held [21] that if the landlord were to grant to a lessee such as Ms Winfield a licence to do something that would otherwise be a

breach of any of the absolute covenants in clause 2.7 of her lease, it would be committing a breach of its agreement with the lessee of each other flat in the building who enjoyed the benefit of clause 3.19. This was, he thought, implicit in clause 3.19, and it would be the case not only where, at the date of the licence, the other lessee had already made the request and provided the necessary security called for by clause 3.19, but also where the obligation under that clause remained contingent.

9. The issue on appeal to the SC was whether, having identified the right question, Lewison L.J. had answered it correctly. If he had, then lessees of flats in buildings would be stuck with the configuration of the demise for the length of the lease, in some cases as long as 999 years! On behalf of the landlord it was argued that the answer given by the Court of Appeal ended up with a commercially unworkable scheme, which was not that which was contemplated by the parties to the leases when they were granted, and which is a recipe for chaos and conflict in multi-tenanted buildings.

10. The SC then began its examination of what it called "the starting point", or "to construe those terms in context, that is to say **to ascertain the meaning which they would convey to a reasonable person** having all the background knowledge which would reasonably have been available to the parties to each lease in the situation in which they were when the terms of those leases were agreed" [emphasis added]. Paragraphs [27] to [30] are the features that the SC decided are important.

11. The reference to "objectivity" is, you might think, highly artificial ,as what is included or excluded as material to the assessment of what the man on the Clapham Omnibus ("a reasonable person having all the background knowledge which would reasonably have been available to the parties to each lease in the situation in which they were when the terms of those leases were agreed") would think is in fact subjective. A Court cannot sensibly contemplate what a lessee might reasonably have expected 35 years earlier, or might do in 50/100/900 years time – new windows, satellite TV, (in the past), fibre-optic broadband, and who knows what new technology in the future.

12. The reasoning underpinning the decision is founded "against this background" [31] as "I come to clauses 2.6 and 2.7". [32] – this is where one to the difficulties the decision creates bites, "**routine works** of this kind" should fall within the scope of clause 2.7 and so outside the scope of clause 2.6 "with the consequence that the landlord could, however unreasonably, withhold its consent. It is much more likely, in my opinion, that the parties intended the two provisions to be read together in the context of the lease and the leasehold scheme for the building as a whole. On that approach it becomes clear that the two clauses are directed at **different kinds of activity**. Clause 2.6 is concerned with **routine improvements and alterations** by a lessee to his or her flat, these being activities that all lessees would expect to be able to carry out, subject to the approval of the landlord. By contrast, clause 2.7 is directed at **activities in the nature of waste, spoil or destruction** which go **beyond routine alterations and improvements and are intrinsically such that they may be damaging to or destructive of the building**. It seems to me that this

concept of waste, spoil or destruction should also be treated as qualifying the covenants not to cut, maim or injure referred to in the rest of the clause. In my opinion and in the context of this clause these words do not extend to cutting which is not itself destructive and is no more than incidental to works of normal alteration or improvement, such as are contemplated under clause 2.6.". The new issue, and therefore difficulty for owners of leaseholds and leases, is what proposed activity a Court will hold is "routine improvements and alterations" (rewiring? replacement plumbing? new kitchen? new bathroom?) and what it will decide is "waste, spoil or destruction".

13. The SC's "waste, spoil or destruction" might be my modernisation, renovation and improvement, much of course, as had occurred when 11 and 13 were knocked into one and turned into flats. This, of course is the irony of the decision. Terraced houses that presumably someone had thought would be better used as flats was converted. That would be the last time this could occur, absent the agreement of all the lessees or the purchase by one person or entity of all the flats at some date in the future.

14. [41] "Dr Duval continues, the inclusion of clause 3.19 in each lease provides **a practical way** of ensuring that all lessees know **the principles and rules upon which the building will be operated and occupied**. Dr Duval accepts that, absent clause 3.19, the landlord and lessee would be free to agree a waiver of an absolute covenant or a licence to carry out a piece of work that would otherwise amount to a breach of its terms, but contends that in this case and **as a result of the inclusion of clause 3.19 in each of the leases**, any such waiver is precluded unless all of the

other lessees agree to waive their rights. Put another way, by undertaking to enforce the covenants of the lease, the landlord has undertaken not to do the opposite, namely to license breaches of covenant" [emphasis added] – on this reasoning, every lessee is held hostage by one recalcitrant neighbour when it comes to modernisations of home improvements. The block as a whole is held frozen in architectural and engineering time in perpetuity during the existence of long-leases - woe betide the person who thinks that their flat/home needs bringing up to date; or who thinks that the victorian WC and separate bathroom might better serve the family as a unitary wet-room bathroom, or that the box room might be more useful as a walk-in wardrobe, or that storage heaters might be replaced by gas-fired central heating etc etc. And what of the property developer who thinks a tired sad old space would best be redeveloped for a new modern urban citizen (who might be fond of ready-meals and doesn't need the waste of space of a kitchen but needs instead a games-room? The landlord made the argument at [58] but it was rejected.

15. Note however where the reasoning adopted by the SC leads [53]: "The purpose of the covenants in clauses 2 and 3.19 is **primarily to provide protection to all of the lessees** of the flats in the building. Each of those lessees would have known that every other lessee **was and would continue to be subject** to the same or similar obligations and, in particular, to the qualified covenant in clause 2.6 and the absolute covenant in clause 2.7. Each lessee would also have known that, under clause 3.19, the landlord would, upon satisfaction of the necessary conditions, enforce those obligations. Clause 3.19 would therefore have been **understood by every lessee to perform an important protective function**". The question is

whether it is **protection** or **stifling**? What is the lessee being "protected" from? Progress?

16. The danger to landlords is that explained in [57], namely "I recognise that if a landlord waives its right to complain of an activity by a lessee in breach of clause 2.7 it cannot subsequently bring a claim against that lessee for breach of the covenant. But that does not mean to say that the landlord has not acted in breach of its obligation under clause 3.19 to another lessee" and is therefore liable for any losses caused to the other lessees. Equally, a lessee is not immune from a challenge to a licence granted on an earlier occasion by the landlord which on the new analysis was granted unlawfully.

17. So, if a landlord has given consent to a lessee to modernise a flat, that landlord now faces the prospect of being found liable for breach of covenant if any other lessee for instance, has an axe to grind about the neighbour's open-plan kitchen in place of the old kitchen and dining room, which the landlord authorised. Beware. Likewise, a purchaser of converted or modernised leasehold premises needs to be sure that any licence that was granted was granted lawfully (within the new interpretation).

18. There is one hero, you might think, in this story. For me, the honour goes to Deputy District Judge Chambers who after a trial held that the landlord could not give its permission absent the consent of all the other lessees. Part-time, alone, with no doubt a fabulously busy list, the DDJ reached the right decision. On appeal s/he is overturned by Judge Parfitt, who is the only Judge to think that what is about to

unfurl is a moment of madness with very serious consequences for lessees and their landlords everywhere. On appeal to the Court of Appeal, Lewison L.J. has the help of Newey LJ and Sir Stephen Richards when deciding that DDJ Chambers got the right answer. And by the time the appeal is decided by the SC, Lord Kitchin has the help of 4 other Secretary Justices as well as the reasoning of DDJ Chambers and Lewison L.J.

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