DUVAL V 11-13 RANDOLPH CRESCENT

[2020] UKSC 18

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1. The case concerned flats in two mid-terraced houses in Maida Vale that had been converted into a single block of nine flats. The property originally formed part of the Church Commissioners' Maida Vale estate. In the 1980s the Church Commissioners granted long leases to purchasers of the flats. The term of each of the leases was 125 years from 24 June 1981. The leases were all in virtually identical terms.
2. Two of the leases (those of flats 11G and 11H) are now held by the claimant, Dr Julia Duval. A third lease (that of flat 13RC) is held by Mrs Martha Winfield.
3. The freehold owner was a now a resident-owned company, which also carried out all the management obligations with respect to the block. All the leaseholders were members of the freehold company.
4. The leases were effectively internal shell lettings with the exterior and structural parts of the building being excluded from any demise and retained by the landlord.
5. There are three relevant clauses which were contained in each of the leases in the block:

   (i) Clause 2.6 is concerned with alterations, improvements and additions and reads:

   > *"Not without the previous written consent of the landlord to erect any structure pipe partition wire or post upon the demised premises nor make or suffer to be made any alteration or improvement in or addition to the demised premises."*

(ii) More importantly, Clause 2.7 (with the heading "waste") reads as follows:

> *"Not to commit or permit or suffer any waste spoil or destruction in or upon the demised premises* ***nor cut maim or injure or suffer to be cut maimed or injured any roof wall or ceiling within or enclosing the demised premises or any sewers drains pipes radiators ventilators wires and cables therein*** *and not to obstruct but leave accessible at all times all casings or coverings of conduits serving the demised premises and other parts of the building."*
> (emphasis added)

As the Supreme Court pointed out, unlike clause 2.6, this clause is on its face an absolute covenant without any express provision allowing the landlord to grant consent to any works which might otherwise be a breach.

(iii) By clause 3.19 of the Lease the landlord covenanted as follows, namely that:

> ***every lease of a residential unit in the building hereafter granted by the landlord*** *at a premium* ***shall contain*** *regulations to be observed by the tenant thereof in similar terms to those contained in the fifth schedule hereto and also* ***covenants of a similar nature to those contained in clauses 2 and 3 of this lease AND at the request of the tenant*** *and subject to payment by the tenant of (and provision beforehand of security for) the costs of the landlord on a complete indemnity basis* ***to enforce any covenants entered into with the landlord by a tenant of any residential unit in the building of a similar nature to those contained in clause 2 of this lease****."*
> (emphasis added)

6. One of the lessees, Mrs Winfield, wanted to carry out works that involved removing a substantial part of a load-bearing wall at basement level. It was common ground that the works would amount to a breach of clause 2.7 if not expressly authorised by the landlord. Mrs Winfield duly applied to her landlord for consent to carry out works. The landlord's board (consisting of a number of the leaseholders) was minded to grant the licence. However Dr Julia Duval, another leaseholder, became aware of the request for consent. She objected to granting it, and so brought a claim for a declaration that the landlord was not entitled to permit Mrs Winfield to act in breach of clause 2.7 of her lease.

7. At first instance, the court held that the landlord had no power to waive the covenant in clause 2.7. That decision was reversed on appeal to Judge Parfitt, who concluded that the landlord could give a licence and, once licensed, the works could not be the subject of enforcement action under clause 3.19. The Court of Appeal took a different view. Lewison LJ concluded that if the landlord were to grant a licence to do something that would otherwise be a breach of clause 2.7, then it would be committing a breach of its agreement with the other lessees who enjoyed the benefit of clause 3.19. It was implicit that the landlord could not do something that would impede its ability to comply with its obligations under clause 3.19 to enforce the covenants against other leaseholders, including clause 2.7.

8. The case was then appealed to the Supreme Court on the ground that this combination of clauses is very common in leases of flats within blocks.

9. There are four things that you may want to now by way of background.

10. The first is that I acted for the landlord at first instance and was sacked when it lost. I don’t feel too bad as my successor was also sacked when he lost in the court of Appeal.

11. The second thing is that, despite the fact that the legal adversaries, Dr Duval and Mrs Winfield, were female, the people who had really fallen out were their respective husbands, who were both solicitors.

12. Thirdly, by the time that the case reached the Supreme Court Mrs Winfield’s proposed works had actually been carried out. So the case was important to the individual parties on costs only.

13. Fourthly, there was a degree of hypocrisy in the Duval's position as they owned two flats which they had knocked together some years previously in the course of which they had carried out the sort of work which they were attempting to prevent Mr and Mrs Winfield from doing.

14. The Supreme Court dismissed the appeal and upheld the Court of Appeal's judgment.

15. The Court identified four important aspects of the factual background to the grant of the leases:

    (i) These were long leases granted at a premium and were thus valuable assets.

    (ii) The parties would have appreciated that, over the lifetime of the leases, each tenant would wish to carry out works of repair refurbishment and modernisation to their flats.

    (iii) It was unlikely, said the Court, that such routine improvements and modifications would have been regarded as likely to impinge on the other lessee or adversely affect the structure.

    (iv) The parties must have regarded it as important that the landlord retained the structure and common parts of the building and played an active role in its management.

16. The Court then turned to look at the relationship between clauses 2.6 and 2.7.

17. One of the arguments made by the landlord was that, if Dr Duval was right, it produced a very impractical and uncommercial result in that the landlord could not license any lessee to carry out apparently minor works of repair and refurbishment such as, for example, cutting into the structural walls to lay pipes or electrical wiring.

18. The Court circumvented that by means of some creative contractual construction.

19. They said that it was most unlikely that the parties to the lease would have intended that such routine works of repair and refurbishment would fall within the scope of clause 2.7 and so outside the scope of clause 2.6. The two provisions had to be read together. They were directed at different kinds of activity. Clause 2.6 is concerned with routine improvements and alterations by a lessee to his or her flat, those being activities which 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. The concept of waste, spoil or destruction was to be treated as qualifying the covenants not to cut, maim or injure referred to in the rest of the clause. Thus the words of clause 2.7 did 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. Clause 2.7 was rather directed at:

> *more fundamental works which go beyond routine alterations and improvements and are intrinsically such that they may be damaging to or destructive of the building. These are the kinds of work which it is entirely reasonable to suppose should not be carried out without the consent of all of the other lessees.*

20. Thus there are certain works ("routine improvements and alterations" or "routine repairs renovations and alterations") which, although they might technically include cutting into the structural parts of the building, nevertheless fall within clause 2.6 and **can** be licensed by a landlord. The nature of what is and what is not such a "routine improvement and/or alteration" is at the moment wholly obscure.

21. However the court said that the landlord's ability to license such works under clause 2.6 was controlled by: the covenant for quiet enjoyment; the principle of non-derogation

from grant; the law of nuisance; the landlord own obligation to repair and maintain the structure.

22. So far as clause 3.19 was concerned, the Court agreed with the Court of Appeal in holding that it involved two separate obligations on the part of the landlord. Firstly, a promise that every lease of a flat in the building would contain covenants of a similar nature to those contained in clause 2 and 3 of the lease. Secondly, a promise that the landlord would, at the request of the lessee and subject to the provision of the required security and promise to pay the costs, enforce any covenant entered into by another lessee which is of a similar nature to any of the lessee's covenants in clause 2 of the lease. These were, the Court held, important assurances from the perspective of a lessee who as paying a substantial premium for the grant of a lease.

23. The Court held that the crucial question was whether a landlord could licence another tenant to carry out works which would otherwise be a breach of clause 2.7. The Court agreed with the landlord that there was no express prohibition in clause 3.9 on the landlord doing that.

24. However the Court held that there was an implied term in the lease that the landlord would not put it out of its power to enforce clause 2.7 by licensing what would otherwise be a breach of it. This was based on the well-established principle:

> *that a party who undertakes a contingent or conditional obligation may, depending upon the circumstances, be under a further obligation not to prevent the contingency from occurring; or from putting it out of his power to discharge the obligation if and when the contingency arises.*

25. The Court held that the purpose of the covenants in clause 2.7 and 3.19 was primarily to provide protection for all the lessees. Clause 2.7 was an absolute covenant and clause 3.19 performed "an important protective function". It would, said the Court, effectively deprive clause 3.19 of practical effect if the landlord had a right to vary or modify this

absolute covenant in clause 2.7 and authorise works which would otherwise be a breach of it. That would be "uncommercial and incoherent".

26. The works for which Mrs Winfield sought consent would have involved, among other things, cutting into and removing a substantial portion of a load-bearing wall at basement level which wall was excluded from the demise of her flat. Those works clearly fell within clause 2.7 and it was right that they could not be carried out unless and until all the lessees agreed.

27. What are the lessons given that such clauses are fairly common in the leases of flats in residential blocks?

28. Well firstly, there are works to the structure which can be licensed by a landlord so long as they fall within the definition of as that fall within the definition of "routine repairs renovations and alterations".

29. Secondly, if in the past a landlord has granted consent to one lessee in a block to carry out works which go beyond "routine repairs renovations and alterations" and which fell within an absolute prohibition such as clause 2.7, then it will technically be liable to any lessee who has not consented for damages for breach of the implied obligation derived from clauses such as clause 3.9. Although any such claim will be subject to the 12 year limitation period and the quantum of any damages is likely to be very small unless the works for which prohibited consent was granted have resulted in increased repairing obligations on the landlord (and thus increased service charges to the lessees) or disturbance to the individual lessee.

30. It is somewhat ironic that Mrs Winfield may now be able to sue the landlord for permitting the works carried out earlier by Dr Duval and her husband.

31. Thirdly the principle will apply not only to alteration covenants, such as clause 2.7 here, but also to other covenants such as user clauses. Thus, if there is a clause preventing

use other than as a private residence by a single family, the landlord will not be able to licence departures from that to permit for example flat sharing by two flatmates, "AirBnB" type short-let arrangements or even working from home. If there is a covenant which compels the lessee to have floor coverings, the landlord may not be able to license a tent to have wooden flooring installed, no matter how much much sound-proofing is installed.

32. Fourthly, the decision may have an impact on the value of these flats. What it means practically is that the layout of each flat is preserved in aspic thought the (very long) term of the lease. That this can be a problem is illustrated by the facts of this case. Dr Duval and her husband had bought two flats and knocked them together. Mrs Winfield wished to modernise her flat by knocking through a wall to create a more modern more spacious layout. These types of work will henceforward be prohibited unless every lessee in the block consents.

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