Landmark Chambers

# Welcome to Landmark Chambers' Property in Quarantine – Part 3: The Landlord's Straitjacket – considering *Duval* and *Aviva*

The recording may be accessed here.

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# Your speakers today are…

**David Holland QC**

**Brooke Lyne**

# Overview

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- Part 1: *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18
  - Context and the lease provisions
  - Implications
- Part 2: *Williams v Aviva Investors Ground Rent* [2020] UKUT 111 (LC)
  - Residential service charges and jurisdiction
  - Apportionment
  - Ousting jurisdiction
  - The cases
  - Is *Aviva* right?

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# Part 1: *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18

# *Duval v 11-13 Randolph Crescent*

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- Flats in two mid-terraced houses converted into nine flats
- 125 years leases in identical terms.
- Two of the leases held by Dr Julia Duval. A third lease held by Mrs Martha Winfield.
- Freehold owner a resident-owned company.
- All leaseholders were members of the freehold company.
- 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.

## Duval: clause 2.6: tenant's obligation

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*"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."*

# Duval: clause 2.7: tenants obligation

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*"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."*

# Duval clause 3.19: Landlords obligation

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***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***

# Duval: four facts

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- DMH acted at first instance and was sacked!
- The people who had fallen out were the husbands: both solicitors.
- By the time that the case reached the Supreme Court the works had actually been carried done.
- Duvals owned two flats knocked together

# Duval: four background matters

- Long leases granted a premium-valuable assets.
- During the term each tenant would wish to carry out works of repair refurbishment and modernisation to their flats.
- Routine improvements and modifications would not impinge on the other lessees or adversely affect the structure.
- Important that the landlord retained the structure and common parts of the building and played an active role in its management.

## Relationship between clause 2.6 and 2.7

- 2.7 did not extend to “routine repairs renovations and alterations”
- These are covered by clause 2.6.
- Clause 2.7 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.*

## Clause 3.19

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- Two separate obligations on landlord
- 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
- Promise that the landlord would, at the request of the lessee and subject to the conditions enforce any covenant entered into by another lessee which is of a similar nature to any of the lessee's covenants in clause 2.

## Clause 3.19: implied term

- 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.
- “uncommercial and incoherent” otherwise

# Duval: Consequences?

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- Works to structure OK as long as “routine repairs renovations and alterations”
- What are “routine repairs renovations and alterations”?
- Landlord open to damages claims?
- Landlords cannot license works to flats or change of use
- Impact on value as original layout “preserved in aspic”

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# Part 2: *Williams v Aviva Investors Ground Rent* [2020] UKUT 111 (LC)

# Residential Service Charges

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- We are talking about residential service charges as defined in s.18, Landlord and Tenant Act 1985 i.e.

  *"an amount payable by a tenant of a dwelling as part of or in addition to the rent …which is payable directly, or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management and… the whole or part of which varies or may vary according to the relevant costs."*

# Jurisdiction

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- Section 27A Landlord and Tenant Act 1985 confers upon the "appropriate tribunal" jurisdiction to determine these disputes.

  "*(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—*

  *(a) the person by whom it is payable,*

  *(b) the person to whom it is payable,*

  *(c) the amount which is payable,*

  *(d) the date at or by which it is payable, and*

  *(e) the manner in which it is payable."*

- Tribunal or the County Court.

# Apportionment of Service Charges

- Usually four methods of apportioning service charges:
  - by floor area;
  - by rateable value;
  - by fixed proportions; or
  - by a duty to pay a “fair proportion” or words to that effect.
- Can the tribunal consider the apportionment?
  - Yes, where it is not fixed by the lease: *Windermere Marina Village v Ian Wild* [2014] UKUT 163 (LC)

# Ousting Jurisdiction

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- Section 27A(6):

  *"(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—*

  *(a) in a particular manner, or*

  *(b) on particular evidence,*

  *of any question which may be the subject of an application under subsection (1) or (3)."*

# *Windermere Marina v Wild* [2014] UKUT 0163

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- Lessees were required to pay a “fair proportion” of the service charges.
- This was to be calculated by reference to a determination by the landlord’s surveyor.
- The surveyor’s decision was said to be “final and binding” on lessees.
- UT said this provision was void.
- Contrary to 27A(6) it sought to oust the jurisdiction of the tribunal and had the effect of providing for the manner in which an issue capable of determination by the tribunal.
- So, the tribunal was entitled to apportion the service charges and work out a “fair proportion” for itself.

# *Gater v Wellington* [2014] UKUT 0561 (LC)

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- The lease provided that service charge proportions were to be determined "by the Landlord or its surveyor (in each case acting reasonably)".
- The determination by the landlord's surveyor purported to be "final and binding".
- Those provisions were void.
- If the parties were unable to agree on a "fair" apportionment, the tribunal was required to determine that question for itself.
- It was not merely a review of the surveyor's approach.

# *Oliver v Sheffield City Council [2017] EWCA Civ 225*

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- Court of Appeal approved *Windermere* and *Gater.*

# But what about alternative methods of apportionment?

- What happens if the lease contains a fixed percentage AND entitled the landlord’s surveyor to re-apportion?

# *Williams v Aviva Investors Ground Rent*

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- The leases contained three different service charge percentages.
- AND made provision for the landlord “otherwise reasonably determine” the apportionment.
- The fixed percentages had never been applied.
  - Percentages for the block only added up to 44%
- Landlord had exercised the contractual discretion to apply different apportionment.

# *Williams v Aviva Investors Ground Rent*

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- First Tier Tribunal
  - Landlord argued that the tribunal retained jurisdiction to re-apportion the service charges
  - Leaseholders argued that the whole provision was void and the fixed percentages ought to have been applied.
  - The FTT accepted the landlord's approach and confirmed that the apportionment was reasonable.

# *Williams v Aviva Investors Ground Rent*

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- Upper Tribunal
  - The FTT was wrong.
  - The discretionary apportionment provision in the lease was void, and therefore had to be struck through.
  - That left the original fixed percentages.
  - The tribunal had no jurisdiction to interfere with fixed percentages.

# *Is Aviva right?*

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- There is a tension between *Aviva* and an earlier case *Fairman v Cinnamon (Plantation Wharf) Ltd* [2018] UKUT 421
  - HHJ Gerald
    - The effect of s.27A(6) was not to strike through substantive lease provisions.
    - It was a provision merely designed to stop the tribunal's jurisdiction being ousted.
    - So, in a where the lease conferred upon the landlord or a surveyor the right to apportion the service charges, the tribunal ought to be substituted in.

# *Is Aviva right?*

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- UT failed to consider *Plantation Wharf* in any detail.
- *Aviva* have sought permission to appeal from the Court of Appeal.

# Implications

- Potential shortfalls for landlords.
- Removes flexibility.
- Considerably alters the meaning of the lease.
- It might be otherwise impossible to vary the apportionment.

# Thank you for listening



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