6 May 2020

PRESS SUMMARY

Duval (Respondent) v 11-13 Randolph Crescent Ltd (Appellant)
[2020] UKSC 18
On appeal from: [2018] EWCA Civ 2298

JUSTICES: Lady Hale, Lord Carnwath, Lady Black, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

11-13 Randolph Crescent is a block of nine flats in Maida Vale, London. Two of the leases are held by the respondent, Dr Julia Duval, and a third lease is held by Mrs Martha Winfield. The term of each lease is 125 years from 24 June 1981. The appellant landlord owns the freehold of the building and is also the management company. All of the shares in the landlord company are owned by the leaseholders of the flats. The leases are, in all relevant respects, in substantially the same form. Each of them contains a covenant, clause 2.6, which prevents the lessee from making any alteration or improvement in, or addition to, the premises demised by the lease without the prior written consent of the landlord. By the operation of a statutory provision, that consent cannot be unreasonably withheld. Each lease also contains an absolute covenant, clause 2.7, which prevents the lessee from cutting into any roofs, walls, ceilings or service media. In addition, clause 3.19 of each lease requires the landlord to enforce, at the request and cost of any lessee, certain covenants in the leases held by the other lessees, including any covenant of a similar nature to clause 2.7.

In 2015, Mrs Winfield sought a licence from the landlord to carry out works to her flat. The proposed works involved removing a substantial part of a load bearing wall at basement level. The licence was refused after the proposal came to the attention of Dr Duval and her husband. However, following presentations by engineers and architects acting for Mrs Winfield, the landlord decided it was minded to grant a licence, subject to Mrs Winfield securing adequate insurance. Dr Duval then issued proceedings against the landlord, seeking a declaration that the landlord did not possess the power to permit Mrs Winfield to act in breach of clause 2.7 of her lease. Deputy District Judge Chambers held that, on the proper interpretation of clause 3.19, the landlord had no power to waive any of the covenants in clause 2 without the prior consent of all of the lessees of the flats in the building. An appeal by the landlord was allowed by the Central London County Court. Dr Duval then appealed, successfully, to the Court of Appeal. The landlord now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Kitchin gives the sole judgment, with which Lady Hale, Lord Carnwath, Lady Black and Lord Sales agree.

REASONS FOR THE JUDGMENT

The starting point is to construe the terms of the leases in context **[25]**. There are certain aspects of the background which are highly relevant. First, each lease is a long-term contract and was acquired for a substantial premium **[27]**. Secondly and importantly, the parties would have appreciated that over the lifetime of the lease it would inevitably be necessary for works to be carried out to each flat **[28]**. Thirdly, the parties would have understood that routine improvements and modifications would be unlikely to impinge on the other lessees, or affect adversely the wider structure or fabric of the building, and that it

would be entirely sensible for the landlord to be in a position to permit such works from time to time **[29]**. Fourthly, the parties must have appreciated the desirability of the landlord retaining not just the reversionary interest in the flats but also the rights in possession of the common parts of the building. Similarly, the parties must have appreciated the important and active role the landlord would play in managing the building and fulfilling its obligations under each lease **[30]**.

Clauses 2.6 and 2.7 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. 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 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. This interpretation is supported by *F W Woolworth and Co Ltd v Lambert* [1937] 1 Ch 37 **[32]**. It must also be remembered that the landlord is subject to other restrictions on its ability to license alterations to a lessee's flat. First, each lessee enjoys the benefit of a covenant for quiet enjoyment **[33]**. Secondly, the landlord must not derogate from its grant **[34]**. Thirdly, each of the lessees is entitled to be protected against nuisance **[35]**. Finally, the landlord has covenanted with the lessee in the terms of clause 3 of the lease, which includes, for example, a covenant to maintain the structure of the building **[36]**.

The critical question is whether the landlord can license structural work which falls within the scope of clause 2.7 and which would otherwise be a breach of that clause. Clause 3.19 does not say expressly that the landlord cannot give a lessee permission to carry out such work, so it must be considered whether this is nevertheless implicit in clause 3.19 **[43]**. It is well established 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 **[44]**. The principle is well illustrated by cases involving breaches of contracts to marry, and implied terms can arise from it **[45-50]**.

There is an implied term in Dr Duval's lease: a promise by the landlord not to put it out of its power to enforce clause 2.7 in the leases of other lessees by licensing what would otherwise be a breach of it **[52]**. That necessarily follows from a consideration of the purpose of the covenants in clauses 2 and 3.19 and the content of the obligations in clause 3.19. Clause 2.7 is an absolute covenant and, under clause 3.19, the complainant lessee is entitled, on provision of security, to require the landlord to enforce it as an absolute covenant. It would not give practical content to the obligation if the landlord had the right to vary or modify the absolute covenant or to authorise what would otherwise be a breach of it **[53-55]**. Further, it would be uncommercial and incoherent to say that clause 3.19 can be deprived of practical effect if the landlord manages to give a lessee consent to carry out work in breach of clause 2.7 before another lessee makes an enforcement request and provides the necessary security. The parties cannot have intended that a valuable right in the objecting lessee's lease could be defeated depending upon who manages to act first, the landlord or that lessee **[57]**.

Clause 2.7 is directed at works which go beyond routine alterations and improvements and are intrinsically such that they may be damaging to or destructive of the building. It is entirely appropriate that works of the kind Mrs Winfield wished to carry out should require the consent of the other lessees, including Dr Duval **[59]**.

References in square brackets are to paragraphs in the judgment