Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18: a change in the balance of power?

Introduction

The issue determined by the Supreme Court in *Duval* is an important one touching on mutual enforceability covenants of the type seen in hundreds, if not thousands, of leases across the land. The issue 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. The Supreme Court decided, as the Court of Appeal had below, that this landlord, if it granted a licence for works otherwise in breach of lease, would itself be in breach of its enforcement covenants with the other leaseholders. Thus, it appears, in a block of flats held on leases with like terms, and a landlord enforceability covenant, the leaseholders can wield considerable control. This article summarises the decision in *Duval*, and then discusses, in its light, the respective positions of landlord and leaseholder bound by it: has the dismissal of the appeal from the Court of Appeal confirmed a change in the balance of power between landlord and tenant?

The Background

In *Duval,* each flat in a block with a common landlord was let on a long lease which contained, at clause 2,6, a covenant not without previous written consent to make alterations, 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.

The lessee of one of the flats asked the landlord for permission to carry out improvement works to her flat, which included the removal of part of a load-bearing wall, which would amount to a breach by the lessee of the covenant in clause 2.7. The landlord was willing to grant consent to the works, but the claimant, who was the lessee of another flat in the block, sought a declaration that to do so would be in breach of clause 3.19, contending that it was implicit in the covenant contained in clause 3.19 that the landlord would not put it out of its power to comply with it, which would be the consequence of the landlord's granting consent to the proposed works.

At first instance, the deputy district judge granted a declaration that the landlord had no power to waive covenants without the consent of the other lessees in the block but the landlord successfully appealed to a judge. The matter went further and was given full consideration by the Court of Appeal which reversed the appeal judge's decision and found in favour of the tenant. The landlord appealed to the Supreme Court and Lord Kitchin with whom Lady Hale, Lord Carnwath, Lady Black and Lord Sales agreed, dismissed the appeal.

The Supreme Court's Decision

The critical question was said by the Supreme Court to be whether the landlord can license, at the request of a lessee, structural work which falls within the scope of clause 2.7 and which, absent a licence from the landlord, would amount to a breach of that clause. Clause 3.19 did not expressly say that the landlord cannot give a lessee permission to carry out structural work falling within the scope of clause 2.7. Therefore, the question was whether this was nevertheless implicit in clause 3.19.

The Court affirmed 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. This proposition however, was said to be properly regarded as an implied term rather than a general rule of law as it would involve the interpolation of terms to deal with matters for which the parties themselves made no express provision. Thus some contracts with conditional terms will not carry with it such an implication; each will turn on its own construction.

However, there was an implied term in the *Duval* lease that the landlord would 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. That necessarily followed 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. At grant in the 1980s, the parties to each lease would have known that their lease was a valuable asset. Clause 2.6, properly construed, allowed what the parties would have expected, repairs, and the modifications and modernisations of each flat one would expect over that term. Clause 2.7, which contrary to the parties' agreement did not limit clause 2.6, was aimed at prohibiting destructive works (hence the reference to waste) against the interests of all the lessees and the landlord. Clause 3.19 was intended to allow the landlord to enforce to mutual benefit of all. 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. The works in question were clause 2.7 works; if the landlord licensed them it would be in breach of clause 3.19.

Unanswered Questions

Particular clauses in a contract must be construed in light of the terms of the document as a whole and in their own context. In that sense, cases which construe the terms of other leases in light of their own terms and in their own context are not determinative of any question in relation to another document. However, a number of general principles can be deduced from the decision which will no doubt have wider application. As the Court of Appeal observed and Supreme Court repeated, such covenants are common and so the issue decided in this case is an important one. Despite this, the decision leaves questions unanswered.

The first question is a perhaps more minor point, but one which may well cause many difficulties with like terms in other leases. The Supreme Court in its decision divided possible works between those within clause 2.6, works of repair and renovation, and clause 2.7, destructive works. The works which were the subject of this case were in the latter category, as the parties agreed. The reason why is not analysed in the decision, and that distinction would likely be difficult to keep clear at times. Clause 2.6 works include improvements. A significant cutting into a structural wall, here a clause 2.7 work, may well be part of an improvement despite its apparently destructive nature. Why is it clear that this is not a clause 2.6 work?

For these clauses, the distinction might be made clearer by reference to the demise. Clause 2.6 works are works of alteration, improvement in or addition to the demised premises. The demised premises did not include the structural wall that was to be cut. Clause 2.7 works can include works to the demised premises, but also to the walls, not demised, which surround it.

That suggests another oddity in this case. Works by a leaseholder outside his demise are works of trespass. A landlord need never permit them, even if there is no clause 2.7 in the lease. If there had been no clause 2.7 in this lease, then a licence for such works would not have breached clause 3.19. Clause 2.7, in this lease, is for the landlord perhaps a clause too far.

The Position of the Landlord

Secondly, there are questions about what landlords of blocks, the leases of which contain similar provisions to those found in *Duval,* can now do.

It is of note that the landlord contended that the tenant's approach resulted in a commercially unworkable scheme, which was not contemplated by the parties to the leases when they were granted, and which would be a recipe for chaos and conflict in multi-tenanted buildings. That seems to have been a common view prior to the Court of Appeal decision in this case. This view was however, turned on its head by the Supreme Court which held that 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 could not 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.

But this still leaves a landlord in the appellant's situation with practical difficulties in the administration of a block of flats or houses subject to mutual enforceability covenants. A landlord who licences what would otherwise be a breach of covenant may find themselves at risk of a damages claim or a claim for an injunction requiring it to enforce. The risk is not just as to works. Any absolute covenant would be caught: covenants against keeping pets, for example, or against carrying on a business in the flat (a particular problem at the moment of Covid-19 lockdown). In theory such a landlord would need to obtain the agreement (at least in writing, if not by deed, for clarity) of all tenants who benefit from a mutual enforceability clause before licensing what would otherwise be a breach of covenant by an individual leaseholder. That seems a counsel of perfection, hard in most cases to obtain even where, as in this case, a landlord is lessee owned. An agreement of its shareholders to the works at an EGM will not prevent one leaseholder, who did not agree with the majority, later suing.

Even more difficult for a landlord will be the situation where a leaseholder does not seek a licence, but simply undertakes works in breach of lease. If they are minor, a landlord may not think it worth the costs risk to pursue them (especially it costs of such litigation are not recoverable through the service charge). Or a landlord may wish to threaten litigation with the aim of giving a retrospective licence once content that works have been carried out properly and without risk to other occupiers. But the grant of such a licence might be a breach of an enforcement clause in the other leases, unless it can be argued that it would have been the likely outcome of lessee requested landlord enforcement in any event.

The Position of the Enforcing Leaseholder

The beneficiaries of the enforceability clause appear to be, at least in theory, in a powerful position, able, in some instances, effectively to hold the other tenants and freeholder to ransom. What of the practicality?

First, how does a lessee, wishing to rely on a clause like clause 3.19, itself prevent works going ahead, if the landlord is not responding to correspondence pointing out its breach? The lessee's recourse is to seek an injunction. As against the landlord, it would be an injunction to enforce against the leaseholder carrying out the works, with the claimant leaseholder giving security for the costs of that enforcement. As against the lessee carrying out the works, however, the leaseholder claiming will gain no new rights via a clause like 3.19. A direct claim against that lessee for an injunction to stop works would have to be based on nuisance, as it would be without 3.19.

What if the landlord is threatening to or has granted a licence. In that case the leaseholder might bring a claim against the landlord and the lessee based on the landlord's breach of clause 3.19, and the lessee's tort in inducing that breach of contract by seeking the licence (assuming the lessee had sufficient knowledge of the enforcement covenant and intention to interfere with it), with possible relief the surrender of that licence by both parties if it had been granted. That would be an approach akin to that in different circumstances in *Crestfort v Tesco* [2005] EWHC 805 (Ch).

If the works have long been done, what relief could the leaseholder seek for the landlord's breach of the enforcement covenant? The relief would be damages, presumably at the measure of a loss of a chance of the works not being done, or being remedied assuming something is wrong with them, had the leaseholder requested the landlord to enforce, and provided the required costs indemnity and/or security. The analysis of such damages, and the role of the hypothetical request, is complicated, and it seems unlikely the level of recovery would be high unless the works done had caused damage to the leaseholder's flat. In that case, a nuisance claim against the lessee who undertook the works, or the landlord by licensing them and hence adopting that nuisance, might well be more straightforward.

A Change in the Balance of Power?

When Lewison LJ decided in the Court of Appeal that the landlord in this case would be in breach of its enforcement covenants if it licensed works otherwise in breach of lease, that seemed a decision which shook the landlord-leaseholder balance of power. The

landlord was not free to agree works. The leaseholder had more control over his decisions. The Supreme Court decision, upholding Lewison LJ, suggests, however, that this is not so great a change. In paragraphs [33] to [36], Lord Kitchin (who gave the only judgment) set out the other landlord wrongs which a landlord licensing damaging works might in any event commit. The granting of that licence might commit a nuisance. It might be a breach of the covenant of quiet enjoyment, or be a derogation from grant. It might amount to a breach of landlord repairing obligations. These observations, together with the possible impracticalities of leaseholder control sketched above, may in practice make this decision of more technical than practical effect than at first reading it might seem.

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