

Insights

DUVAL V RANDOLPH CRESCENT - “NEW NORMAL” FOR LANDLORDS AND TENANTS OF MULTI-LET BUILDINGS

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SUMMARY

The recent Supreme Court case of *Duval v Randolph Crescent* concerns the question of whether a landlord may allow a departure from a tenant's lease covenant in a multi-let building, where the leases of the other tenants in the building contain a promise by the landlord to enforce the covenants of other tenants' leases.

Implications

The implication of this Supreme Court decision is that landlords are limited in their ability to licence departures from tenants' covenants if this would prevent them from complying with the enforcement covenant that they have given to other tenants in the building. This is to protect the tenants in the building who have purchased their flats with the “benefit” of the landlord enforcement covenant, secure in the knowledge that the landlord will step in to ensure compliance with lease covenants by other tenants in the building.

On the flipside, tenants of multi-let buildings (where the leases contain a landlord enforcement covenant) will be “stuck” with their lease covenants for the duration of their lease (often exceeding 100 years) as their landlord is prevented from licensing any departures from tenant covenants (where a departure is absolutely prohibited in their lease) without risking putting itself in breach of its enforcement covenant to other tenants.

With this in mind, landlords in these circumstances must consider tenants' requests for changes to their demise extremely carefully and, in particular, whether consenting to such changes could put it in breach of any obligations it owes to its other tenants.

In practical terms, this case means that requesting tenants might (1) have to wait longer for consent, whilst landlords consider applications for consent to alterations more carefully in the context of both the tenant's lease and other leases of premises in the building; (2) spend more money on the application as the landlord will (reasonably) require more details of the scope of the

proposed works; and (3) possibly be required to give the landlord an indemnity if there is any possibility that consenting might lead to a breach of the landlord's enforcement covenant.

Facts of the case

Mrs Winfield, a leaseholder of a block of nine flats, wanted to carry out works to her basement flat, that were absolutely prohibited by her lease, and so she asked the landlord to licence the works. The landlord (who owned the freehold reversion of the whole block of flats) was minded to grant Mrs Winfield a licence permitting her to do the works, however Dr Duval, a lessee of a neighbouring flat, objected, relying on the landlord "enforcement covenant" in her own lease, by which the landlord had promised to enforce the covenants in other tenants' leases in the building. Dr Duval argued that, by granting consent to Mrs Winfield's proposed alterations, the landlord would breach this landlord enforcement covenant in her lease. The question for the court was whether granting a licence to Mrs Winfield to carry out the prohibited works would breach the enforcement covenant that the landlord had given to Dr Duval (and all other leaseholders in the block).

The landlord argued that it was free to do as it pleased with its own property and was entitled to consent to or licence what would otherwise be a breach of covenant (by Mrs Winfield).

The Supreme Court agreed with the leaseholder, Dr Duval, holding as follows:

- Although the leases did not expressly prevent the landlord from waiving a breach or licensing tenant works that would otherwise be a breach of an individual tenant's lease, there was an implied term in Dr Duval's lease - a promise by the landlord not to deprive itself of the power to enforce breaches in the leases of other tenants by licensing those breaches.
- It would not give practical content to this enforcement obligation if the landlord had the right to vary or modify the tenant covenant or to authorise what would otherwise be a breach of it.
- It would be uncommercial and incoherent to say that the landlord enforcement clause can be deprived of practical effect if the landlord manages to licence tenant works that would be a breach of their lease before another tenant makes an enforcement request and provides the necessary security.

Lessons from the case

Enforcement covenants of the type in this case are common and still widely used. Obviously, each set of facts and the terms of the relevant leases need to be scrutinised, but the following general principles have come out of this case:

1. Landlords do not have a free hand to release or modify tenant covenants where it has promised other tenants in the building that it will enforce those tenant covenants (as they stand).
2. Landlords who have given an enforcement covenant along these lines will have a limited ability to allow even enhancements or improvements to individual flats if the proposed works are absolutely prohibited by a tenant's lease, and tenants in turn will not be able to obtain permission to alter their flats where the proposed works are prohibited by their lease.
3. An exception to this could be if the relevant enforcement covenant gives the landlord a discretion to permit a departure from a tenant covenant in certain prescribed circumstances, for example in the interests of good estate management (which was not the case in *Duva*).
4. The only way to mitigate the risk to a landlord of being in breach of an enforceability covenant, is for the landlord to seek consent from all the tenants in the building (who have the benefit of the enforcement covenant) to what would otherwise be a breach of a tenant's lease – by no means straightforward.
5. The application of the principle in this case is potentially very wide. In any multi-let building, where there are a number of leases on similar terms that contain a landlord enforcement clause, landlords and tenants will have very limited scope to depart from the terms of the lease as they stood at the commencement of the lease.

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