UK Supreme Court offers lessons for landlords of multi-tenanted buildings in Cayman

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Introduction

In the UK, it is common for mutual-enforceability covenants (the nature of such covenants is explained below) to be found in the leases of flats located in apartment blocks. The enforcement of such a covenant was considered by the UK Supreme Court in *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18. While such mutual-enforceability covenants are (to the best of the author's knowledge) not used in the Cayman Islands, the decision offers important lessons about leasehold obligations, especially where the same landlord enters into leases with multiple tenants in the same building. The lessons relate to the nature of the landlord's obligations.

What did the Supreme Court decide?

The case concerned leases of flats in a London building. The building had been converted from two mid-terrace houses into nine flats. The freehold of the building was owned by a company of which the tenants were the shareholders. Each lease, which was for a term of 125 years commencing on 24 June 1981, included a clause 3.19 pursuant to which the landlord covenanted with the tenant that all other flat leases would contain covenants of a similar nature to those the tenant was giving and that at the request of the tenant, and subject to provision of security for costs, the landlord would enforce the covenants given by the other tenants.

One of the tenants, Mrs Winfield, wished to carry out works to her flat which would involve removing part of a load-bearing wall. This was prohibited by clause 2.7 of her lease, which contained an absolute covenant against "*cutting or maiming…any roof wall or ceiling within or enclosing the demised premises*". She applied to the landlord for a licence, which the landlord

was minded to grant, for permission to carry out the work. However, another tenant, Dr Duval, contended that to do so would be a breach by the landlord of the obligations it owed Dr Duval.

The question was whether the grant by the landlord to Mrs Winfield of a licence to carry out an activity falling within clause 2.7 amounted to a breach of clause 3.19 of its agreements with all of the other tenants.

Even though clause 3.19 did not say expressly that the landlord could not give a tenant permission to carry out structural work falling within the scope of clause 2.7, the Supreme Court held unanimously that it was implicit in Dr Duval's lease that the landlord would not put it out of its power to enforce clause 2.7 of Mrs Winfield's lease by licensing the activity that would otherwise be a breach of that clause.

What are the lessons for Cayman?

Lord Kitchen delivered the sole judgment with which the other members of the Court agreed. In arriving at his conclusion, his Lordship referred to principles of general application that are worth noting, particularly where an owner of a building enters into leases with multiple tenants.

1. Lesson one – Construction of overlapping clauses

The first lesson is a lesson of general application; it relates to how to interpret clauses of a lease that appear to overlap, a circumstance that arises often. The short point is this: in appropriate circumstances, reading such clauses together in the context of the lease and the leasehold scheme for the building as a whole may offer a better guide to the objective intention of the parties than focussing on the words used in isolation. It was this approach that caused Lord Kitchen to conclude that any activity that fell within the qualified covenant (i.e. clause 2.6 which covered alterations, improvements and additions that may be permitted with the landlord's consent) was excluded from the absolute covenant (i.e. clause 2.7 which absolutely prohibited the tenant from "*cutting or maiming…any roof wall or ceiling within or enclosing the demised premises*"). This conclusion contrasted with the approach of the parties' counsel which was to limit the scope of clause 2.6 by reference to clause 2.7; in other words, they took the view that "*any activity which falls within the scope of clause 2.7 is necessarily outside the scope of clause 2.6*".

It is instructive to look at his Lordship's approach in more detail.

To recap, clause 2.7 absolutely prohibited the "*cutting or maiming*" of certain parts of the demised premises. After noting that any alteration or improvement within the apparent scope of clause 2.6 would almost certainly involve some "*cutting*" of a wall, pipe or wire, his Lordship continued as follows, at paragraph 32:

"*It seems to me to be most unlikely that the parties intended that routine works of this kind*

should fall within the scope of clause 2.7 and so outside the scope of clause 2.6 with the consequence that the landlord could, however unreasonably, withhold its consent. It is much more likely, in my opinion, that the parties intended the two provisions to be read together in the context of the lease and the leasehold scheme for the building as a whole."

For his Lordship, this more holistic approach yielded the following outcome:

"*On that approach it becomes clear that the two clauses are directed at different kinds of activity. Clause 2.6 is concerned with routine improvements and alterations by a [tenant] to his or her flat, these being activities that all [tenants] 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. It seems to me that 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 my opinion and 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.*"

His Lordship cited with approval *F W Woolworth and Co Ltd v Lambert* [1937] Ch 37 in which the Court of Appeal had similarly excluded from the operation of an absolute covenant anything which fell within a qualified covenant, rather than the other way round.

2. Lesson 2- Landlord's covenant of quiet enjoyment

Every lease will include a landlord's covenant for quiet enjoyment, being a covenant that the tenant's possession of the demised premises will not be substantially interfered with by the landlord or anyone claiming under the landlord; such a covenant goes to the essential nature of a lease under which a tenant is assured exclusive possession of the demised premises during the term of the lease.

In a multi-tenanted building, each lease will include such a covenant. What does this mean for the landlord? Lord Kitchen commented on this situation. Citing the decision of the House of Lords in *Southwark London Borough Council v Mills* [2001] 1 AC 1, he said that the covenant protects the right of all of the tenants of the building to use their units in ordinary and lawful ways, such that, for example, regular excessive noise generated by one tenant may constitute a substantial interference with the ordinary enjoyment of the premises of another tenant.

It would no doubt come as a surprise to most landlords that the landlord could be in breach of its covenant for quiet enjoyment under its lease with one tenant for failing to prevent the noise generated by another tenant in the same building.

3. Lesson 3 – Tenants are entitled to be protected against nuisance

Another lesson closely connected to the preceding one relates to nuisance. Again citing *Southwark v Mills*, Lord Kitchen identified another protection for tenants of a multi-tenanted building: each tenant is entitled to be protected against nuisance, that is to say, the doing of something to or in a neighbouring or nearby unit which constitutes an unreasonable interference with the utility of the tenant's own unit. Importantly, while the primary defendant in such a case is the tenant who causes the nuisance by doing the act in question, the landlord will be liable if it has authorised the tenant to commit that nuisance.

4. Lesson 4 – Landlord must not derogate from its grant

Finally, Lord Kitchen addressed the principle that a landlord must not derogate from its grant. Like the covenant of quiet enjoyment, he noted that this principle rests on the notion that a man may not give with one hand and take away with the other.

By way of example of the doctrine, his Lordship said that were the landlord to permit a neighbouring tenant to cut into a load bearing wall in such a way as to remove or substantially interfere with the support it offered to the first tenant, it would constitute a clear derogation from the landlord's grant to the first tenant.

His Lordship also referred to services enjoyed by each tenant of a building in common with other tenants. In the case of Dr Duval's lease, he referred to the free passage and running of water, soil, gas, electricity and other services in and through the conduits that pass through the building. Clearly, permitting a neighbouring tenant to substantially interfere with such common services to a tenant would also constitute an impermissible derogation from its grant to the second tenant.

Other Cayman implications of the Supreme Court's decision

In *Duval*, the Supreme Court held that it was an implied term of clause 3.19 of Dr Duval's lease that the landlord could not give another tenant in the building permission to undertake structural work falling within clause 2.7 of that other tenant's lease. While mutual-enforceability clauses of this type are unknown in Cayman, the Court's approach has other implications for Cayman.

What about (say) a Cayman shopping centre where a tenant (**Tenant 1**) obtains a covenant from the landlord that Tenant 1 will be the only tenant in the centre entitled to operate a particular type of business or profession. What if another tenant (**Tenant 2**) sought the landlord's consent to change its permitted use, which the landlord was minded to give, to a use that conflicted with the landlord's covenant in favour of Tenant 1? Although such a clause is not strictly a mutual-enforceability clause, *Duval* lends weight to the argument that a court would imply a term in the covenant with Tenant 1 that the landlord must abstain from doing anything (such giving consent to Tenant 2) which would prevent it from fulfilling the obligation it has undertaken to discharge to Tenant 1.

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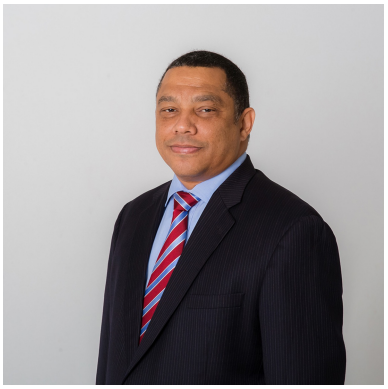

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