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*‘Cut your neighbour down to size?’*

6 July 2021

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# 39 from 39: Introduction

## ***Cut your neighbour down to size? Aspects of disputes involving neighbours***

- 1) The maintenance and improvement of property – what rights do neighbouring landowners have, and what steps should (and should not) be taken to enforce these?
- 2) Noise and disturbance – what can a neighbour do when things get out of hand, and what is the effect of *Duval v 11-13 Randolph Crescent Limited* [2020] UKSC 18 in such disputes?
- 3) Encroachment by a lessee on land not demised – how does this issue arise, and what effect does it have on common parts and amenity land?

# Neighbour disputes

- A Judge's view
  - *Wilkinson v Farmer* [2010] EWCA Civ 1148 at [4]-[5] per Mummery LJ
- ADR
  - Property Boundaries (Resolution of Disputes) Bill – not yet law

# (1) Maintenance and improvement of property



# Access to Neighbouring Land Act 1992

- What are the requirements for an order under this Act?
- What other options does an owner/occupier have?
- When does the Act not apply?

# Rights of access?

- Easement for access?
- Entitlement to maintain / improve easement?
- Party Wall etc. Act 1996, section 1 or section 2?
- Crane oversail: *Anchor Brewhouse (Docklands Developments) v Berkley House Ltd* [1987] EGLR 172
- Licence / permission?

## (2) Noise, disturbance and other tenants



# *Duval v 11-13 Randolph Crescent Limited [2020] UKSC 18*





# The facts

- 11–13 Randolph Crescent in Maida Vale
- two mid-terrace houses, now a single block separated into nine flats
- Term of each of the leases was 125 years from 24 June 1981
- Two leases held by Dr Duval; a third lease held by Mrs Winfield
- Landlord is also the management company

# The lease terms

- Clause 2.6: not to make any alteration or improvement to the demised premises without the consent of the landlord (qualified by reference to consent: section 19(2) LTA 1927)
- Clause 2.7: not to commit waste or cut, main or injure any roof, wall or ceiling within or enclosing the demised premises (absolute covenant)

# The lease terms

- Clause 3.19: landlord's covenant:
  - Every lease granted to be in similar terms
  - “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”

# The facts

- Mrs Winfield approached the landlord's managing agents for a licence to carry out works
- Will cut into the load-bearing or structural walls of the flat
- Dr Duval asked the landlord to secure an undertaking from Mrs Winfield not to act in contravention of clause 2.7 of her lease

# The proceedings

- First instance: DDJ Chambers holds that the landlord has no power to waive any of the covenants in clause 2 without consent of all of the other lessees
- Appeal to HHJ Parfitt: landlord had the power to license works that would otherwise amount to a breach

# The proceedings

- Further appeal to Court of Appeal: [2019] Ch 357
- Held that waiver by the landlord of a breach of the covenant in clause 2.7 by a lessee or the grant of a licence to commit what would otherwise be a breach of that covenant would amount to a breach of clause 3.19 of the leases held by all of the other lessees in the building

# The Supreme Court

- Decision of the Court of Appeal upheld by the Supreme Court
- Judgment of Lord Kitchin JSC (with whom Lady Black, Lord Sales JJSC, Baroness Hale and Lord Carnwath agreed)



# Clauses 2.6 and 2.7

- Clause 2.6 is concerned with routine improvements and alterations by a lessee
- Clause 2.7 is directed at activities in the nature of waste, which go beyond routine alterations and improvements
- *FW Woolworth and Co Ltd v Lambert* [1937] Ch 37: exclude from the operation of the absolute covenant anything which fell within the qualified covenant



# Quiet enjoyment / derogation from grant

- Each lessee enjoys the benefit of a covenant for quiet enjoyment
- *Southwark London Borough Council v Mills* [2001] 1 AC 1: may not give with one hand and take away with the other i.e. landlord cannot allow a neighbouring lessee to substantially interfere with support for Dr Duval's flats

# Nuisance

- Primary defendant in such a case is the lessee who causes the nuisance by doing the act in question, but the landlord will be liable if it has authorised the lessee to commit that nuisance: *Southwark v Mills*

# Clause 3.19

- Implied term: 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 (*Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701)

# Clause 3.19

- Purpose of the covenants in clauses 2 and 3.19 is primarily to provide protection to all of the lessees of the flats in the building
- Necessarily follows that the landlord will not put it out of its power to enforce clause 2.7 in the lease of the offending lessee by licensing the activity that would otherwise be a breach of that clause

# Noise

- How does *Duval* interact with claims against landlords for:
  - breach of covenant by licensing noise disturbance e.g. with the replacement of flooring?
  - breach of the quiet enjoyment covenant?
- *Fouladi v Darout* [2018] EWHC 2501 (Ch)
- Other options: complaint to the local authority relying on Noise Act 1996; private nuisance claim

# (3) Encroachment by a lessee



# Encroachment by a lessee onto landlord's land

- What if a tenant occupies land belonging to its landlord, but which is not demised?
- Doctrine based on estoppel or limitation?
  - *JF Perrott & Co v Cohen* [1950] 156 EG 422
  - *Secretary for Justice v Chau Ka Chik Tso* [2011] HKEC 1617 CFA (extinction of landlord's title)
- What is a sufficient period and extent of possession?
- What problems can arise between neighbours?
- Potential application(s) to Land Registry

# Encroachment by lessee on to third party's land





# Adverse possession

- Encroachments by tenant on land belonging to third parties will enure for the landlord's benefit if:
  - the land is very close to the demised land and occupied by the tenant together with the demised land; and
  - no different intention should be shown by the conduct of the landlord / tenant within the period of adverse possession.

# Adverse possession

- *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9
- The Palm Tree public house, Palm Street, London
- Adjacent to the pub was a storage area, which the tenants used

# Adverse possession

- Parke B in *Kingsmill v Millard* (1855) 11 Ex. 313 (1855) 11 Ex. 313 , at 318:

*“...the presumption is, that the tenant has inclosed it for the benefit of his landlord unless he has done some act disclaiming the landlord's title. ... The encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit.”*

# Adverse possession

- *Smirk v Lyndale Developments Ltd* [1975]  
Ch. 317
- Neuberger LJ (as he then was) in *Tower Hamlets v Barrett*:
  - Unclear rationale
  - Rebuttable presumption
  - Must be very close to the demised land

# Adverse possession

- *Tower Hamlets case:*
- *“...where the adjoining land is still included in the tenancy, it should be relatively easy to conclude, even to presume, that, where the landlord and tenant thereafter agree a sale of the reversion to, or, indeed, a new tenancy of, the land originally comprised in the tenancy, the sale or new tenancy should extend to the adjoining land.”*

# Acquisition of easement by prescription

- Where a dominant tenement is subject to a lease, the acts of user by the lessee which are relied upon to support a claim to an easement acquired by prescription are treated as acts of user by the freehold reversioner and will lead to the acquisition of an easement appurtenant to the freehold

*(Metropolitan Housing Trust Ltd v RMC FH*

*Co Ltd* [2017] EWHC 2609 (Ch); [2018] 1 Ch 105)

# Questions / discussion

# Q&A

# Thank you for listening!

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# Thank you for listening!

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