Easter Term

[2020] UKSC 18

On appeal from: [2018] EWCA Civ 2298

JUDGMENT

Duval (Respondent) v11-13 Randolph Crescent Ltd (Appellant)

before

Lady Hale

Lord Carnwath

Lady Black

Lord Kitchin

Lord Sales

JUDGMENT GIVEN ON

6 May 2020

Heard on 10 October 2019

Appellant	Respondent
Joanne Wicks QC	Richard Mawrey QC
Emer Murphy	George Mallet
(Instructed by Ashfords LLP (London))	(Instructed by Duval Vassiliades)

LORD KITCHIN: (with whom Lady Hale, Lord Carnwath, Lady Black and Lord Sales agree)

1.
The issue to which this appeal gives rise is 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. As the Court of Appeal observed, such covenants are common and so the issue is an important one.

2.
This particular dispute concerns the leases of the flats in 11-13 Randolph Crescent in Maida Vale. The leases are, in all relevant respects, in substantially the same form and each of them contains an absolute covenant, clause 2.7, which prevents the lessee from cutting into any roofs, walls, ceilings or service media. They also contain a landlord’s covenant, clause 3.19, requiring it 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. It is accepted that such clauses are commonly found in the leases of flats located in apartment blocks. The question is whether the grant by the landlord to a lessee of a licence to carry out an activity falling within clause 2.7 amounts to a breach of clause 3.19 of its agreements with all of the other lessees.

The leases

3.
11-13 Randolph Crescent comprises what were originally two mid-terrace houses, but it is now a single block separated into nine flats. It formed part of the Church Commissioners' Maida Vale estate. In the 1980s the Church Commissioners granted long leases to purchasers of the flats. The term of each of the leases was 125 years from 24 June 1981. Two of the leases (those of flats 11G and 11H) are now held by the respondent, Dr Julia Duval. A third lease (that of flat 13RC) is held by Mrs Martha Winfield.

4.
By a transfer dated 17 June 1986 the freehold of the building was transferred to the appellant landlord. The landlord is also the management company. All of the shares in the landlord are owned by the leaseholders of the flats, as the leases themselves require.

5.
The lease of each flat demises the internal parts of the flat including all internal non-load bearing, non-dividing walls; one half (severed vertically) of internal, non-load bearing, dividing walls; the internal surfaces of external walls and of load bearing walls; the floor and horizontal structures underneath the floor; the ceiling of the flat, but not the horizontal structures immediately above it; and conduits exclusively serving the flat. But the lease expressly excludes, among other things, the outer and load bearing walls of the building; load bearing or structural columns and beams; the external surfaces of window frames; and any conduits not exclusively serving the flat.

6.
The lessees' obligations are set out in clause 2. They include covenants to pay the reserved rents and service charges (clause 2.1 and the third schedule); covenants to repair, clean and decorate the demised premises (clauses 2.4 and 2.5); covenants to permit the landlord's agents to enter the premises and, among other things, construct any "building or erection" on any land adjoining or neighbouring the building or the demised premises (clause 2.8); and covenants aimed at securing that the lessees of the flats, and they alone, hold shares in the management company, that is to say the landlord (clause 2.10.4).

7.
Clause 2.6 is concerned with alterations, improvements and additions and reads:

"Not without the previous written consent of the Landlord to erect any structure pipe partition wire or post upon the Demised Premises nor make or suffer to be made any alteration or improvement in or addition to the Demised Premises."

8.
This is therefore a covenant which is qualified by reference to the landlord's consent. However, by operation of section 19(2) of the Landlord and Tenant Act 1927, such consent is not to be unreasonably withheld.

9.
Clause 2.7 is entitled “waste” and reads:

“Not to commit or permit or suffer any waste spoil or destruction in or upon the Demised Premises nor cut maim or injure or suffer to be cut maimed or injured any roof wall or ceiling within or enclosing the Demised Premises or any sewers drains pipes radiators ventilators wires and cables therein and not to obstruct but leave accessible at all times all casings or coverings of Conduits serving the Demised Premises and other parts of the Building.”

10.
In contrast to clause 2.6, this is an absolute covenant. There are two further aspects of it that I must mention at this stage. First, there may be thought to be a degree of overlap between the activities to which it refers and those the subject of clause 2.6. For example, improvements and alterations, which are the subject of clause 2.6, may involve removing and replacing radiators, wiring, cabling and the like, and these are activities which are specifically mentioned in clause 2.7. The common approach of the parties was that clause 2.7 therefore sets boundaries to the activities that fall within clause 2.6. In other words, any activity which falls within the scope of clause 2.7 is necessarily outside the scope of clause 2.6. That is of course one possible interpretation of the relationship between them. But it is not the only one and for reasons to which I will come, it is not one which I favour.

11.
Secondly, although not qualified by reference to the landlord’s consent, it is common ground that, as between the landlord and the lessee, the landlord has the power to license what would otherwise be a breach of this covenant. But, as the Court of Appeal emphasised, it does not follow that by doing so the landlord will not be in breach of a collateral contract as between the landlord and another lessee. Here, and as will become clear, Dr Duval contends that there is such a collateral contract and that by granting such a licence the landlord will be acting in breach of its terms, and in particular clause 3.19.

12.
Clause 2.14.2 requires the lessee to pay to the landlord all costs, charges and expenses it incurs on any application by the lessee for any licence or consent in connection with the lease.

13.
The fifth schedule to each lease contains various rules and regulations about the use of the property with which the lessee must comply. These include prohibitions on allowing rubbish to accumulate in the flat, playing musical instruments at certain times of day, hanging clothes outside the flat, placing window boxes on external windowsills, and parking cars in any yard, garden or driveway of the building.

14.
The landlord’s covenants are set out in clause 3. They include a covenant that the lessee shall have quiet enjoyment of the demised premises (clause 3.1); a covenant to maintain and keep in good and substantial repair the main structure of the building and all of the conduits and ducts in the building (save for those which exclusively serve any of the demised premises) (clause 3.3); covenants to maintain, cleanse and keep in good and substantial repair the common parts of the building (clause 3.4); and covenants periodically to decorate the building and the common parts (clauses 3.5 and 3.6).

15.
Clause 3.19 is of particular importance and reads:

“… every lease of a residential unit in the Building hereafter granted by the Landlord at a premium shall contain regulations to be observed by the tenant thereof in similar terms to those contained in the Fifth Schedule hereto and also covenants of a similar nature to those contained in clauses 2 and 3 of this Lease AND 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 dispute and the judgments below

16.
In the spring of 2015, Mrs Winfield approached the landlord’s managing agents for a licence to carry out proposed works to flat 13RC. These works would involve, among other things, removing a substantial part of a load bearing wall at basement level. It was common ground that they would amount to a breach of clause 2.7 of Mrs Winfield’s lease if not specifically authorised by the landlord. Progress was made towards the agreement of a licence but, the proposed works having come to the attention of Dr Duval and her husband and they having objected, the licence was refused. However, following presentations by the engineers and architects acting for Mrs Winfield, the landlord reconsidered the matter and, having done so, decided it was minded to grant a licence, subject to Mrs Winfield securing adequate insurance.

17.
In December 2015 and then again in February 2016, Dr Duval asked the landlord to secure an undertaking from Mrs Winfield not to act in contravention of clause 2.7 of her lease by cutting or maiming any of the load bearing or structural walls within flat 13RC. On both occasions, Dr Duval said that the landlord would be indemnified if legal action became necessary. On 12 May 2016 Dr Duval began these proceedings by issuing a claim form against the landlord seeking, among other things, 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.

18.
The proceedings came on for trial before Deputy District Judge Chambers who held that, on the proper interpretation of clause 3.19 of the lease, 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, and made declarations and orders to that effect.

19.
An appeal by the landlord was allowed by Judge Parfitt, sitting in the Central London County Court, by order dated 27 July 2017. In broad terms he held that the landlord had the power to license works that would otherwise amount to a breach of clause 2.7 of the lease; that if such works were licensed they would not amount to a breach of covenant; and that, once licensed, such works could not be the subject of enforcement action pursuant to clause 3.19.

20.
A further appeal by Dr Duval to the Court of Appeal was allowed for the reasons set out by that court in its judgment handed down on 18 October 2018 ([2018] EWCA Civ 2298; [2019] Ch 357). Lewison LJ, with whom Newey LJ and Sir Stephen Richards agreed, explained that the landlord had made two promises in clause 3.19. The first was a promise that every lease of a residential unit in the building granted at a premium would contain covenants similar to those in clauses 2 and 3, so including covenants similar to those in clauses 2.7 and 3.19. The second was a promise to enforce the covenants

at the request and expense of a lessee. This was a contingent obligation, the relevant contingency being the lessee's request and the provision of security. If the contingency arose then the landlord's obligation was triggered. Lewison LJ proceeded on the assumption that the contingency had not arisen on the facts in the present case and we must do the same.

21.
Lewison LJ then answered the question of principle set out at para 1 above in the negative. He held that if the landlord were to grant to a lessee such as Mrs Winfield a licence to do something that would otherwise be a breach of any of the absolute covenants in clause 2.7 of her lease, it would be committing a breach of its agreement with the lessee of each other flat in the building who enjoyed the benefit of clause 3.19. This was, he thought, implicit in clause 3.19, and it would be the case not only where, at the date of the licence, the other lessee had already made the request and provided the necessary security called for by clause 3.19, but also where the obligation under that clause remained contingent.

22.
The Court of Appeal therefore made a declaration to the effect that the 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.

This appeal

23.
On this further appeal the landlord contends that, although the Court of Appeal identified the right question, it failed to answer it correctly. In particular, the Court of Appeal failed properly to construe the terms of the leases in their context; failed properly to analyse whether the term it implied satisfied the relevant test for the implication of terms; and ended up with a commercially unworkable scheme, which was not that which was contemplated by the parties to the leases when they were granted, and which is a recipe for chaos and conflict in multi-tenanted buildings.

24.
Dr Duval responds that the Court of Appeal arrived at the right conclusion. Her primary case is that clause 3.19, on its proper construction, precludes the landlord from granting a licence to any lessee to do anything that would otherwise amount to a breach of an absolute covenant in that lessee's lease, including clause 2.7. Her secondary case is that it is implicit in each lease that the landlord will not put it out of its power to comply with a request under clause 3.19. She submits that upon its proper interpretation or by way of implication clause 3.19 obliges the landlord to enforce all of the covenants to which it refers and provides a mechanism whereby a lessee can compel the landlord to take legal action if necessary. By contrast, she continues, the interpretation contended for by Mrs Winfield would remove any meaningful distinction between clauses 2.6 and 2.7 and would allow the landlord to put it out of its power to perform its obligations to other lessees under clause 3.19 of each of their leases.

25.
The parties therefore disagree fundamentally about the proper interpretation of the terms in the leases which Dr Duval and Mrs Winfield hold. Accordingly, the starting point must be to construe those terms in context, that is to say to ascertain the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties to each lease in the situation in which they were when the terms of those leases were agreed.

26.
Once the process of construing the express words is complete, the issue of an implied term falls to be considered. The rationale for this two-stage approach was explained by Lord Neuberger of Abbotsbury in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742, paras 27 and 28: until one has worked out what the parties have expressly agreed, it is difficult to see how one can decide whether a term should be implied into a contract and, if so, what it is.

The background

27.
There are in my view certain aspects of the background which are highly relevant to the exercise of interpretation which must be carried out. The first is that each lease is a long-term contract, having a term of 125 years from 24 June 1981, and was acquired for a substantial premium. The parties to each lease would therefore have been well aware that, from the time of its grant, it was a readily marketable and extremely valuable asset. They would also have understood that it would be in the interests of each lessee to maintain his or her flat so as to retain and perhaps enhance that value.

28.
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 of the flats. Those works would include the routine repair and replacement of the plumbing, drainage, wiring and heating systems of each flat as necessary or thought desirable from time to time. They would also have been well aware that the lessees might at any time wish to modernise their flats or refurbish them to reflect changing tastes and fashions; or to incorporate technological developments and improvements relating to, for example, the supply of services such as water, gas and electricity, the provision of heating, or the transmission and reception of data for telecommunications, the internet or television.

29.
Thirdly, the parties would have understood that routine improvements and modifications of this kind 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, where appropriate, to give permission to the lessees from time to time to allow such works to take place.

30.
Fourthly, the parties must have appreciated the desirability of the landlord retaining, in the interests of all of the lessees, not just the reversionary interest in the flats but also the rights in possession of the common parts of the building such as the stairwells, lobbies, corridors and the outer and load bearing walls; and similarly, the important and active role the landlord would play in managing the building and fulfilling its obligations under the covenants to which I have referred in para 14 above.

Clauses 2.6 and 2.7 - interpretation

31.
Against this background I come to clauses 2.6 and 2.7. As I have mentioned, it was the common approach of the parties (and the Court of Appeal apparently accepted) that clause 2.7 sets the boundaries of clause 2.6. To take an example, a routine rewiring of one room in a flat would necessarily involve “cutting” a wire and a wall. On the parties’ interpretation, an activity such as this would fall within the scope of clause 2.7 and so would necessarily be outside the scope of clause 2.6.

Indeed, it is difficult to think of any alteration or improvement within the apparent scope of clause 2.6 which would not involve some “cutting” of a wall, pipe or wire.

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. 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 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. 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. Support for this view may be found in F W Woolworth and Co Ltd v Lambert[1937] Ch 37. There the Court of Appeal considered the proper interpretation of two covenants in the lease of a shop, one being a covenant by the lessee not to make any alterations to the demised premises without the consent of the landlord and the other being an absolute covenant by the lessee not to commit any waste, spoil or destruction on the demised premises or any part of it. The court construed the absolute covenant in such a way as not to conflict with the qualified covenant. As Romer LJ explained at p 60, it was necessary to exclude from the operation of the absolute covenant anything which fell within the qualified covenant, not the other way around.

33.
It must also be remembered that the landlord is subject to other restrictions on its ability to license a lessee to make alterations to his or her flat and in my opinion this provides further support for the interpretation of clauses 2.6 and 2.7 which I would hold to be correct. First, each lessee enjoys the benefit of a covenant for quiet enjoyment, that is to say a covenant that the lessee’s possession of his or her own flat will not be substantially interfered with by the landlord or anyone claiming under the landlord. This protects the right of all of the lessees to use their flats in ordinary and lawful ways. So, for example, regular excessive noise generated by one lessee may constitute a substantial interference with the ordinary enjoyment of the premises of another lessee: Southwark London Borough Council v Mills [2001] 1 AC 1, per Lord Hoffmann at pp 10A-11C; per Lord Millett at p 23B-D.

34.
Secondly, the landlord must not derogate from its grant. As Lord Millett explained in Southwarkv Mills at p 23F, the principle underpinning this obligation and the covenant of quiet enjoyment is much the same: a man may not give with one hand and take away with the other. In order to determine whether a specific act or omission on the part of the landlord constitutes a derogation from grant, it is obviously necessary to establish the extent of the grant. Here the first schedule of Dr Duval’s leases contain, for example, rights of way and passage to and from the demised premises (para 2); the free passage and running of water, soil, gas, electricity and other services in and through the conduits that pass through the building (para 4); and the right to adjacent and lateral support and to shelter and

protection from adjoining premises (para 5). Were the landlord to permit a neighbouring lessee to cut into a load bearing wall in such a way as to remove or substantially interfere with the support it offered to either of Dr Duval's flats, it would, in my opinion, constitute a clear derogation from her grant.

35.
Thirdly, each of the lessees is entitled to be protected against nuisance, that is to say, in this context, the doing of something to or in a neighbouring or nearby flat which constitutes an unreasonable interference with the utility of his or her own flat. The 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 at p 15D-F per Lord Hoffmann, pp 21H-22B per Lord Millett.

36.
Finally, the landlord has covenanted with the lessee in the terms of clause 3 of the lease. I have referred to this clause earlier in this judgment. Of particular importance here are the covenants to maintain and keep in good and substantial repair the structure of the building including the foundations, main walls, roofs, doors and window frames and conduits (clause 3.3); to maintain, cleanse and keep in good and substantial repair the common parts of the building (clause 3.4); to decorate the outside of the building and inner common parts (clauses 3.5 and 3.6); and to keep the common parts clean and properly lit (clause 3.7).

Clause 3.19 - interpretation

37.
As the Court of Appeal observed, clause 3.19 has two parts. The first is a promise by the landlord that every lease of a flat in the building granted by the landlord at a premium from that point in time will contain covenants of a similar nature to those contained in clauses 2 and 3 of the lease. The Court of Appeal emphasised and I agree that a covenant is a legally binding obligation and so the landlord promised that each lease granted thereafter would contain similar legally binding obligations on the lessee. The landlord also promised that each lease would contain a covenant similar to clause 3.19; that is to say a promise by the landlord that it would enforce covenants of a similar nature to those contained in clause 2, provided the relevant conditions were satisfied.

38.
The second part of clause 3.19 is a promise by the landlord that it will, at the request of a lessee and subject to the provision of the required security and the promise to pay the landlord's costs on an indemnity basis, enforce any covenant entered into by another lessee which is of a similar nature to any of the covenants contained in clause 2 of the lease of the complainant lessee.

39.
The landlord points out that clause 3.19 does not say that the covenants in each lease must be the same; it says they must be of a similar nature. This, says the landlord, accommodates the possibility that it has, on occasion and at the request of one of the lessees, agreed to a limited departure from the terms of clause 2.7. Turning to the second part of clause 3.19, the landlord emphasises that this is conditional. The objecting lessee must make a request and agree to pay the costs of the landlord on an indemnity basis and provide appropriate security. What the landlord has to do, once those conditions have been satisfied, is to enforce similar covenants in the lease of the lessee who proposes to carry out or is carrying out the work the subject of the objection. However, the landlord continues, clause 3.19 only allows a valid request for enforcement to be made so long as it remains legally possible for

the landlord to take legal action. The parties cannot have contemplated the landlord could be obliged to take action against a lessee who would have a complete defence to that action, for example because the landlord had authorised the activity complained of in advance.

40.
The landlord also contends that, if a lessee applies for a licence to do what would, without the licence, be a breach of covenant, the lessee does not, simply by making that request, commit or threaten to commit a breach in respect of which the landlord can take enforcement action, and so there is no basis for another lessee to make a clause 3.19 request. If, on the other hand, there is a breach or threatened breach in relation to which a landlord can take legal action, and another lessee satisfies the various conditions to which I have referred, the landlord cannot then unilaterally waive the breach or authorise the threatened breach. At that stage the landlord is made subject to the control of the objecting lessee, who has accepted the risk of proceedings.

41.
Dr Duval responds and the Court of Appeal accepted that clause 3.19 provides a mechanism whereby every lessee knows that, if one lessee carries out or threatens to carry out an act in breach of a covenant by which it has agreed to be bound then any of the other lessees can require the landlord to take action to enforce that covenant. This, says Dr Duval, is important because, in contrast to a letting scheme where a building's lessees are given rights inter se so that each may enforce the covenants in each of the leases against each other, enforcement of the covenants of the leases of the units in this block can only take place by the landlord. Further, Dr Duval continues, the inclusion of clause 3.19 in each lease provides a practical way of ensuring that all lessees know the principles and rules upon which the building will be operated and occupied. Dr Duval accepts that, absent clause 3.19, the landlord and lessee would be free to agree a waiver of an absolute covenant or a licence to carry out a piece of work that would otherwise amount to a breach of its terms, but contends that in this case and as a result of the inclusion of clause 3.19 in each of the leases, any such waiver is precluded unless all of the other lessees agree to waive their rights. Put another way, by undertaking to enforce the covenants of the lease, the landlord has undertaken not to do the opposite, namely to license breaches of covenant. She argues that, were it otherwise, clause 3.19 would be ineffective.

42.
In my opinion Dr Duval is right to say that, in the first part of clause 3.19, the landlord made a promise that every lease of a residential unit in the building granted by the landlord at a premium would contain covenants similar to those in clauses 2 and 3. In other words, each lessee knew that every other lessee would be bound by similar covenants to those contained in clauses 2.6 and 2.7, and further, that each lease would contain a covenant similar to clause 3.19, that is to say a covenant by the landlord to enforce the covenants in the lease of every other lessee upon request and the provision of security for the landlord's costs. As Lewison LJ put it at para 16 of his judgment:

"From the perspective of a lessee who is paying a premium for the grant of a long lease, the combination of these two promises would be taken to mean that the lessee could be sure that upon request (and the provision of security) the landlord would enforce the covenants by which each lessee had agreed to be bound. Those covenants would be in the form in which they appear in the leases as granted; and would have the practical effect that their appearance in that form was designed to have."

43.

That brings me to the critical question, namely 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. I agree that clause 3.19 does not say expressly that the landlord cannot give a lessee permission to carry out structural work falling within the scope of clause 2.7, so it must now be considered whether this is nevertheless implicit in clause 3.19.

Implied term

44.
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. The principle was explained in these terms by Lord Alverstone CJ in Ogdens v Nelson[1903] 2 KB 287, 296:

“It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge; further, that, where a person has undertaken to carry on a business, out of the profits of which he has undertaken to pay certain moneys as a consideration for the contract to the other party to the contract, he must not by his own act or default disable and incapacitate himself from further carrying on such business.”

45.
The principle is well illustrated by cases involving breaches of contracts to marry. In Short v Stone(1846) 8 QB 358 the defendant agreed to marry the claimant within a reasonable time after request. He broke that agreement by marrying somebody else before the request had been made, and in that way put it out of his power to comply with the request, if it were made. In Caines v Smith (1847) 15 M & W 189 the defendant acted in breach of his promise to marry the claimant by marrying another woman, and it was no answer that the claimant had not asked the defendant to fulfil his promise before issuing proceedings.

46.
In Southern Foundries (1926) Ltd v Shirlaw[1940] AC 701, 717 Lord Atkin characterised the principle as:

“a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself ‘of his own motion’ bringing about the impossibility of performance is in itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B.”

47.
Founding herself on these authorities, Dr Duval sought to characterise as a rule of law the proposition that, where two persons have entered into a contract, the performance of which on both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations he has undertaken to discharge; and similarly, the proposition that, where one party has undertaken a contingent obligation, he will do nothing to prevent the contingency occurring, or from putting it out of his power to comply with the obligation when the contingency arises. In my view, however, propositions such as these are, at least in general,

more properly regarded as implied terms because, where appropriate, they involve the interpolation of terms to deal with matters for which the parties themselves have made no express provision.

48.
Thus, for example, in Stirling v Maitland (1864) 5 B & S 840, 852, 122 ER 1043, 1047, Cockburn CJ said:

“I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.”

49.
As we have seen, in Southern Foundries v Shirlaw, Lord Atkin characterised this principle as a rule of law. But Viscount Maugham (at pp 712-713) adopted an implied term approach. He explained that it was not a rigid rule but one capable of qualification in any particular case; and, in the particular circumstances of that case, the implication should be taken to extend only to direct acts of a party and not to the indirect and unforeseen consequences which might follow from acts which, on the face of them, did not necessarily or even probably alter the state of circumstances under which alone the arrangement could be operative. So too Lord Romer (at pp 730-731), Lord Wright (at p 723) and Lord Porter (at pp 741-742) preferred an implied term analysis.

50.
Similarly, in Luxor (Eastbourne) Ltd v Cooper[1941] AC 108 the parties agreed that if a party introduced by the respondent should buy two cinemas for a sum in excess of a certain figure, the appellants would pay him a commission on the completion of the sale. The respondent alleged that he was entitled to his commission because he had introduced persons who were ready and willing to purchase the cinemas on the terms on which the appellants were willing to sell, even though no such sale took place. In the particular circumstances of that case the House of Lords held there was no room in the contract for an implied term that the appellants would not dispose of the cinemas themselves in a way which would prevent the respondent from earning his commission.

51.
The correct approach to the implication of terms was recently stated by Lord Neuberger, with whom Lord Sumption, Lord Hodge and Lord Clarke agreed, in Marks and Spencer plc v BNP Paribas, paras 14-32. It is sufficient for present purposes to note first, that the express terms of the contract must be construed before one can consider any question of implication; secondly, that the term to be implied must be necessary to give business efficacy to the contract or so obvious that “it goes without saying”; and thirdly, that the term to be implied must be capable of clear expression. A way of assessing whether a term is necessary to give business efficacy to a contract is to consider whether, without the term, the contract would lack commercial or practical coherence.

52.
In this case Lewison LJ identified, at para 27 of his judgment, the term that Dr Duval argues is implicit in her lease as 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. I agree with Lewison LJ that this is, in substance, the term that Dr Duval seeks to imply and, in my view and for the reasons I will now explain, he was also right to find that such a term must be implied in her lease.

53.

The 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. Each of those lessees would have known that every other lessee was and would continue to be subject to the same or similar obligations and, in particular, to the qualified covenant in clause 2.6 and the absolute covenant in clause 2.7. Each lessee would also have known that, under clause 3.19, the landlord would, upon satisfaction of the necessary conditions, enforce those obligations. Clause 3.19 would therefore have been understood by every lessee to perform an important protective function.

54.
What is more and as the landlord accepts, the first obligation in clause 3.19 is a continuing one with the consequence that the landlord is required to keep in place in every lease covenants of a similar nature to those in clause 2, including clauses 2.6 and 2.7. If a lessee threatens to carry out or has carried out an activity in breach of clauses 2.6 or 2.7 then, at the request of another lessee and on the provision of security, the landlord is obliged by the second part of clause 3.19 to take enforcement action.

55.
In my view it 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. The clause 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. As Lewison LJ said at para 27 of his judgment, 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.

56.
As I have mentioned, the landlord has abandoned on this further appeal a submission it made to the Court of Appeal that it could authorise a breach by a lessee of clause 2.7 at any time. It now only argues that it can authorise such a breach up to the moment that an objecting lessee has asked it to take enforcement action and provided the necessary security. It also contends that clause 3.19 allows a valid request for enforcement to be made for so long as it remains legally possible for it to take legal action and not thereafter. The parties cannot have contemplated that the landlord would be obliged to take action against another lessee who would have a complete defence.

57.
I cannot accept these submissions. I recognise that if a landlord waives its right to complain of an activity by a lessee in breach of clause 2.7 it cannot subsequently bring a claim against that lessee for breach of the covenant. But that does not mean to say that the landlord has not acted in breach of its obligation under clause 3.19 to another lessee. In my view it would be uncommercial and incoherent to say, as the landlord does, that clause 3.19 can be deprived of practical effect if it 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.

58.
The landlord also argues that, over the lifetime of the leases, it was inevitable that each lessee would wish from time to time to carry out repairs, renovations or improvements falling within the scope of clause 2.7. Those works might not impinge in any way on neighbouring flats; or on the landlord’s

retained interest in possession of the load bearing walls, the structural columns and beams, the external surfaces of the building and the common parts such as the stairwells, lobbies and corridors. The parties to the original leases must also have appreciated the obvious desirability of allowing the landlord, after proper consideration of the proposals, to grant a consent for works of that kind to be carried out. Yet, the landlord continues, on the interpretation contended for by Dr Duval, it would be precluded from licensing any such works unless each and every other lessee has expressly consented to them. It would also deprive the landlord of the opportunity to control the activities of a lessee which might impinge upon its own interests in possession in the building, and would place that power in the hands of all of the other lessees. Further and importantly, says the landlord, it would confer on each of those other lessees the power to veto repairs, renovations or improvements, however capricious or unreasonable his or her intentions in doing so might be. Moreover, in a large block of flats the landlord might struggle to obtain a response from all of the other lessees, so frustrating its ability to consent to the works without leaving itself open to a claim for breach of the terms of the other leases.

59.
The flaw in this submission, as it seems to me, is that it is founded upon a misapprehension of the scope of clauses 2.6 and 2.7. I do not accept that clause 2.7 extends to the kind of routine repairs, renovations and alterations which the landlord describes. Those alterations fall within the scope of clause 2.6 and so the landlord can give its permission for them to be carried out. By contrast, clause 2.7 is directed to more fundamental works which go beyond routine alterations and improvements and are intrinsically such that they may be damaging to or destructive of the building. These are the kinds of work which it is entirely reasonable to suppose should not be carried out without the consent of all of the other lessees. The present case provides a good example. The work that Mrs Winfield wished to carry out would have involved, among other things, cutting into and removing a substantial portion of a load bearing wall at basement level and excluded from the demise of her flat. In my view the parties were right to agree that this work would fall within the scope of clause 2.7 and it seems to me to be entirely appropriate that works of this kind should require the consent of the other lessees, including Dr Duval.

Conclusion

60.
For all of these reasons, I would dismiss this appeal.