

Can a landlord grant consent for a breach of covenant?

May 2020



Published by
[Robert Mullarkey](#)

*Can a landlord give consent to an action that a tenant is otherwise absolutely prohibited from doing if other leases require the landlord to enforce such covenants where they are breached? That was the question before the Supreme Court in *Duval v 11-13 Randolph Crescent Ltd*.*

While the facts of the case relate to a freehold management company of a block of flats and a residential long leaseholder, the principles of the court's decision are likely to apply in a commercial context where similar covenants are present.

Dr Duval (D) was a long leaseholder of two residential flats in a block of flats in Media Vale, North-West London. Mrs Winfield (W) was a long leaseholder of another flat in the block. Each long residential lease in the block contained a covenant which prevented the leaseholder from making any alterations or improvements to their premises without the landlord's consent, which was not to be unreasonably withheld by the landlord. There was a further absolute prohibition on the leaseholders carrying out any works which cut into any roof, wall, ceiling or any service media. Each lease also required the landlord to enforce covenants against other leaseholders at the request and cost of any of the other leaseholder in the block.

W sought permission from the landlord (freehold management company) to carry out structural works to her flat, which included the removal of a substantial part of a load bearing wall at basement level. Such works would amount to a breach of the absolute prohibition. The landlord indicated that it was minded to grant a licence to W giving her permission to carry out the works in breach of the absolute covenant, on the condition that W obtained insurance. D issued proceedings against the landlord seeking a declaration that it had no power to permit W to act in breach of the absolute prohibition and to do so would be a breach of the landlord's covenant with the other leaseholders.

Finding in favour of D, the Supreme Court held that there was an implied term in D's lease that the landlord would not do anything to "put it out of its power" to enforce the covenants in the lease. Having given W consent to carry out structural works which were absolutely prohibited in the lease, the landlord would no longer be able to enforce the terms of the lease at the request of the other leaseholder in the block. If the landlord could vary, modify or permit breaches of a covenant by granting a licence, the implied covenant would be useless. The Supreme Court concluded that the only way that the works could be carried out would be with the consent of all other leaseholders in the block, including D.

Although this decision was made in a residential context, the principles could be far reaching and will apply equally to commercial leases. For example, logistic or industrial units on an estate may contain similar covenants with an absolute prohibition on alterations and similar covenants for the landlord to enforce covenants. In such circumstances, it would not fall within the landlord's power to permit the tenant to breach the covenant. This decision could be pertinent as tenants look to modify their premises to adjust to a post-COVID world.