

Real Estate Tip of the Week: Is an absolute prohibition always good for the landlord?

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In the case of *Duval v 11-13 Randolph Crescent Ltd* the leases of all the residential units within a building contained a standard mutuality covenant (a landlord covenant to impose similar covenants on each tenant) and an enforcement covenant (the landlord covenanting to enforce covenants at the request and expense of a tenant).

The leases also contained an absolute prohibition in relation to certain works, but the landlord granted consent to one tenant to carry out such prohibited works. Another tenant objected and the Court of Appeal found in favour of the objecting tenant. It held that the landlord would be in breach of its enforcement covenant by granting another tenant consent to do something that would otherwise be in breach of the tenant's lease.

The issue in this case is not about the landlord sanctioning a tenant's breach, which is always an option open to a landlord. The issue is more that, where leases contain a mutuality covenant and an enforcement covenant, the landlord would put itself in breach of its enforcement covenant to other tenants, when sanctioning one individual tenant's breach.

What are the consequences for landlords in these circumstances?

Remedies for tenants that object may include (i) an injunction to prevent the landlord granting a licence for the works to be carried out, or (ii) damages in the event that a licence has been granted and the works have been carried out. This is not necessarily a huge concern for landlords. The other tenant(s) may not have suffered significant loss or damage, so damages may be insubstantial. As regards an injunction, the other tenant(s) would have to convince the court that there is good reason to support the grant of any injunction.

What are the considerations for landlords?

A tenant determined to compel a landlord to enforce covenants, even where the breach has no impact on the claimant tenant, may be penalised in costs even if the landlord is in breach. In addition, leases are likely to include provisions for a tenant to provide security for costs if it requires the landlord to enforce covenants. These considerations should make a tenant think twice about taking action where the sanctioned breach has no real impact on them. Landlords could also consider using qualified covenants instead of absolute covenants, giving the landlord freedom to grant consent on a case by case basis without putting the landlord in breach of an enforcement covenant.

As always, if in doubt, seek legal advice sooner rather than later.

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