

Taken for granted

Joanna Sykes on the scope of the doctrine of non-derogation from grant

IN BRIEF

- Derogation from grant occurs when one party agrees to grant rights to another but then does something which detracts from this grant.
- The doctrine is uncertain in its scope so the courts look at the facts and the parties' reasonable expectations in each case in order to decide whether the doctrine applies.

In 1975 Lord Denning stated the principle of non-derogation from grant: "If one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit, because that would be to take away with one hand what is given with the other."

In the context of landlords and tenants, where a landlord lets land for a specific purpose, then it is under an obligation not to take any steps as regards its retained land which would render the demised premises unfit or unsuitable for the purpose for which they were let.

The problem with this doctrine is that it is founded in case law and as such there is some uncertainty as to its scope and application. Certainly its scope is not confined to real estate, but for the purposes of this article I shall limit the discussion to landlord and tenant matters. The courts have not formulated a legal test that can be applied to assist landlords and tenants in determining whether or not the doctrine applies to their particular set of circumstances. Indeed, the main guiding principle seems to be that the court must take into account the circumstances and the reasonable contemplation of the parties at the time of the grant of the lease. However, the principle of non-derogation from grant is implied into all leases and in this article I shall discuss the main contexts in which the concept arises, before looking at the distinction between it and the idea of quiet enjoyment, before concluding with some drafting suggestions.

Competing businesses

Tenants have often attempted to invoke the doctrine where they are experiencing problems with competing businesses,

particularly in the context of shopping centres and shopping malls where a landlord has some control over the neighbouring tenants and common areas.

In *Port v Griffiths* [1938] 1 All ER 295 the landlord had let a shop to the tenant for a 21 year term with an express tenant covenant to use it for the retail business of the sale of wool and general trimmings, and no other purpose. Subsequently the landlord let the adjoining shop to another tenant with a tenant covenant to use it for the retail business of the sale of tailor and dressmaking trimmings and cloths and no other purpose. The first tenant alleged that this was a derogation from grant as it frustrated the purpose for which the first premises were let. The court held that it was not within the reasonable contemplation of the parties that the landlord could not let an adjoining property to a rival of the first tenant. It would be unreasonable to assume that the landlord had accepted any such restrictive obligations and the landlord should not be compelled to insert an express term into any new lease restraining tenants from uses similar to the business of the first tenant. There was no derogation from grant in this case.

Had the tenant's argument been accepted, it would have meant that where a landlord knowingly lets premises to a tenant for a particular trade it impliedly guarantees to that tenant a monopoly of its particular trade, in respect of any other property the landlord may have. The presence of a trade rival next door may or may not operate to the detriment of a particular business. The key question was whether the letting of the second shop rendered the first tenant's shop unfit or materially less fit to be used for the purpose for which it was demised.

The case was supported by *Romulus*

Trading Co. Ltd and Another v Comet Properties Limited [1996] 2 EGLR 70. In this case the tenant argued that the law had moved on from *Port v Griffiths* and that an economic disadvantage should be recognised as derogation from grant on the basis of the Lord Denning principle. The judge considered the law to be clear and certain. If a landlord allows a competing business to set up next door for the same trade then there is no derogation from grant.

Issue of control

However, a year later in *Chartered Trust Plc v Davies* [1997] 2 EGLR 83 a landlord of a shopping mall was deemed to have derogated from its grant by failing to take steps to remove a nuisance from the common parts. In this case, a landlord granted to its tenant a lease of a shop in a shopping mall and four years later the adjoining unit was let to a pawnbroker. The pawnbroker shop attracted customers with little money to spend in the shopping mall who also waited outside the first tenant's shop. The pawnbroker shop also erected a sign which restricted the light to part of the shopping mall and deterred passing trade from entering the first tenant's shop. The court determined that where a landlord grants leases in a shopping mall over which it maintains control and recovers a service charge, it cannot argue that the tenant's sole protection against nuisance by another tenant is its ability to bring an individual action. The duty lies with the landlord. The landlord's failure to prevent the nuisance by the pawnbroker under the terms of the lease either by enforcing the covenant against nuisance, or making regulations ensuring that the passageways were kept clear, left the first tenant's premises materially less fit for its purpose. The landlords had therefore derogated from grant.

The general impression at the time of the grant of the first tenant's lease was that this development was going to be high class with a policy of letting to tenants within a high class retail category. The judge noted particularly that the unit was a shop within a shopping arcade or shopping mall rather than a separate independent retail unit. The landlord therefore took responsibility for common areas and it was implicit that other tenants would be subject to a similar form of lease and obvious that the uses

to which other units were put and the manner in which business was carried on by those tenants would have an impact on the businesses of other individual tenants and the general success of the development. The letting to a pawnbroker in general was not an error but the fact that the tenant in question caused substantial interference with the adjoining tenant's business by creating a nuisance raised a question as to whether the landlord was under any legal obligation to intervene. The Court of Appeal found that the mere fact of letting retained land was not a derogation from grant and the landlord would only be liable for activities of the tenant on the retained land where it had consented to the nuisance.

An interesting point to note from *Chartered Trust plc v Davies* is that the court felt that there must come a point where the landlord becomes legally obliged to protect what it has granted. But how do the courts and landlords determine when this point arises? In *Petra Investments Limited v Jeffrey Rogers Plc* [2000] EGCS 66, [2000] All ER (D) 719 a tenant's claim of derogation from grant was not upheld. The tenant took a lease of a shop in a Chelsea shopping mall which was marketed as a high quality fashion retail centre. However, the landlords could not attract many such retailers and the tenant's trade suffered. One unit was let to Virgin Megastore which further decreased trade. However, the court held that the fact that the premises were let specifically as a retail unit within a centrally managed centre did not imply the landlord had a general responsibility not to do anything which may cause damage to the business of its tenants. The actions of the landlord had not rendered the premises unfit or materially less fit for the particular purpose for which the demise was made. Clearly, a landlord's obligation to protect what it has granted does not extend this far.

Reasonable contemplation of the parties

The case of *Oceanic Village Limited v Shirayama Shokusan Co. Ltd* [2001] EGCS 20 provided a tenant with a successful claim for derogation from grant in the context of competing businesses. The tenant operated a gift shop adjoining London Aquarium within a building known as Riverside Building. The landlord covenanted in the lease not to admit any other gift shop to be operated in the building. However, the term "building" was not defined. The landlord proposed to open two new gift shops along a walkway

between the façade of the Riverside Building and the river wall selling gifts that were similar to the tenant's products. It was determined on the facts that the new gift shops would not be within the building and therefore would not be in breach of the express covenant. However, it was decided that the new shops could not sell similar products as this would be in breach of the implied obligation on the part of the landlord not to derogate from grant.

The court found that the main purpose for the grant of the lease was to enable the tenant to run a gift shop for the London Aquarium. A term was therefore implied into the lease restricting operating another gift shop selling similar products on an adjacent walkway. The court interfered with what the parties had expressly agreed by applying the doctrine of non-derogation from grant and consequently overriding the express words of the lease. What marks this case out from the previous cases is that the unit was supposed to be the only gift shop for the London Aquarium to the extent that the tenant had obligations regarding what percentage of its stock was London Aquarium-related products. It was clearly within the reasonable contemplation of the parties that it would be the only gift shop selling these products.

Again in *Platt v London Underground Limited* [2001] 20 EG 227, [2001] All ER (D) 257 (Feb) the court determined that there had been a derogation from grant. London Underground granted two leases to the tenant of kiosks at Goodge Street tube station. One was a bureau de change at the station entrance and the other was a newsagents at the station exit. The tenant then found that the station exit was closed during busy periods and passing trade was much less than expected. The tenant claimed damages on the basis that London Underground had derogated from grant, and the court agreed. The scope of a landlord's obligations not to derogate from grant was determined by the express terms of the lease, the circumstances surrounding the grant of a lease and the reasonable contemplation of the parties when the lease was granted. Both parties appeared to have entered into the lease on the basis that the station exit would remain open at all times and nothing in the lease suggested otherwise.

So what is the test?

It is useful to take into account the factual background to the grant of the lease in order to establish the outcome and predict the court's decision. This review of the

case law highlights that the facts and circumstances surrounding the grant of the lease and, in connection with this, the reasonable contemplation of the parties as material determining factors for the court. It is in light of these factors that the court makes its decision whether or not to imply a term into the lease imposing additional obligations on the landlord.

How does this differ from quiet enjoyment?

The covenant for quiet enjoyment stands alongside and to some extent overlaps with the landlord's implied obligation not to derogate from grant. The obligation not to derogate from grant is not excluded by the inclusion of an express quiet enjoyment covenant, *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836. The covenant for quiet enjoyment imposes obligations on the landlord in its capacity as a landlord and is therefore limited to implied obligations which fall within the scope of the landlord's covenants. There is therefore an overlap with the doctrine of non-derogation from grant where this also leads to the implication of a landlord covenant. However, the doctrine of non-derogation from grant has a wider application in that it is not limited to leases and also it can be implied into rights reserved to a landlord and applied against a tenant. In addition, it can impose restrictive obligations on neighbouring occupiers with the same landlord.

Drafting suggestions

In light of the case law discussed above, it would be desirable to ensure when acting for a landlord that there is a statement in any lease that nothing in the lease imposes any restriction on the use of any other units or neighbouring property, whether belonging to the landlord or otherwise.

When acting for a tenant, it is desirable to obtain a covenant by the landlord to enforce the covenants entered into by tenants of other units in the same development or who occupy the landlord's adjoining property. It is necessary to be very clear as to the extent of the landlord's property that is to be affected by this obligation. If the lease is silent, the tenant would have no right to require the landlord to enforce the covenants made by other tenants in the development and would have to rely on a claim of derogation from grant, with limited chances of success. NLJ

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