Parity not priority is Paramount

Nikolas Ireland analyses a case requiring the court to balance the competing interests of the parties to a lease

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'While the focus of the court was on the application for injunctive relief, one eye was firmly on the bigger picture and whether the covenant of quiet enjoyment would be breached by the landlord's proposed method of carrying out the works.'

The recent case of *Century Projects Ltd v Almacantar (Centre Point) Ltd* [2014] has provided food for thought on the balancing act between a tenant's right to quiet enjoyment and non-derogation from grant and a landlord's obligation to carry out works. It also serves as a practical application of the guidelines the courts will follow when exercising their discretion to grant interlocutory injunctions.

This case reminds both landlords and tenants that whenever consideration is given to landlord repair covenants in the context of quiet enjoyment, it is important to remember that the court will not prioritise the rights of one party over another. A landlord must take care to be reasonable in carrying out their repairing obligations, while a tenant must accept that any interference with their demise as a result of such repair will not automatically be actionable as a breach of quiet enjoyment.

Background facts

The claimant, Century Projects Ltd (the tenant), is the tenant of the highest lettable floors of the iconic Centre Point Tower in London. The tenant runs a high-end restaurant from the premises, known as Paramount, which is marketed heavily on the basis of its views across London. Indeed, one look at the Paramount website confirms that they put much stock in their 'unparalleled 360-degree views of London', and that this unique selling point is something upon which the tenant has based its business.

The defendant companies (the landlord) are the landlords and owners of the Centre Point Tower. The application by the tenant sought an interlocutory injunction restraining the landlord from carrying out external repair works to the concrete façade of the building using scaffolding. The concern for the tenant was that the scheme of scaffolding proposed, being a fixed scaffolding blocking the windows of their demise and covered with a protective sheeting, would destroy the view which the restaurant enjoys. The tenant claimed this would constitute a breach of the quiet enjoyment covenant given by the landlord in the lease, as well as a breach of the landlord's implied obligation not to derogate from grant. The tenant said the works could be carried out using cradles, which would have caused minimal disruption to the view.

Planned works and expert reports

It was agreed between the parties that the external repair works needed to be carried out, and that these were the responsibility of the landlord, but the method by which they would be carried out was in dispute. The landlord commissioned a contractor, Sir Robert McAlpine, to prepare a report that sought to provide confirmation of the correct method by which to access the external façade to carry out the works. Options such as the use of suspended cradles, abseiling and mast climbing platforms were all mooted but the report concluded that scaffolding was the only viable option, taking into account the height of the building and health and safety considerations. The tenant was not happy with this proposition, given that it would result in the views from the restaurant being completely blocked for the duration of the works, which were estimated at six months.

The tenant instructed an expert to prepare a report which concluded that the works could be carried out using suspended cradles with a far

less prejudicial effect on the tenant's business, as the view would not be so heavily disrupted. The landlord, in response, instructed their own expert who confirmed in a further report that scaffolding was the only suitable option and that they would not recommend the use of cradles in the circumstances. While the consistent advice which the landlord received from its advisors was that scaffolding was the appropriate method to use, it was the tenant's case that the landlord was under an obligation to take all reasonable precautions to minimise the disruption to its business. Therefore, if the use of cradles would be as quick, cheap and safe as scaffolding then the landlord would not be taking all reasonable precautions by pressing ahead with scaffolding. The principle of 'reasonable precautions' is discussed further below.

The landlord sought to have the matter determined at this stage and submitted that there was no serious issue to be tried on the proper construction of the lease. As the demise granted was for premises from which to run a restaurant, it was argued that the works proposed would not result in any frustration of that use and that 'the grantor's obligations are confined to the subject matter of the grant', as Lord Millett stated in *London Borough of Southwark v Mills* [1999]. Following Lord Millett's further statement that 'there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant', it was submitted that neither was there any actionable breach under the principle of non-derogation from grant. The landlord said that a covenant was effective only over that which is actually demised, and so there could be no breach of quiet enjoyment as a result of any interference with the view enjoyed by the restaurant.

The court's role

While the court was conscious that its role was not to deal in depth with legal and evidential matters which would form the subject matter of the trial, they did appear to support the landlord's view that *Southwark* may very well demonstrate that there can be no breach of the covenant for quiet enjoyment if the only interference is with a view which is not the subject of the demise. However, the court was not willing to determine the point at an interlocutory stage. The court only needed to determine whether or not there was a serious issue to be tried for the purposes of the application for an injunction.

Judicial comment

Upon consideration of the tenant's application for injunctive relief and whether or not there was a serious issue to be tried, the court also took into account whether the tenant had a realistic prospect of establishing a breach of covenant if the landlord were to carry out the works using scaffolding as proposed.

It is interesting to note that the court appeared far more supportive of the landlord's standpoint and stated their belief that they were in a strong position. As general guidance for practitioners, this suggests that in principle, a landlord will be entitled to carry out works to its building despite the disruption it may cause to a tenant's business interests. The court recognised that where the landlord has an obligation to carry out repairs, with that comes the responsibility to engage contractors, specify a programme of works and the method of execution. Accordingly, it would be unusual to encounter a situation where a third party could dictate to the landlord how to perform the works that it was obliged to carry out.

The key point for landlords to consider when carrying out works with the potential to impact upon a tenant's business is whether the chosen method of those works is reasonable in all the circumstances. This is the driving force behind the principle that an obligation to carry out repairs must fit together with a covenant for quiet enjoyment. It is clear that neither provision is intended to trump the other and therefore, while a landlord does not seem likely to be prevented from carrying out repair works to its building, they should be reasonable in their execution of those works. By the same token, a tenant cannot claim that, by virtue of a covenant for quiet enjoyment, a landlord must only carry out works in such a way as results in the least possible interference to the tenant's business.

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Goldmile principle

The case of *Goldmile Properties Ltd v Lechouritis* [2003] established this principle and gives important guidance in situations where these covenants appear to be at loggerheads with each other.

The facts of *Goldmile* are similar to those of *Almacantar* in that it concerned a restaurant lease with both the tenant's covenant for quiet enjoyment and a landlord's obligation to carry out repairs. The landlord carried out repair works, requiring scaffolding and sheeting around the tenant's portion of the building for six months, with the effect that the tenant's restaurant was shrouded and looked closed and, in addition, suffered from building dust inside.

The court found that there was no breach of the quiet enjoyment covenant as a result of the landlord's works. While there was obviously interference to the tenant's business, the test was whether the landlord had used all reasonable precautions to minimise disturbance to the tenant when carrying out repairs.

Definitions

Quiet enjoyment: a tenant's right to enjoy the demised premises free from disturbance or interference from the landlord.

Non-derogation from grant: the principle that a party conferring a benefit on another party should not deprive that party of the enjoyment of that benefit or take action which renders the premises unfit or unsuitable for the purpose for which they were let.

It is important to note that 'all reasonable precautions' is not to be construed as 'all possible precautions'. Clearly the former is a lower standard and does not require the landlord to take unreasonable steps or to depart from good practice simply to prevent disturbance to the tenant. The Court of Appeal in *Goldmile* gave a helpful illustration of this principle by stating that while it would be possible to erect scaffolding at the premises early in the morning on the day the restaurant was shut, carry out the works all day and dismantle the scaffolding in the evening, it would not be reasonable. The cost and duration of the works would increase and the landlord was not, therefore, required to conduct the works in this way in order to protect the tenant's business and the covenant for quiet enjoyment.

Selby LJ in *Goldmile* said that 'the two covenants must be construed and applied so far as possible so as to coexist on a basis of parity, not priority, respecting the terms of both', which is the basis upon which the court assessed the likelihood of the tenant succeeding in *Almacantar*.

By adopting the idea of parity over priority, the court in *Almacantar* commented on the reasonableness of the landlord's actions and stated that, as the proposed scaffolding was based upon numerous reports and consistent findings from their professional team, it was difficult to imagine any court at trial finding for the tenant. Indeed it was noted by Mr Justice Nugee that 'the notion that the landlords can be held to be in breach of their covenant in placing the contracts as advised by their apparently competent and reputable professional advisors is one that I find surprising'.

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The conclusion, therefore, as to whether the tenant had an arguable case to prevent the landlord from using scaffolding to carry out the repair works was that, while they did, it was one which faced 'significant difficulties'. It appears therefore that the tenant may have quite a battle on its hands in order to demonstrate that the landlord has breached the covenant for quiet enjoyment, or derogated from grant, at trial.

Injunctive relief and the *American Cyanamid* guidelines

The landmark case of *American Cyanamid Co v Ethicon Ltd* [1975] sets out the principles upon which the court should exercise their discretion to grant interim injunctions. The House of Lords in this case declared that so long as the claim is not frivolous or vexatious, the substantial factor that must be considered is the balance of convenience between the parties, including whether damages would be an adequate remedy for the claimant and whether the defendant would be able to pay them.

Is there a serious case to be tried?

The first hurdle to overcome is to demonstrate to the court that the claim is of some substance. A claimant with a cause of action that is considered frivolous or vexatious will have their application for an injunction refused at the outset.

While the court will consider the merits of the claimant's claim to establish whether there is a serious case to be tried, they will not embark on a full-scale examination of the case. Lord Diplock stated in *American Cyanamid* that:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

This passage was quoted by the court in *Almacantar*, which recognised that, while the tenant faced an uphill battle in making out their case to prevent the landlord from carrying out the works using scaffolding, the points of law raised were not to be decided at this stage. The issue at hand was

whether the proposed actions of the landlord were capable of breaching the quiet enjoyment and derogation from grant covenants given. In deciding this point, the court gave some helpful commentary on the application of the general principles, which will be of interest both to landlords seeking to carry out works and to any tenants who wish to oppose them.

The submission by the landlord that the terms of the lease conclusively demonstrated that there was no serious issue to be tried was rejected by the court, which reasoned that, as the purpose of the letting was, arguably, to enable a restaurant with a spectacular view, it could be argued that blocking the view would be to frustrate the purpose. Although the tenant's position was weak in the eyes of the court, it could not be said that there was no serious issue to be tried.

Where does the balance of convenience lie?

The next factor for the court to consider is to weigh the potential damage which would be suffered by the claimant if the injunction were not granted against the potential damage to the defendant if the injunction were granted. This balancing act is performed within the specific factual context of the case and allows the court to adopt a flexible approach by taking into consideration a variety of circumstances.

One factor of considerable importance is whether a claimant would be adequately compensated by an award of damages if no injunction is granted, and it is subsequently established at trial that the defendants are in breach of covenant. It is also important for the court to ensure that, if an injunction is granted, the claimant would be able to meet the damages award should they fail to successfully make their case at trial thereby overturning the injunction.

In *Almacantar*, the assessment of damages as an adequate form of compensation was deliberated and the court decided that, as the business of the tenant was ultimately one of making profit, then damages to remedy loss of business would leave the tenant fully compensated according to law. Given the financial muscle of the landlord, there was no concern that they would be unable to pay a substantial damages award.

However, it was recognised that there was a chance the restaurant could shut permanently as a result of the works and that damages may not be capable of compensating for this loss given the personal value of the business to the tenant. This risk and loss was, however, considered to be small.

It was highlighted that should an injunction be granted to the tenant, only for the landlord to subsequently succeed at the trial, damages of approximately £3.75m would be claimed from the tenant to reimburse the landlord for the losses caused by the injunctive relief granted. The vast majority of these losses would pertain to disruption to the works schedule and the knock-on effect this would have on the landlord's broader development of the site as a whole. The important question was therefore: would the tenant be capable of paying such a substantial damages award? Based on consideration of the tenant's accounts and assets, the answer was no.

The court's consideration of the balance of convenience therefore led to the finding that there would be a 'very real and significant risk of uncompensatable disadvantage to the defendants and, although some disadvantage to the claimant… nothing like as strong'. On the basis of the *American Cyanamid* principles, the injunction was refused, leaving the landlord free to proceed with the works as advised. However, they would do so in the knowledge that the tenant believed the works would be in breach of covenant and that damages could be applicable.

Conclusion

The tenant's application for an injunction was, of course, the focus of this hearing and it is clear from the court's application of the relevant principles that the key to success in this regard is to demonstrate that the balance of convenience dictates that more harm will be caused to the claimant than the defendant if an injunction is not granted. The tenant's downfall in their attempt at obtaining an injunction in this case appeared to be their inability to pay the likely resulting damages should their claim against the landlord fail at the trial. The potential loss was simply too great for the landlord to be expected to bear, leading to the dismissal of the tenant's application.

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While the focus of the court was on the application for injunctive relief, one eye was firmly on the bigger picture and whether the covenant of quiet enjoyment would be breached by the landlord's proposed method of carrying out the works. The driving message behind the judgment in *Almacantar* in this regard is that the competing covenants must fit together, with neither trumping the other. There is a balance to be met between the provisions and it would appear that, so long as the landlord acts reasonably in the exercise of the works, for instance by acting on expert advice, there will be no breach of the quiet enjoyment covenant upon which the tenant can base its claim.

While the comments from the court do seem to paint the tenant as the underdog in this matter, should it proceed to a full trial, it is safe to say that in the case of this particular restaurant's claim against the landlord, the proof of the pudding will most certainly be in the eating. ■

American Cyanamid Co v Ethicon Ltd [1975] UKHL 1

Century Projects Ltd v Almacantar (Centre Point) Ltd & ors [2014] EWHC 394 (Ch)

Goldmile Properties Ltd v Lechouritis [2003] EWCA Civ 49

London Borough of Southwark & anor v Mills & ors [1999] UKHL 40