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Mixed Use and Residential Property

Daejan Investments Limited v Benson & Others

Service charges and the discretion to dispense with statutory consultation procedures

In February 2011, we reported on the Court of Appeal decision in Daejan Investments Ltd v Benson (click here for the article).

On 6 March 2013, the Supreme Court gave its judgment in the case.

Background and issues

The background to the case and the issues to be decided were considered in our article of February 2011 (click here).

In very brief summary, in three ways the landlord had not followed all the stages of the correct procedure to consult with tenants prior to imposing service charges.

The landlord applied for dispensation pursuant to s20ZA(1) of the Landlord and Tenant Act 1985. It argued, among other things:

- That the failure to comply exactly with the consultation procedure had not caused the tenants to suffer significant prejudice;
- That the financial consequences on the landlord of not granting dispensation was a relevant factor; and
- An offer to compensate the tenant for any prejudice to them by reducing the cost of the works by £50,000 was also relevant.

The Supreme Court's decision

Although the decision was not unanimous, the Supreme Court has overruled the decisions of all lower Courts and tribunals and granted the landlord dispensation on terms. There is no justification for treating consultation or transparency as appropriate ends in themselves. The main question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

The Supreme Court gave some guidance on a number of matters that arise in these cases.

- The main question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

- The financial consequences to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

- It is not appropriate to distinguish between “a serious failing” and “a technical, minor or excusable oversight”, save in relation to the prejudice it causes.

- Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

- The LVT has power to grant a dispensation on such terms as it thinks fit, provided that those terms are appropriate. So, the LVT can require a landlord to reduce the recoverable cost of the works by an amount equivalent to the additional cost of the works caused by the failure to comply with consultation requirements.

- The LVT has power to impose a condition that the landlord pays the tenants’ reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord’s application under section 20ZA(1).

- The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some “relevant” prejudice that they would or might have suffered is on the tenants.

- The court considered that “relevant” prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

- The more serious and/or deliberate the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice.

- Once the tenants had shown a credible case for prejudice, the LVT should look to the landlord to rebut it.

For a full copy of the Supreme Court’s decision, go to:
http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0057_Judgment.pdf

Advice for landlords

While the decision is of assistance to landlords, it will be noted that dispensation came at a price (in this case, a discount to the cost of the works undertaken and the obligation to pay the tenants’ costs of responding to the dispensation application). Some might think it was quite expensive, although perhaps less expensive to the landlord than if it had not obtained dispensation (that said, its own legal costs should be factored in too).

In our view, the advice to landlords remains as we set out in February 2011 (click here). It is better to comply with the procedures for consultation fully than to undertake the exercise and then have to pursue what might be a long, costly and uncertain, dispensation process.

If you would like any further advice on these matters, please contact:

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