

Mixed Use and Residential Property

## **Daejan Investments Limited v Benson & Others**

### **Service charges and the discretion to dispense with statutory consultation procedures**

[This briefing was written in February 2011. Since then, judgment has been given in the case by the Supreme Court on 6 March 2013. Click [here](#) for a case update]

Judgment in the case of Daejan Investment Limited v Benson & Others was handed down by the Court of Appeal on 28 January 2011. The judgment contains important clarification on how the discretion to dispense with the statutory consultation in respect of residential service charges should be exercised (sections 20 and 20ZA of the Landlord & Tenant Act 1985 “the 1985 Act”).

Daejan (part of the Freshwater group) was the freehold owner and landlord of a block of shops and flats, Queens Mansions, in Muswell Hill. Benson and Others (the Respondents to the appeal) were the leaseholders of five flats. The appeal was brought by Daejan against the decision of the Lands Tribunal (“LT”) (now the Upper Tribunal (Lands Chamber)). The LT’s decision had upheld the refusal of the Leasehold Valuation Tribunal (“LVT”) to dispense with the consultation requirements (under Section 20ZA) due to Daejan’s failure to comply with the statutory consultation requirements. The Court of Appeal dismissed Daejan’s appeal and upheld the refusal by the LVT to allow the dispensation.

### **Statutory consultation procedures**

Residential leaseholders must be consulted where a landlord proposes to carry out works above a certain value (“qualifying works”) or to enter into a long-term agreement for the provision of services (“qualifying long term agreement”) the costs of which are to be claimed through a service charge (under section 20 of the 1985 Act).

Different consultation procedures are imposed depending on whether the landlord is intending to enter into a qualifying long-term agreement or to carry out qualifying works. The procedures are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003. In brief, the process of consultation for qualifying works consists of giving information to the tenants at three stages – when there is an intention to carry out works, when estimates have been obtained and when a contract has been entered into. Observations from tenants are to be invited at the first two stages. The observations must be taken into account by the landlord and the landlord’s responses provided to the tenants.

The landlord may apply to the LVT for an order waiving the consultation requirements under section 20ZA(1) of the 1985 Act. The LVT is entitled to dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so (for example, if there was no time to consult because emergency works were necessary).

## **Daejan's failure to comply**

The judgment sets out the conclusions of the LVT as to how the landlord, Daejan, failed to comply with the consultation procedures, as follows:

- (i) A summary of the observations received from the tenants and the landlord's responses were not properly included.
- (ii) All the estimates were not available for inspection by the tenants at a place, during the hours and for the period specified in the notice. The relevant period of thirty days was cut short as it was indicated to the tenants that the contractor for the major works had been decided by the landlord (and the contract was then awarded). As a result the tenants concluded that further representations were futile. The consultation process was curtailed and the invitation to inspect the estimates and make observations was rendered ineffective at that point.
- (iii) The relevant period of thirty days was cut short before the leaseholders were provided with copies of all the estimates and had had an opportunity to make observations. The landlord did not have regard to the observations in respect of the estimates which the leaseholders may have made, had they had the opportunity to do so within the relevant period.

## **The issues**

The judgment groups the principal issues on the appeal into three headings; (1) the financial consequences for the landlord or tenant, (2) the nature of the landlord, and (3) the correct approach to prejudice (allegedly suffered by a tenant in consequence of the landlord's failure to comply with the consultation requirements). The decisions and main observations made by the Court of Appeal under each heading are set out below.

### **Financial consequences**

The financial consequence of the refusal by the LVT to allow a dispensation was significant to Daejan because it meant that the company could not recover £270,000 of the costs of major works from the tenants. Instead, pursuant to the statutory scheme, Daejan's recovery from the (five) tenants was "capped" at £250 each (i.e. £1,250 in total).

It was, however, held that the financial effect of the grant or refusal of dispensation is an irrelevant consideration when exercising the discretion under Section 20ZA(1).

### **Nature of the landlord**

The Court of Appeal observed that a less rigorous approach may be justified in respect of lessee owned/controlled landlords (where the lessees are their own landlord). In that situation, the consultation requirements have to be considered against the background that the leaseholders are spending their own money. It was considered that, in this situation, there may be a greater likelihood of the leaseholders canvassing the relevant information by way of informal or extra-statutory consultation.

## **Prejudice**

It was held that significant prejudice to the tenants is a consideration of the first importance in exercising the discretion to dispense. The Court of Appeal observed that both the LVT and LT were entirely right to treat Daejan's curtailment of the consultation process as a serious failing and that it did cause the tenants serious prejudice.

With reference to Daejan awarding the contract for the works (apparently before the completion of the consultation process), it was observed that, even assuming this failing to be the result of a lack of understanding or ineptitude rather than a flouting of the consultation requirements, it is impossible to view it as a technical, minor or excusable oversight.

The Court of Appeal endorsed the LVT's approach of treating the tenants' loss of opportunity (to make representations and have them considered) as itself amounting to significant prejudice. It was observed that there may be instances where a landlord may seek to assert that the failure to comply with the consultation requirements would have made no difference and therefore could not prejudice the tenants. The Court of Appeal warned, however, that arguments of this nature would need careful scrutiny; there would otherwise be a risk of undermining the purpose of the statutory scheme. There would also be difficulties of proof and it would inevitably give rise to an exercise in speculation.

A final point of interest is that Daejan had made an offer to the tenants to deduct £50,000 from the costs of the works. The LVT had held that the offer did not alter the "existence of substantial prejudice suffered by the leaseholders" and the Court of Appeal held that the landlord's offer to apply a discount was not a ground for dispensation.

## **Advice for landlords**

The judgment usefully sets out examples of situations when dispensation might be granted, as follows:

- (i) The need to undertake emergency works.
- (ii) The availability, realistically, of only a single specialist contractor.
- (iii) A minor breach of procedure, causing no prejudice to the tenants.

These are just a few examples (not a closed list) but it was observed that none of the examples given would undermine the integrity or importance of the consultation procedure.

Yet the consultation legislation has no regard to the financial consequences for a landlord if it does not comply with the statutory consultation requirements. Landlords therefore need to ensure they are familiar with and follow the various procedures to ensure maximum recovery of the expenses incurred. The landlord's failure to fully comply with the provisions will only provide its tenants with a basis by which to lawfully withhold payment.

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

### **Jason Hunter**

Partner

+44 (0)20 7440 4812

Jason.Hunter@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP.

© Russell-Cooke LLP. February 2011