



SERVICES CHARGES: AT LAST SOME COMMON SENSE

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On 6th March 2013 the UK Supreme Court handed down judgment in the case of *Daejan Investments Limited v Benson and others* [2013] UKSC 14. By a majority decision the Court reversed the earlier LVT and Court of Appeal judgments and granted dispensation (on terms) to the landlords, Daejan.

The purpose of sections 19 to 20ZA of the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) (England) Regulations 2003/1987 is to ensure that tenants are not required either to pay for unnecessary or defective services, or to pay more than they should for necessary services provided to an acceptable standard.

Section 20 of the 1985 Act requires a landlord planning to undertake qualifying works, where any one leaseholder will be required to contribute over £250, to consult the leaseholders in a specified form. The consultation procedure entails a sequence of notices seeking comments on the proposed works (with the landlord taking into consideration the observations received from the leaseholders) and informing leaseholders of the tenders obtained.

If a landlord does not comply with the correct consultation procedure, it is possible to obtain a dispensation by application to the LVT who may make such an order where it is satisfied that it is reasonable to do so. In the absence of either a dispensation order or proper compliance with the section 20 procedure, the contribution is capped at £250 per leaseholder.

Daejan owned the freehold to a building (comprising of seven flats and shops) in Muswell Hill, London. Five flats were held under long leases where the owners were obliged to pay service charges towards the cost of the repair of the structure, exterior and common parts of the building. Major works were commenced by Daejan but there had been errors in their consultation process. The costs involved were just under £280,000 so the tenants applied to the LVT for a determination of the level of service charges payable given the procedural defects. Daejan sought a dispensation order and proposed a £50,000 deduction from the costs of the works.

The LVT refused Daejan's application and stated the deduction offered did not alter the prejudice suffered. The Upper Tribunal dismissed Daejan's appeal and the Court of Appeal upheld that decision.

The Supreme Court granted dispensation on terms that the leaseholders' overall liability would be reduced by £50,000 and Daejan would pay the leaseholders reasonable costs in relation to the application for dispensation before the LVT.

The Supreme Court found it was hard to see why dispensation should not be granted where the failure to comply had not affected the extent, quality and cost of the works. The purpose of the consultation procedure was to ensure leaseholders were protected from paying for inappropriate works or paying more than would be appropriate. It was also noted that the dispensing jurisdiction under section 20ZA(1) was not meant to be punitive or an exemplary exercise.

Therefore in considering applications for dispensation the LVT should focus on whether the leaseholders were prejudiced by either paying for inappropriate works or paying more than would be appropriate because of the landlord's failure to comply. The Court also made it clear that:-

- The LVT has the power to grant dispensation on appropriate terms and can impose conditions.
- The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the LVT should look to the landlord to rebut it.
- The onus is on the leaseholders to establish what steps they would have taken had the breach not happened and in what way their rights have been prejudiced as a consequence.
- Where relevant prejudice has been established the LVT should, in the absence of some good reason otherwise, require the landlord to reduce the amount of service charges claimed to compensate the leaseholders fully for that prejudice.

Essentially the LVT is to reconstruct what would have happened had the consultation been followed properly by a landlord. In deciding what conditions to impose the LVT should adopt a "sympathetic" approach to the leaseholders, albeit that sympathy should be realistic.

Therefore when faced with a landlord's dispensation application based on *procedural* failings leaseholders should not assume that the seriousness of the breach will protect them. However landlords should not be complacent as, whilst this decision widens the remit of the LVT to grant dispensation, a failure to consult *properly* will be costly one way or another.

