

Landlords – Fail to Consult at your Peril

The Court of Appeal's decision in *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38 makes sobering reading for landlords of residential blocks or estates. The decision concerned a block of shops and flats in Muswell Hill, comprising seven flats on the ground and upper floors. Five had been let on long-leases. In about 2006, Daejan arranged for major works to be carried out to the building. The total cost of those major works was in excess of £400,000, of which Daejan expected to recover about £270,000 from the five long-leaseholders. There was no suggestion that the works were not necessary; nor that they had not been done to a reasonable standard; nor that the contract price was unreasonably high. However, the Court of Appeal upheld the previous decisions of the Lands Valuation Tribunal (LVT) and Lands Tribunal that, as a consequence of failing properly to comply with the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Daejan could not recover more than the statutory cap of £250 from each long-lessee.

The effect of para 6 of SI 2003/1987, when read with LTA 1985, s 20, is that, if the consultation requirements have been neither complied with nor dispensed with, no tenant can be required to pay more than £250.

Daejan properly sent out Notices of Intention to carry out the works on 6 July 2005. By December 2005, four priced tenders for the works had been obtained. All the tenders were priced in excess of £400,000, but two of the tenders – those from "Mitre" and "Rosewood" – appeared to be the most competitive.

Pursuant to SI 2003/1987, a landlord must issue a "para (b) statement" setting out the estimated cost from at least two of the estimates, together with a summary of any observations received from the tenants in response to the Notice of Intention to carry out the works, and the landlord's responses to those observations. The landlord must accompany the para (b) statement with a notice detailing where all the estimates may be inspected, and inviting each leaseholder and any recognised tenants association to make written observations on those estimates. The consultation period must be no less than 30 days from the date of the notice.

Unfortunately, only Mitre's tender was provided to the tenants. The Secretary of the Recognised Tenants Association was pressing Daejan for the opportunity to inspect all the tenders. In June and July 2006, Daejan made two attempts to serve a para (b) statement, but the priced specifications were not made available to the lessees who wished to see them until 11 August 2006. By then, however, the lessees had been informed by Daejan that the contract had, in effect, already been awarded to Mitre and that the statutory consultation process was for all practical purposes ended.

On the facts, the LVT found that Daejan's para (b) statement was non-compliant in that it failed to include a summary of the observations received and the landlord's responses thereto; that Daejan had failed to make all the estimates available for inspection as specified in the notice and had curtailed the consultation period; and, that Daejan had failed to have regard to the observations that the lessees may have made had they been given an opportunity to make any within the relevant period.

In those circumstances, the LVT declined to dispense with the consultation requirements. In the course of doing so, it held that the consequential financial loss that Daejan would suffer if it declined to dispense with the consultation requirements was irrelevant. The Lands Tribunal agreed, and the primary issue before the Court of Appeal was whether that principle was correct as a matter of law.

Daejan argued that the purpose of the dispensing power in LTA 1985, s 20ZA(1) was to ensure that the landlord did not suffer the financial penalty imposed by s 20 save where it was reasonable that it should do so. What was required to determine what was reasonable was a consideration of all factors in order to arrive at a just result. The two most substantial considerations were that the lessees had suffered only modest prejudice, but that the financial loss to the landlord was huge.

The lessees argued that the statutory right to be consulted was a substantive right, and that proper statutory consultation was an end in itself such that the landlord's failure (if significant) necessarily gave rise

to prejudice to the lessees. If the financial loss to the landlords was relevant, the more expensive the proposed works became, the more likely it would be for the consultation requirements to be dispensed with, when instead one might have expected the lessees' rights to be consulted to become more important.

The Court of Appeal was firmly of the view that, when the LVT was exercising its discretion as to whether to dispense with the consultation requirements, the potential financial consequences to the landlord were irrelevant. On the other hand, the identity of the landlord might be relevant. There might, for example, be good grounds for applying a less rigorous approach to a lessee-owned landlord than to a corporate or local authority landlord. The rationale for the distinction is that the latter organisations are not controlled by anyone having a financial interest in the result of the decision-making process, but the former is more likely to act in the lessees' own interests.

Finally, the Court of Appeal confirmed that significant prejudice to the tenants is "a consideration of the first importance" when exercising the dispensatory discretion under s 20ZA(1). It was not an error of law for the LVT to speculate at what might have been the outcome had the statutory consultation been allowed to run its proper course. Significantly, however, the Court of Appeal also confirmed that it was also not an error of law to regard the curtailment of that statutory consultation as amounting, in and of itself, to significant prejudice to the lessees.

Care will have to be taken when *Daejan Investments v Benson* is deployed before the LVT. The Court of Appeal did not hold that the curtailment of the statutory consultation would always constitute significant prejudice to lessees – the judgment is no more than authority for the proposition that curtailment of the statutory consultation is capable of constituting significant prejudice to lessees. It is nevertheless easy to foresee that tenants will scrutinise all consultation procedures in future for the slightest non-compliance in the hope that they will be able to rely on *Daejan Investments v Benson*. In future, landlords would be well advised to take even more care to ensure that they have properly complied to the letter of the statutory consultation procedure. As Daejan has found to its cost, it can be very expensive not to do so.

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