***Daejan Investments Ltd v Benson & ors* [2013] UKSC 14**

On 06 March 2013, the Supreme Court handed down judgment in the service charge dispute between Daejan Investments Ltd ("Daejan") and Mr Benson. It is a decision which will alter the way in which the LVT will deal with applications under s.20ZA of the Landlord and Tenant Act 1985 for dispensation from the requirement to follow the statutory consultation procedure for qualifying works.

The wording of the 1985 Act and the Service Charges (Consultation Regulations) (England) Regulations 2003 (SI 2003/1987) (the "Regulations") suggests that where a landlord intends to incur costs exceeding £250 per lessee in respect of qualifying works, if s/he fails to follow the consultation procedure contained in the Regulations, s/he is limited to recovering only £250 of those costs per lessee.

Summary facts

Suffice it to say that Daejan failed to follow the (detailed) consultation requirements in several respects. It applied for dispensation, and offered to make a £50,000 reduction on the total cost of the works.

The LVT refused to grant dispensation because it considered that the lessees had suffered significant prejudice as a result of those failures. Evidence of that prejudice was weak, but the LVT held that the £50,000 reduction offered did "*not alter the existence of substantial prejudice suffered*" by the lessees.

The dispute slowly made its way to the Supreme Court.

The key issue

The issue which divided the Supreme Court was the relationship between breach and prejudice.

The question was whether actual financial prejudice had to be shown for a lessee to get home on the £250 limit, or whether a more general, intangible prejudice was sufficient. The majority adopted with the first proposition and rejected the second. Lords Hope and Wilson disagreed: "Lord Neuberger's conclusion … seems to me to subvert Parliament's intention", smouldered Lord Wilson.

The statutory history and context

In matters service charge, Parliament has generally acted to protect the tenant, as evidenced by sections 18-30 of the 1985 Act and the Regulations. Equally however, civil law is rarely punitive: with a few exceptions, its normal aim is to compensate rather than to enrich.

In *Daejan*, notwithstanding the wording of the Act and the Regulations, the Supreme Court appears to have resolved that Parliament did not intend faulty consultation to be another such exception. It also reflects the flexible approach which was statutorily introduced into the Tenancy Deposit Scheme by the Equality Act 2010.

In short therefore, the outcome of *Daejan* accords with general civil law principle, even if not with narrow statutory interpretation.

In two other respects however, I find that the decision in *Daejan* is incomplete.

Consultation as an end in itself

At [52], Lord Neuberger held that: "there is no justification for treating consultation or transparency as appropriate ends in themselves".

When I discussed this case with a public law colleague, she observed that the consultation procedure for service charges bore similarities to the provisions often found in public law for the expression of observations by the population likely to be affected by the exercise of a given power. That observation gives support to the proposition that consultation, transparency and accountability can be ends in themselves, as well as means.

Conditional dispensation

All five of their Lordships approved the concept of conditional dispensation. No authority was cited in any of the tribunals, the Court of Appeal or the Supreme Court in support of the power to dispense on terms. The origin of that power is a mystery, all the more so because the LVT is a creature of statute, and therefore has no powers which are not expressly given to it.

And what about the conditions themselves? Are they limited to shortening time or reducing the amount payable by lessees? Or will the LVT in future be able to impose wider conditions? If the landlord makes an application for dispensation whilst major works are underway, will the LVT be entitled to impose conditions such as temporarily re-accommodating lessees prejudiced by a particularly messy contractor?

The effects of the judgment: what next?

Mitigation of the effects of* Phillips v Francis *[2012] EWHC 3650 (Ch)?

Whilst *Daejan* is on a different point to *Phillips*, it seems to me that it does swing the pendulum back towards the centre ground. Take the example of a landlord who breaches the requirement to consult in a year where he does not anticipate expenditure in respect of which *Phillips* would require him to consult. The positive effect of *Daejan* is twofold. First, in all but the most urgent works, the landlord can make a pre-emptive application for dispensation from the requirement to give a full thirty day period for observations.

Second, a landlord now has a better prospect of recovering unconsulted-for expenditure because of the newly-hewn requirement for evidence of financially relevant prejudice to lessees.

It is worth noting however, that the LVT now has the power to make it a condition of dispensation that the landlord pay lessees' reasonably incurred costs of the dispensation application. Where the landlord-lessee relationship is fraught therefore, it may be a courageous decision ("courageous" in the "Yes Minister" sense) to go ahead with works without consultation.

Sterilisation of the consultation process?

Lord Neuberger's description of relevant financial prejudice may fairly be likened to special damage because any reduction in the cost of works must be directly quantifiable by reference to the section 19 criteria, ie, it can be calculated by reference to direct costs.

By contrast, the minority standpoint describes a reduction more akin to general damages, ie damages for an intangible loss such as the loss of an opportunity to make observations, or the loss of transparency in the landlord's dealings with the lessee.

The tying in of prejudice to losses which arise from the section 19 criteria arguably sterilises the whole consultation process. It is difficult to envisage situations where relevant prejudice might be sustained under section 20 which would not also fall under section 19 – almost by definition it could be said that the two are one and the same.

I cannot help but reach the conclusion that the post-*Daejan* section 20 is a considerably feebler – even if fairer – animal.

Conclusion

Experience tells me that transparency and accountability are important in the landlord and tenant relationship: those qualities would be preserved if the court were to consider intangible but identifiable prejudice in addition to relevant financial prejudice, in granting dispensation on terms.

The tricky question is as to the quantification of that intangible prejudice, but then again, as Lord Neuberger said at [66]: “the fact that an assessment is difficult has never been regarded as a valid reason for the court refusing to carry it out (although in some cases disproportionality may be a good reason for such a refusal)”.