Beyond repair: increased rights for la

Tenants disputing service charges will no longer be able to rely on landlords' failure to consult unless they can show detriment, says Natasha Rees

Last month the Supreme Court granted Daejan Investments Ltd, a landlord that had undertaken £280,000 worth of repairs to one of its tenanted blocks, dispensation from the consultation requirements under sthe Landlord and Tenant Act 1985 (*Daejan Investments Ltd v Benson & Ors* [2013] UKSC 14. In reaching this decision, the Supreme Court overruled the the LVT, the Upper Tribunal and the Court of Appeal. The judgment appears to give the LVT wider powers to dispense with the statutory consultation requirements and, to this extent at least, is good news for residential landlords. Tenants will now find it much harder to avoid paying service charges based purely on technical or procedural irregularities.

The case concerned sections 20 and 20ZA of the Act relating to the requirement for a landlord to consult their tenants in relation to major works.

If these requirements are not complied with or are not dispensed with by the LVT, a landlord will be limited to recovering £250 per tenant regardless of how much the works cost. The Supreme Court had to consider in some detail the power of the LVT to grant dispensation and how this should be exercised.

In *Daejan* the tenants of a block known as Queens Mansions in Muswell Hill applied to the LVT for a determination as to the reasonableness of the landlord's proposed charges for major works in the sum of just under £280,000. The landlord had carried out works to the building but had made a number of errors in the statutory consultation process. The tenants claimed that the landlord should be limited to recovering £250 from each of the five tenants as a result of these failures which meant that the landlord faced a shortfall of around £278,750.

Three questions

The LVT originally held that the landlord had not complied with the statutory consultation requirements by failing to provide a summary of the observations received from the tenants and by not making all of the estimates available for inspection. The landlord had also sought an order dispensing with the requirements of section 20. The LVT held that the consultation requirements could not be dispensed with due to the fact that the landlord's failure had caused "substantial prejudice" to the leaseholders.

In upholding the LVT and Upper Tribunal's decisions, Gross LJ in the Court of Appeal commented in respect of the dispensation application that the financial effect on the landlord of refusing dispensation was irrelevant and that the landlord's failure was serious, not a "technical, minor or excusable oversight".

The landlord appealed to the Supreme Court where the issue was then considered by five judges.

Lord Neuberger, who gave the leading judgment, felt that there were three questions of principle that had to be answered before they could resolve the appeal. Firstly they had to consider the proper approach to be adopted when considering an application to dispense with the consultation requirements.

Secondly, they had to consider whether any dispensation could be granted on terms and finally, they had to decide what approach should be adopted where prejudice is alleged by the tenants.

On the first question they found that the LVT should look at the extent, if any, to which the tenants' protection from paying for unreasonable works, or paying more than necessary, has been prejudiced. If there is no prejudice dispensation should be granted. They did, however, agree that the financial effect on the landord was irrelevant and clarified that the nature of the landlord (i.e. whether it was tenant owned) is equally irrelevant. As such, it no longer appears to matter whether the breach is substantial or a "technical, minor or excusable oversight", what is relevant is whether the tenants will suffer any prejudice as a result of the grant of dispensation.

On the second question, they held that the LVT does have the power to grant

ndlords to recover maintenance costs

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dispensation on such appropriate terms as it thinks fit. This means that the LVT can grant dispensation but only if certain conditions are met. As a result, Daejan's dispensation was conditional upon it paying the tenants' reasonable costs, and the cost of the works that it was entitled to recover was reduced by £50,000 as a result.

Finally, on the third issue they decided that the factual burden of establishing prejudice was the tenants' responsibility, and only when a credible case for prejudice was established should the LVT look to the landlord to rebut it. The fact that conditional dispensation could be granted meant that tenants could, in turn, be compensated for any prejudice suffered. In *Daejan*, the failure to comply with the consultation process which would have allowed the tenants to make a case for using one contractor over another was considered to be adequately compensated by the payment of £50,000 a sum that had previously been offered by the landlord.

Commercial and flexible

The decision will no doubt come as a welcome relief for landlords following the recent High Court case of *Phillips and Goddard v Francis* [2012] EWHC 3650 (Ch) where it was decided that landlords have to consider qualifying works as a whole throughout the accounting period in question when consulting with tenants. While it remains unclear how the residential property industry will react to this decision it does appear that as a result of *Daejan*, the LVT will be able to interpret the statutory consultation provisions in a more commercial and flexible manner going forwards. The fact that the LVT can impose conditions, however, means that landlords will still face potentially significant financial disadvantages if they fail to consult properly.

The decision will be welcomed by residential landlords as procedural irregularities or failures in complying with the consultation process are less likely to leave the landlord with a significant shortfall. Obviously landlords should still make sure they comply with the consultation requirements but where they fail, and an application is made for dispensation, the onus will now be on the tenant to show prejudice. Even in cases where prejudice is established, the LVT will now have the power to grant dispensation on terms which negate that prejudice.

Since the decision appears to allow the LVT to order that a landlord must pay the tenants' costs as a condition of any dispensation in cases of failure to comply, and where prejudice to tenants can be shown, an early offer from the landlord would be advisable. If there has been prejudice suffered but the tenants reject a reasonable and early offer from the landlord it may give the landlord scope to argue that its liability for costs should be reduced.

Small comfort

Conversely the decision will make it much harder for tenants to challenge charges for works projects where they feel that they have not been properly consulted. Even if they can show a failure to comply with the statutory consultation process the burden will now be on them to demonstrate that they have been prejudiced by that failure. They will have to show what steps they would have taken had they been properly consulted and the loss they have suffered as a result.

If prejudice can be shown then tenants should take comfort from the fact that they will probably receive some compensation and are likely to be reimbursed in terms of costs.

The decision suggests that prejudice should be measured at the date of the breach. If tenants decide to challenge a landlord in relation to the cost of a works project due to its failure to comply with the statutory requirements, it would be advisable to quantify the loss suffered as a result of the failure at the outset.

The LVT will need to see evidence of this if they are going to consider refusing a landlord's dispensation application. It will also help the LVT decide what conditions should be attached to any grant of dispensation if they decide to allow it.

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