



6 March 2013

## PRESS SUMMARY

### **Daejan Investments Limited (Appellant) v Benson and others (Respondents) [2013] UKSC 14** *On appeal from [2011] EWCA Civ 38*

**JUSTICES:** Lord Neuberger (President), Lord Hope (Deputy President), Lord Clarke, Lord Wilson, Lord Sumption

#### **BACKGROUND TO THE APPEAL**

Provisions in the Landlord and Tenant Act 1985 (“the 1985 Act”) and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) impose statutory requirements and restrictions on a landlord, which impinge on its ability to recover service charges from tenants, typically of flats in a block of flats. Unless certain consultation requirements (“the Requirements”), which can be conveniently divided into four stages, are complied with by the landlord, or dispensed with by the Leasehold Valuation Tribunal (“the LVT”), the landlord cannot recover more than £250 from each tenant in respect of works for which the service charge would otherwise be greater. Section 20ZA(1) of the 1985 Act provides that the LVT may dispense with the Requirements if satisfied that it is reasonable to do so. The issue on this appeal concerns the width and flexibility of the LVT’s jurisdiction to dispense with the Requirements, and the principles upon which that jurisdiction should be exercised.

Daejan Investments Limited (“Daejan”) is the owner of the freehold of Queens Mansions (“the Building”). The Building is managed by Highdorn Co Ltd, which carries on business under the name of Freshwater Property Management (“FPM”). Five of the seven flats in the building are held under long leases, each of which is held by a respondent to this appeal (collectively “the respondents”). Each lease includes an obligation on the tenant to pay a specified fixed proportion of the cost of providing, among other things, the services which the landlord is obliged to provide, which include the repair of the structure, exterior and common parts of the building. The respondents were, at all material times, members of the Queens Mansions Residents Association (“QMRA”). In 2005, FPM sent QMRA a specification in respect of proposed works to the building (“the Works”), and appointed Robert Edward Associates (“REA”) as contract administrator. REA sent to QMRA and the respondents a notice of intention to carry out the Works, and provided estimates for them, thereby complying with stages 1 and 2 of the Requirements. REA informed the respondents and QMRA that two tenders appeared to be the most competitive: one from Rosewood Building Contractors (“Rosewood”); the other from Mitre Construction Ltd (“Mitre”). The respondents and QMRA were only provided with the priced specification submitted by Mitre. Daejan contracted for the Works with Mitre, but in so doing failed to comply with the third of the four stages of the Requirements, which required, among other things, Daejan to issue a statement to QMRA with a summary of observations on the estimates, its responses to them, and notice of where they would be available for inspection.

Daejan requested the LVT to grant it dispensation from the Requirements, so that Daejan would be entitled to recover just under £280,000 in total from the respondents, as opposed to £1,250 in the absence of dispensation. During the course of the proceedings, Daejan proposed a £50,000 deduction to the £280,000. The LVT regarded Daejan’s failure as a serious breach of the Requirements, which amounted to serious prejudice to the respondents. Accordingly, the LVT refused dispensation. The Upper Tribunal and the Court of Appeal agreed with this refusal.

#### **JUDGMENT**

The Supreme Court, by a majority of three to two (Lord Hope and Lord Wilson dissenting), allows the appeal, granting Daejan dispensation from the Requirements on terms that (i) the respondents’ aggregate

liability to pay for the works be reduced by £50,000, and (ii) Daejan pay the reasonable costs of the respondents in relation to the proceedings before the LVT. Lord Neuberger gives the majority judgment.

## **REASONS FOR THE JUDGMENT**

The correct question in this case was whether, if dispensation was granted, the respondents would suffer any relevant prejudice, and, if so, what relevant prejudice, as a result of Daejan's failure to comply with the Requirements. It is highly questionable whether any such prejudice would have been suffered. The only specific prejudice was a matter of speculation, namely that the respondents lost the opportunity of making out the case for using Rosewood to carry out the Works, rather than Mitre [77]. Although there was a partial failure by Daejan to comply with the third stage of the Requirements, the relevant prejudice to the respondents could not be higher than the £50,000 effectively offered by Daejan [84]. It would be pointless to remit to the LVT the issue as to whether the £50,000 was sufficient compensation [80].

The purpose of the Requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the LVT should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements [44]. The Requirements are a means to the end of the protection of tenants in relation to service charges [46]. There is no justification for treating consultation and transparency as appropriate ends in themselves [52]. The right to be consulted is not a free-standing right [78]. As regards compliance with the Requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes [47]-[49].

The LVT has power to grant dispensation on appropriate terms [54], and can impose conditions on the grant of dispensation [58], including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application [59]-[61]. Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted [65]. While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants [67]. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it [69]. Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it and should be sympathetic to the tenants' case [68].

Insofar as the tenants will suffer relevant prejudice, the LVT should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the Requirements have been satisfied [71]. This conclusion does not enable a landlord to buy its way out of having failed to comply with the Requirements, because a landlord faces significant disadvantages for non-compliance [73]. This conclusion achieves a fair balance between ensuring that tenants do not receive a windfall, and that landlords are not cavalier about observing the Requirements strictly [74].

The minority considers that the LVT should weigh the gravity of the non-compliance with the Requirements in determining whether to grant dispensation [111]. This includes distinguishing between breaches or departures according to their level of seriousness, without having first to consider the amount of prejudice they may cause or may have caused [92]. The legislative history of the Requirements suggests that the gravity of non-compliance is relevant [103]-[109]. Substantial non-compliance with the Requirements entitles the LVT to refuse to grant dispensation [91],[110]. Daejan's termination of the consultation process represented serious non-compliance with the Requirements [99]. Questions as to the gravity of non-compliance are questions of fact and degree best left to the judgment of the LVT [88]. Judicial restraint should be exercised by an appellate court where it is prescribing limits on the way an expert tribunal is to perform its functions [89]. The LVT's decision to reject the £50,000 proposal was not based on an error of law that would entitle the Supreme Court to interfere with it [94],[117].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.**

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