

Let those who don't take notice beware!

John Byers discusses some of the points arising from the recent service charge dispute case, *Deajan Investments Ltd v Benson & Others* heard in the Court of Appeal

The leasehold sector has long been accustomed to the requirements of the Landlord and Tenant Act 1985, for a landlord to serve a series of notices on lessees (known as Section 20 notices) before entering into major works or long term contracts. The process involves notices at various stages of the procurement process intended to enable lessees to understand a landlord's intentions regarding major works and giving them an opportunity to comment on the proposals and the costs and nominate contractors to provide estimates for the works. This procedure is set out in the Act and is intended to protect long lessees from unfair expenditure by their landlord.

In this interesting case a landlord didn't follow the procedure correctly. They were slow to produce copies of estimates obtained for major works and gave the lessees the impression that any observations would make little difference to the outcome of the consultation process. As a result the contributions recoverable from the lessees were capped at £250 per lessee, while the landlord was seeking a sum of over £50,000 from each lessee.

We can learn a few lessons from this case.

FOLLOW THE PROCEDURE CAREFULLY

The landlord didn't follow certain aspects of the process properly. For example they didn't advise lessess of where the estimates were available for inspection, or have all the estimates ready for inspection. In the second notice they didn't set out a summary of the observations made by the lessees and respond to them. Following the procedure accurately is very important, although the judgement went on to stress that it is of equal importance for the landlord to approach the notice process with a genuine open minded attitude. The Court implied that this may be of more importance than following every last detail of the notice procedure.

PROVIDE INFORMATION IN A TIMELY MANNER

The consultation process requires landlords to provide copies of the estimates obtained.

These must be made available to the lessees in a timely fashion. This includes the right to inspect all the estimates received from the builders if the lessees wish to see them.

DO NOT TRY AND INFLUENCE LESSEES

In this case, by their conduct and communications the landlord gave lessees the distinct impression that their mind was already made up about which builder should be used. That made the lessees feel that their observations would be pointless and were unlikely to be considered seriously. In the judgement it was said that the landlord "had effectively closed its mind to any new observations on the choice of contractors". Consultation should be entered into in a genuinely open minded and co-operative manner.

THE FINANCIAL PENALTY TO EITHER PARTY IS NOT RELEVANT

In the appeal it was argued that it would be

unfair to penalise the landlord (in this case to a tune of around £270,000 of unrecoverable service charge) because of breaches in the procedure. It was argued that having to bear the costs was a disproportionate penalty compared to the breach of the procedures. However the Court was very clear that the amount of cost or benefit to either party cannot be relevant to their consideration of the matter.

THE TYPE OF LANDLORD MIGHT BE RELEVANT

Associated with the arguments about the effect on the landlord of failing to recover service charge was discussion as to whether the type of landlord company would effect the degree to which they should adhere to the procedure (ie, that maybe more should be expected of a large commercial landlord or local authority than a small private individual). In my view the judgement was a little contradictory on this issue saying, on one hand that all landlords were expected to carefully follow the notice procedures, while adding the comment: "where the lessees are their own landlord, the consultation requirements have to be considered against the background that they are spending their own money". This implies that maybe a lessee-owned landlord company may be treated a little more leniently, although obviously every case will turn on its own merits.

WHEN MIGHT DISPENSATION BE GRANTED?

In the judgement, the Court suggests three circumstances when the LVT might be right to consider giving a landlord dispensation from the notice procedures. These are:

- "the need to undertake emergency works";
- "the availability, realistically, of only a single specialist contractor" and;
- "a minor breach of the procedures, causing no prejudice to the tenants".

However it is clear that the general thrust of the judgement is that any landlord must closely and carefully follow the notice procedures. If they do not, they proceed at risk of not being able to recover service charges. ■

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