



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	:	CHI/40UD/LDC/2023/0049
Property	:	Various properties of Abri Group Limited & The Swaythling Housing Society
Applicant	:	Abri Group Limited (1) The Swaythling Housing Society (2)
Representative	:	Clarke Willmott LLP
Respondent	:	Sarah Walsh
Representative	:	None
Type of Application	:	To dispense with the requirement to consult lessees about entering long term qualifying agreements Section 20ZA Landlord and Tenant Act 1985
Tribunal Member(s)	:	Mrs J Coupe FRICS Mr M.J.F. Donaldson FRICS
Date and venue	:	29 June 2023 - Determined on the papers
Date of Decision	:	30 June 2023

DECISION

Decision

The Tribunal grants dispensation from the consultation requirements of Section 20 Landlord and Tenant Act 1985 in respect of entering into a fixed term energy contract for a period in excess of twelve months (potentially for two years) across their portfolio subject to two conditions:

- i. The Applicants shall, each year for which the dispensation runs, provide the Lessees with a short statement appended to the service charge accounts recording the total cost of energy incurred during the previous period together with an estimate of the cost that would have been incurred if energy had been procured under a contract for a year or less.**
- ii. The Applicants shall publish this decision on the lessees' online portal.**

In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

Background to the Application

1. The Applicants seek dispensation under Section 20ZA of the Landlord and Tenant Act 1985 (“the Act”) from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The application was received on 21 April 2023 and relates to qualifying long-term agreements for the provision of gas and electricity across the Applicants portfolio of properties.
2. The Applicants describe the portfolio as:
“A total of approximately 242 bedsits, 1186 bungalows, 7992 flats, 1535 houses and 105 maisonettes”

and the Respondents’ terms of occupation as:
“The Respondents occupy the properties subject to this application either under a tenancy agreement, a shared ownership or long leasehold interest.”

Further, that the properties are:
“subject to the energy contracts or impacted by them (i.e. through supply to communal areas, if not directly servicing [sic] the properties themselves).”
3. The Applicants explain that:
“The qualifying long-term agreements are in relation to the energy supply to the communal areas of the properties..... The current energy contracts will expire on 30 June 2023 and the Applicant intends to enter into new energy contracts which have been procured by Third Party Intermediary, The Monarch Partnership, from July 2023. The Applicant is seeking dispensation in respect of the energy contracts it intends to

enter into from 1 July 2023.”

“The Applicant has carried out an informal consultation with the Respondents. The Applicant sent the Respondents a letter dated 1 February 2023 explaining the process and the intention to enter into energy contracts for a longer period to secure the best available prices. The Respondents were invited to make written observations by email. The Applicant became aware that a number of Respondents did not receive a copy of the informal consultation letter and were subsequently written to with the same informal consultation letter on 5 April 2023.”

Copies of the informal consultation letters, observations from the Respondents and the Applicants response accompanied the application.

4. Dispensation is sought on the grounds that:

“... it is impractical for the Applicant to comply with the requirements. Due to the nature of the energy market and the volatility of price fluctuations, the prices will almost certainly have varied and increased by the time the consultation process is complete.

The Applicant is unable to comply with Schedule 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003 1987). The Applicant has appointed The Monarch Partnership ("Monarch") to act as a Third-Party Intermediary to approach the energy market and obtain bids from energy companies to supply gas and/or electricity to the properties subject to this application. Depending on the bids received, Monarch will advise the Applicant of the period the bids should be accepted to ensure best price and value is obtained for the Respondents.

The nature of the long-term agreements mean that it is not reasonably practicable for the Applicant to give the required information at the Notice of Proposal stage of the consultation process and have regard to the Respondents observations, as there has to be acceptance of prices offered in a small window of time, i.e. 24 hours.

The Applicant therefore seeks an order for unconditional dispensation from the consultation requirements under Section 20ZA of the Landlord and Tenant Act 1985 to enable the Applicant to contract with the successful bidder for the supply of gas and electric for the heating and power to the communal areas of the Applicants' stock and the properties subject to this application.”

5. A list of Respondents was appended at pages 19-191 of the Applicant's application form.

6. The Tribunal made Directions on 4 May 2023 requiring the Applicants to send a copy of the Directions and a copy of the application for dispensation to each Respondent and to confirm by 18 May 2023 to the Tribunal that this had been done. On 12 May 2023 the Tribunal granted permission to the Applicant to upload the documents to an online portal, access details for which would be provided to each Respondent. On 18 May 2023 the Applicant advised that service of documentation had been effected by uploading the required documents to the online portal.

7. Appended to the Directions was a 'Form for Respondents' which invited all those affected by this application to indicate to the Tribunal, copied to the Applicants, whether they agreed or opposed the application to seek dispensation from statutory consultation. Where objecting to the application, Respondents were directed to set out the grounds of their objections and to provide evidence as to what they may do differently if the Applicants were required to comply with the full statutory consultation process.
8. The Tribunal received three completed forms. Forms submitted by Ms G Ball and from Dr. J. Fox indicated agreement to the application and, accordingly, they, along with all lessees who chose not to respond to this application, are hereby removed as Respondents. The third reply form, from Ms S Walsh, included an objection to the application. The grounds of said objection are laid out in paragraphs 17 and 20 below. In accordance with the Directions and as the sole dissenter, Ms Walsh is the only Respondent in this matter.
9. The Directions ordered that the application would be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 unless a party objected in writing to the Tribunal within 14 days.
10. Ms Walsh' objection was received by the Tribunal on 25 May 2023. The submissions did not include an objection to the matter being determined on the papers.
11. On 15 June 2023 the Applicants submitted a case management application to the Tribunal requesting that the matter be determined on the papers.
12. Having reviewed the totality of submissions including the application, the Respondents' submissions and the Applicant's response, the Tribunal concluded that the matter was capable of being determined fairly, justly and efficiently on the papers, consistent with the overriding objective of the Tribunal. Accordingly, on 19 June 2023 the oral hearing listing for 29 June 2023 was vacated. On 15 June 2023 the Respondent confirmed her agreement to a paper determination.
13. These reasons address in **summary form** the key issues raised by the parties. They do not recite each and every point referred to in submissions. The Tribunal concentrates on those issues which, in its view, go to the heart of the application.
14. The only issue before the Tribunal is if it is reasonable to dispense with any statutory consultation requirements. The Tribunal makes no findings as to whether any service charge costs in regard to the supply of gas and electric will, in due course, be reasonable or payable.

The Law

15. The relevant section of the Act reads as follows:

S.20ZA Consultation requirements:

- (1) Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

Submissions

16. The Applicant's case is as set out at paragraphs 3 and 4 above.
17. The Respondent's objection to the application, received on 25 May 2023, stated:

"I believe we should stick to 12 month contracts. We have been through the period where we have all had to absorb the extra financial pain of hyperinflation with our utility bills. We are now at [sic] point where the rates are most probably likely to only come down for the next 24 months. I therefore feel the focus should be on minimising our risk of overpaying for too long rather than trying to enter into a longer term contract. At best a longer term contract will result in very marginal savings, but more likely will just mean we end up paying more than those on 2 x 12 month contracts as rates reduce.

18. By way of a witness statement dated 6 June 2023, Ms Samantha Pirt, on behalf of the Respondent and in her capacity as Head of Procurement for Abri Group Limited responded to the objections raised by Ms Walsh, explaining that the current energy contract expires on 30 June 2023 and in order to secure the most competitive renewal package the Applicant engaged the services of an independent energy consultant who monitors market fluctuations in energy prices on their behalf, prior to tendering the renewal contract to the market. With ongoing volatility within the energy market, the Applicant seeks the flexibility of securing a 24-month energy contract if, following competitive tendering, such a term is determined to provide best value for the lessees. Without dispensation, the Applicant would be limited to placing a 365-day contract, which may prove more expensive.
19. Ms Pirt continued her statement by explaining that Respondents were invited to apply to join a small group of lessees who would review and evaluate the tenders received. Having expressed an interest, the Respondent had been invited to join such group.
20. Despite not being required to do so, Ms Walsh included a response to Ms Pirt's witness statement within an email to the Tribunal dated 15 June 2023, advising that her concerns had not been addressed by Ms Pirt's statement. Ms Walsh concluded her email:

"I still feel it is less risky to enter 2 x 12 month contracts rather than a 24 month contract as I believe even lower rates for the

second 12 months will be available in 12 months time. Should this not be the case then it is still the least riskier option because a higher rate has only been risked for 12 months instead of 24 months.”

Discussion

21. In order to grant the application, the Tribunal must be satisfied under s.20ZA of the Act that it is reasonable to dispense with the consultation requirements. In reaching its decision, the Tribunal has taken into account all of the evidence submitted and the objections of the Respondent, Ms Walsh.
22. In considering this matter the Tribunal has had regard to the decision of the Supreme Court in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 (“*Daejan*”) and the guidance to the Tribunal that in considering dispensation requests, it should focus on whether tenants are prejudiced by the lack of the consultation requirements of section 20. In summary, the Supreme Court noted the following:
 - i. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA is the real prejudice to the tenants flowing from the landlord’s breach of the consultation requirements.
 - ii. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - iii. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - iv. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - v. The Tribunal has power to impose a condition that the landlord pays the tenants’ reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord’s application under section 20ZA (1).
 - vi. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some “relevant” prejudice that they would or might have suffered is on the tenants.
 - vii. The Supreme Court considered that “relevant” prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

- viii. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - ix. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.
23. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and, if so, to what extent, the Respondent would suffer relevant prejudice if dispensation was granted. As stated above, the factual burden is on the Respondent to identify any relevant prejudice which they claim they might suffer.
24. The Tribunal now turns to the facts of this application.
25. The Tribunal is concerned solely with whether the Applicant should be granted dispensation from the statutory consultation process relating to a long-term qualifying agreement. The Tribunal is not considering whether any energy contract subsequently entered into is appropriate nor whether the service charge costs incurred as a result of such contract are either reasonable or payable.
26. The Tribunal accepts that following various world events over the preceding eighteen months, the energy markets have experienced considerable volatility. The Tribunal further accept that were the Applicant to be required to comply with the full consultation requirements of S.20 of the Act, they are unlikely to be able to place any contract offered within the requisite timeframe.
27. The Respondent, whilst referring to the costs of supply and potential market fluctuations, has not addressed within her short submissions the fundamental part of this application, that being whether dispensation from consultation, either with or without conditions, should be granted. Ms Walsh focused her objection on her concern that energy prices may fall over a 24-month period and, accordingly, she would be financially disadvantaged if, in such event, a long-term contract had been placed.
28. The directions issued by the Tribunal to all Respondents on 4 May 2023 required any lessee who objected to the application to submit evidence of what they would do differently if the Applicant were to comply with the full statutory consultation process. Ms Walsh, in her two responses to the Tribunal, fails to address this requirement.

DETERMINATION

29. The test the Tribunal must apply in determining whether dispensation should be granted is that set out by the Supreme Court in the *Daejan* decision referred to above. The Tribunal finds that remaining on short-term energy contracts, where more competitively priced-long term contracts are available, would not be in the Respondent's best financial interests.

30. The Applicant has shown a willingness to consult with lessees in so far as practical and, furthermore, has set up a small sub-group of affected individuals who were invited to analyse the data provided by their appointed energy consultant.
31. In her submissions the Respondent failed to persuade the Tribunal that she would be prejudiced by the granting of dispensation from consultation.
32. Accordingly, the Tribunal determines in principle that it is appropriate to grant dispensation.
33. Consideration must now be given as to whether the dispensation should be granted subject to conditions. As stated, market fluctuations caused by international economic and political uncertainty have undoubtedly created considerable volatility in the energy markets.
34. For transparency purposes, the Tribunal considers it appropriate that all lessees are, annually, advised of the energy costs incurred and, furthermore, are provided with a comparison of equivalent energy costs under a contract for a year or less.
35. **The Tribunal therefore grants conditional dispensation from the consultation requirements of Section 20 Landlord and Tenant Act 1985 in respect of entering into a fixed energy contract for a period in excess of 12 months (and potentially to 24 months) across the portfolio referred to in paragraph 5 above.**
36. **The dispensation is subject to the condition that each year the Applicant provides the lessees with a short statement appended to the service charge accounts recording the cost of energy incurred during that service charge year together with an estimate of the costs that would have been incurred if the same energy had been procured under short-term contracts.**
37. **The Tribunal impose a further condition on the granting of dispensation in that the Applicants are required to upload a copy of this decision to the online portal previously used to provide documentation to lessees.**
38. In granting dispensation, the Tribunal makes no determination on whether the costs of the works are reasonable or payable. If any leaseholder wishes to challenge the reasonableness of the costs arising from the relevant works, then a separate application under Section 27A of the Landlord and Tenant Act 1985 should be made.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.