FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/41UC/LDC/2023/0005**
Property	**:**	**Flats at Aspen Mews, Chestnut Grange, Cotswold Road, Hamilton Avenue, Hampden Avenue, Needwood Court, Price Court, Shobnall Close, Short Street and Stone Road, Burton upon Trent, as listed in the Appendix ("the Flats").**
Applicant	**:**	**Trent & Dove Housing Limited (Landlord)**
Representative	**:**	
Respondents	**:**	**The long leaseholders of the Flats (Lessees)**
Type of Applications	**:**	**To dispense with the requirement to consult lessees about major works section 20ZA of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge D. Barlow**
Date of Decision	**:**	**26 June 2023**

DECISION

DECISION

(1) The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of entering into a fixed energy contract for electricity for a period of more than one year, across the Portfolio of properties listed in the Appendix.

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

BACKGROUND

1. The Applicant seeks dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act. The application, received on 4 February 2023, relates to a qualifying long term agreement (QLTA) for the supply of electricity to the common areas of the buildings in each of the developments in which the Flats are situated (the Portfolio).

2. To benefit from economies of scale the Applicant procures one contract for electricity over the entire Portfolio. The contract current at the date of the application was a qualifying long term agreement ("QLTA") which was due for renewal on 1 April 2023.

3. The Applicant states that it wishes to enter into new energy contract across the Portfolio for the benefit of the Lessees. However, the current volatility of energy prices means that the price is unlikely to remain stable for the length of time required for consultation under s20 of the Landlord and Tenant Act 1985. The Applicant wants to fix the rate as soon as possible to ensure the best value for its residents and consultation under s20 will prejudice the negotiations. It uses an energy broker who uses live market data to track trading, tendering and reporting systems to monitor wholesale energy process in real time. The broker also uses "a tender management process to analyse consumption rates and supplier offers which are then benchmarked. Together these tools allow market lows to be identified and the best rates secure for clients".

4. The Applicant states that from October 2022 to January 2023 there was significant volatility with prices ranging from an average of 65p/Kwh down to 36p/Kwh. In March 2023 the Applicant fixed the majority of sites to reduce the risk of high price increases, contracting 96% of their landlord supply meters with an average price of 26.6/Kwh. Unit process for the remaining sites remain unfavourable and continue to be monitored. As the

signing of contracts is required the same day that prices become available it is not possible to meet the requirements of s20.

5. Dispensation is therefore sought because the timescales required by the consultation process pursuant to section 20 would preclude the Applicant from consulting with the Lessees before a quote expires. This will prevent the Applicant from enetering into a beneficial QLTA to fix its residents' energy charges.

6. Directions issued on 18 April 2023 provided for service by the Applicant on each of the Lessee Respondents a copy of the application and the directions and for the Applicant to confirm to the Tribunal that this had been done. The directions provided for the Lessees to confirm if they consented to or objected to the application by 31 May 2023.

7. The Applicant confirmed on 10 May 2023, that the application and directions had been sent to each of the Lessee Respondents.

8. No responses have been received by the Tribunal from the Lessees and no request made for an oral hearing. The application is therefore determined on the papers received in accordance with Rule 31 of the Tribunal's procedural rules.

9. The only issue for the Tribunal is if it is reasonable to dispense with any statutory consultation requirements. This decision does not concern the issue of whether any service charge costs will be reasonable or payable.

THE LAW

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

> 20ZA Consultation requirements:
>
> 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.

11. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. 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 (1) 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 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.

Evidence

12. The Applicant's case is as set out at paragraph 1-5 above.

Determination

13. I accept that the supply of energy is subject to volatility of costs and that the normal procurement process following consultation with lessees would prevent the Applicant from benefiting from the potential cost savings that are available.

14. The test that I must apply in determining whether dispensation may be given is that set out by the Supreme Court in the *Daejan* decision referred to above. Clearly to remain on short term energy supply contracts when less

expensive long-term contracts are available cannot be to the lessees' advantage. No Lessee has objected and the Tribunal is not therefore satisfied that they would be prejudiced by granting dispensation.

15. The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of entering into a fixed energy contract (potentially for two or three years) across their portfolio.

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

Judge D Barlow **26 June 2023**

Rights of Appeal

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 rpmidland@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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.

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.

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.

APPENDIX