FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/22UQ/LDC/2023/0015**
Properties	**:**	**All properties accommodating any dwelling leased to any of the respondents**
Applicant	**:**	**Metropolitan Housing Trust Limited**
Representative	**:**	**Alex Collins and Karen Ramphal**
Respondents	**:**	**All leaseholders of dwellings at the Properties who may be liable to pay a service charge towards costs incurred under the relevant agreement (see below)**
Type of application	**:**	**Dispensation with consultation requirements** - Section 20ZA of the Landlord and Tenant Act 1985
Tribunal members	**:**	**Judge David Wyatt**
Date of decision	**:**	**6 October 2023**

DECISION

The tribunal's decision

The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 (the "**1985 Act**") to dispense with all the consultation requirements in relation to the agreement dated 9 December 2022 entered into between the Applicant and Pinnacle FM Limited ("**Pinnacle**") for grounds maintenance services for Lot 7 (described below) for a term from 1 November 2022 until 31 October 2026 with provision for the Applicant to extend that term by up to 24 months in total.

Reasons for the tribunal's decision

The application

1. The Applicant applied for dispensation with the statutory consultation requirements in respect of the relevant agreement. That is a "*qualifying long term agreement*" under section 20ZA of the Landlord and Tenant Act 1985 because it was entered into for a term of more than 12 months.

2. Accordingly, the relevant contributions of the Respondents through the service charge towards the costs payable under the relevant agreement would be limited to £100 per accounting period unless the statutory consultation requirements, prescribed by section 20 of the 1985 Act and the Service Charges (Consultation etc) (England) Regulations 2003 (the "**Regulations**") were complied with or are dispensed with by the tribunal.

3. In this application, the Applicant seeks a determination from the tribunal, under section 20ZA of the 1985 Act, to dispense with the consultation requirements. The tribunal has jurisdiction to grant such dispensation if satisfied that it is reasonable to do so. In this application, the only issue for the tribunal is whether it is satisfied that it is reasonable to dispense with the consultation requirements. **This application does not concern any issue of whether any service charges for the costs payable under the agreement will be reasonable or payable, or what proportion is payable.**

Background

4. The Applicant had informally consulted leaseholders about their proposal to award a new agreement to the incumbent supplier without a new competitive procurement exercise. On 12 September 2022, they wrote explaining that the current estate services agreement with "*Pinnacle PSG*" for Cambridgeshire, East Anglia, Northamptonshire, Essex and Hertfordshire (described as "**Lot 7**") was in the last year of a four-year term and due to expire in February 2023.

5. The Applicant proposed to award a new agreement to the same supplier using a revised specification and contract terms from a procurement exercise for other lots (regions) carried out in 2021. They described the types of services the agreement would cover. They said that during the previous procurement exercise for Lot 7 (in 2019) only Pinnacle had produced bids which met their minimum standards. They said the new agreement would include additional services so costs would increase "*slightly*" in future. They explained the proposed agreement would be for four years, until 2026, with the possibility to extend this by up to a further two years.

6. The Applicant received and responded to observations from various leaseholders. These discussed a range of matters, including several concerns from individual leaseholders about the quality of services provided for their buildings and/or grounds. Ultimately, the Applicant decided to enter into their proposed agreement with Pinnacle and did so on 1 November 2022. The services which may be provided under the agreement include internal cleaning, window cleaning, tree surveying and maintenance, removal of bulk refuse, playground cleaning and maintenance services.

7. The Applicant later made their application to the tribunal to dispense with the consultation requirements. On 14 June 2023, after their payment of the application fee had been traced, the tribunal gave case management directions. These required the Applicant to (amongst other things) write to each of the Respondents by 30 June 2023 to provide specified information and details enabling them to view and download copies of the key documents from the Applicant's website or to request copies. The directions required any Respondents who opposed the application to respond by 14 July 2023. The directions provided that, unless any party requested a hearing or the tribunal decided a hearing was necessary, the tribunal would decide the matter based on the papers produced by the parties, without a hearing.

8. The Applicant wrote to leaseholders on 28 June 2023, highlighting the date of 14 July 2023 for opposition and enclosing a copy of the reply form produced with the case management directions for objecting leaseholders to use.

Objections

9. Three leaseholders responded to object. A leaseholder of a flat in Liberty House in Welwyn Garden City objected but did not wish to have a hearing. They said (in essence) that Lot 7 should be split into at least two separate lots to enable a reasonable number of potential suppliers to submit tenders. A leaseholder of a flat in Bloomsbury House in Northampton objected and initially requested a hearing. Another leaseholder of a flat in the same building sent a form with their details as an objector but gave no reasons for their objection and did not request a hearing.

10. On 25 July 2023, I gave further directions. These warned that the three objecting leaseholders had produced only very limited case documents and encouraged them to take independent legal advice. On 14 August 2023, the second objector sent further details of his concerns. He referred to the explanations given to him when he had responded to the Applicant's original proposal in September 2022; he argued that unsuccessful bidders in the 2021 procurement exercise for the other lots might have been more competitive now, for this lot. He also referred to his concerns about windows not being cleaned and other

service problems discussed in his earlier correspondence with the Applicant. The second objector also expressed concern that the Applicant appeared to be connected with Pinnacle Property Management Ltd through a different company. That concern later fell away when he accepted the explanations from the Applicant and Pinnacle Group Limited that (as appeared likely) Pinnacle Property Management Ltd happens to have a similar name but has "*nothing to do*" with the relevant Pinnacle group of companies.

11. The second objector and the Applicant's representatives discussed his remaining concerns in correspondence in September 2023. Ultimately, he confirmed by e-mail on 7 September 2023 that he withdrew his request for a hearing and would like the tribunal to make its decision taking into account the further correspondence between the parties about the two remaining points he was concerned about, as considered below. In the circumstances, under rule 31(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the parties are taken to have consented to this matter being determined without a hearing. This determination is based on the documents in the bundle produced by the Applicant and the further e-mail of 7 September 2023 from the second objector with attachment. On reviewing these documents, I considered that a hearing was not necessary.

Consultation requirements

12. In Daejan Investments Limited v Benson and Ors [2013] UKSC 14, the Supreme Court indicated [at 44] that the issue on which the tribunal should focus when entertaining an application for dispensation: "*…must be the extent, if any, to which the tenants were prejudiced … by the failure … to comply …*". Lord Neuberger referred [at 65] to *relevant* prejudice, saying the only disadvantage of which tenants: "*…could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted*."

13. The Applicant said the agreement had been entered into using a public procurement framework agreement. The second objector was the only Respondent to make a case about which consultation requirements applied, referring to those in Schedule 1 to the Regulations. These required in essence a notice of intention and duty to have regard to observations, seeking to obtain estimates from any nominated suppliers, a statement of at least two proposals (including at least one in respect of a supplier wholly unconnected with the landlord and a proposal based on any estimate from a nominated supplier) with a summary of observations made, a duty to have regard to any observations made on those proposals and a duty to notify with a summary of observations made if an agreement is then entered into with a supplier who did not submit the lowest estimate.

14. The requirements under Schedule 2 to the Regulations (where advertisement by public notice is required) differ because they assume a public procurement exercise, so the stages after the notice of intention focus on provision of cost estimates or unit costs/rates and other specific information rather than more than one proposal.

Review

15. As noted above, the first objector was concerned about the size of Lot 7. They said it should be split into at least two separate lots to enable a reasonable number of potential contractors to submit tenders. As they had commented at the observation stage, they were concerned that creating a lot covering such a large geographical area limited the number of potential suppliers. They referred to the potential risks of awarding such a large area to one supplier and pointed out that there are significant differences between densely populated commuter areas, like the estates in Welwyn Garden City and Hatfield, and more remote areas with dispersed properties.

16. In their earlier correspondence, the Applicant had acknowledged that smaller suppliers would find the size of the lot difficult. They said that before 2015 several smaller contractors had provided services. They said this had made it difficult to monitor suppliers and provide a consistent service, increasing management time and costs. They said that the procurement exercise in 2021 for Lots 1-6 had assessed bids giving 55% to quality, 35% to cost and 10% to social value. Of the four bidders for Lots 1 and 2, only Pinnacle had met the minimum requirements. For London, 10 prospective suppliers submitted bids and three met the essential requirements. Pinnacle won Lots 3 and 6, Cleanscapes won Lots 4 and 5 and Chequers were unsuccessful. They said that neither Cleanscapes nor Chequers operate outside London. They said the contract arrangements helped them to control costs, sites could be added or removed and they would terminate agreements early if there was persistent underperformance.

17. The objector suggested that to avoid problems dispensation could be granted on this occasion (assuming the agreement was for three years) but made conditional on the Applicant splitting the lot for future procurement exercises. They said that in 2022 about a quarter of the leasehold properties in Lot 7 (about 450) and about 125 rented flats were on the Times Square estate in Welwyn Garden City. They said two further blocks (208 flats) in the first stage of the Shredded Wheat development nearby had started to be occupied, with about 600 more expected in the coming years. They said with this in mind lots with smaller geographical areas should be viable by the time of the next consultation. By then, they thought, regional suppliers including those who bid for the lots in London in 2021 would be interested in tendering for a suitable area with the Welwyn Hatfield or Hertfordshire estates.

18. The second objector said his most important concern was that the unsuccessful bidders in the procurement exercise for the other lots might have been more competitive for this lot, if it had been put out to the market. The Applicant gave a similar explanation to that noted above in relation to the previous procurement exercises. In response to further enquiries, the Applicant explained that during the last competition for Lot 7, in 2019, the Applicant had received bids from Pinnacle and two other companies. They said both of those other companies had agreements with the Applicant between 2015 and 2019. They said both of those agreements had been: "*…lost in part due to underperformance*". They said that in the 2019 procurement exercise the only bidder meeting the minimum requirements had been Pinnacle, as indicated in their original consultation letter.

19. The second objector argued that nonetheless the relevant companies may have improved their performance and now be good competitive candidates. I take it that he means the previous suppliers in and bidders for Lot 7 and/or the other bidders in the other consultation exercises for the other lots.

20. Finally, the second objector was concerned that windows at his building were not being cleaned. The Applicant initially said they understood some of the windows were inaccessible and if they were not being cleaned service charge adjustments would be made. The second objector queried this, observing that his own windows were not easy to reach but had suddenly been cleaned for the first time on 21 August 2023. The Applicant repeated that they would make appropriate adjustments to the service charge account. They argued this was not evidence of underperformance of the supplier and "*may*" have been an oversight on the part of the Applicant. They said they would be willing to arrange an on-site meeting to identify any windows which were being missed. The second objector argued this was evidence of underperformance of the supplier, since windows had not been cleaned for more than a year despite complaints to the Applicant.

The tribunal's decision

21. Generally, the concerns about the size of Lot 7 seem to have some force, particularly in view of the single supplier and long contractual term. However, I am not satisfied that any relevant prejudice was caused in this respect. The informal consultation arrangements in 2022 did not precisely comply with the requirements for a notice of intention but provided the key information, including the size of the lot and the potential duration of the agreement. It seems to me that the Applicant had regard to the observations made in response, but decided to proceed with their large lot and long proposed term for the reasons they gave at the time.

22. Nor am I satisfied that I should attempt to impose a condition in relation to any future agreement, for the same reasons and in view of the uncertainty which might be caused by any such condition. Of course, the Applicant may need to carefully consider what lot(s) would be appropriate for future procurements, taking into account the matters described and anticipated by the relevant objector. It may be that in Lot 7 some denser areas compensate for those which are less profitable, but the arguments from the objector for splitting the lot in future to enable better competition and reduce the risks of a single supplier may have some merit.

23. I am not satisfied that any relevant prejudice was caused by the failure to allow other suppliers to bid for the opportunity and provide the specified further information, or to summarise observations, on this occasion. None of the objectors appear to have nominated any proposed supplier. The informal consultation letter did not invite them to do so, but it explained the position and none of them say they would have identified any particular alternative supplier if they had been fully consulted, apart from the suggestions relating to the other bidders in the earlier procurement exercise. There has been no suggestion that the minimum criteria set by the Applicant were inappropriate and it appears two other suppliers met them for the lots in London. None of the objectors have produced any evidence that any of the bidders who were unsuccessful in the previous procurement exercises would have been willing to bid for Lot 7 or would now have satisfied the Applicant's minimum requirements. The terms of the agreement follow those which were the product of the 2021 competitive procurement exercise.

24. Obviously, a lack of a competitive exercise leaves a risk that a better deal could have been negotiated and/or a further competitive supplier could have been introduced. However, the objectors merely speculated that this might have been possible. On the evidence produced by the parties, it seems likely that (as the Applicant said in their original consultation letter) if a competitive procurement exercise had been carried out for Lot 7 and the consultation requirements had been complied with, Pinnacle would again have been the only acceptable bidder at the relevant time. That may (at least in part) be a result of the large area a supplier would have to cover, but again in view of the informal initial consultation I am not satisfied by what the objectors have produced that there would have been any relevant difference in the result if the requirements had been fully complied with.

25. Similarly, I am not satisfied that the service provision/quality concerns represent relevant prejudice for the purposes of this dispensation application. They could have been addressed more efficiently when they were raised in September 2022, but the problems described by the relevant objector do not appear significant enough to suggest that if they had been raised during a compliant consultation exercise they would have resulted in a material change. The agreement would probably still have been awarded to Pinnacle on the same terms.

26. In the circumstances, based on the documents provided by the parties, I am satisfied that it is reasonable to dispense with the statutory consultation requirements in relation to the relevant agreement. This decision means only that any service charges payable by leaseholders to contribute towards costs incurred by the Applicant under the agreement will not be capped at £100 per accounting period because of the failure to comply with the consultation requirements.

27. **As noted above, this decision does not determine whether any such service charges will be reasonable or payable.** However, nothing in this decision prevents any leaseholder from making an application to the tribunal under section 27A of the 1985 Act in future to challenge payability of service charges sought from them in relation to their building for costs under the grounds maintenance agreement and (for example) providing comparable quotations from regional suppliers for the relevant services as part of any evidence for any case that the costs are not reasonable (or were not reasonably incurred), or providing evidence that relevant services were not of a reasonable standard.

28. The tribunal determines under section 20ZA of the 1985 Act to dispense with all the consultation requirements in relation to the relevant agreement. There was no application to the tribunal for an order under section 20C of the 1985 Act.

29. The tribunal cannot advise the parties, who should take their own independent legal advice. This decision document is not exhaustive; it simply summarises the matters which were key to my decision to dispense with the consultation requirements on this occasion.

30. As set out in the case management directions, the tribunal will send a copy of this decision to the three objecting leaseholders. The Applicant is responsible for providing this decision to all relevant leaseholders. The Applicant may wish to send copies of this decision directly to all Respondents, but that is a matter for them. In any event, the Applicant shall place a copy of this decision (including the appeal rights information below) on their (or the relevant) website by **13 October 2023** and shall maintain it there for at least three months, with a sufficiently prominent link on their home page.

Name: Judge David Wyatt **Date:** 6 October 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).