



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

Case reference	:	CAM/33UE/LDC/2023/0056
Properties	:	All properties which may be directly or indirectly charged for gas and/or electricity under the relevant energy agreement
Applicant	:	Freebridge Community Housing Limited
Representative	:	Birketts, Solicitors
Respondents	:	The leaseholders/tenants of dwellings at the Properties who may be liable to pay a service charge towards costs incurred under the energy agreement
Type of application	:	For dispensation of the consultation requirements under section 20ZA Landlord and Tenant Act 1985
Tribunal member	:	Judge K. Saward
Date of decision	:	14 March 2024

DECISION AND REASONS

Decision of the Tribunal

- (1) The Tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 to dispense retrospectively with all the consultation requirements in respect of the qualifying long term agreements for the supply of gas and electricity to the communal boilers and communal parts of the properties (as detailed in the application) entered on:
 - (i) 1 October 2022 with TotalEnergies Gas & Power Limited (gas and electricity), and
 - (ii) 1 October 2023 with SmartestEnergy Limited (electricity only).

REASONS

The application

1. The Applicant is the landlord of seventeen sheltered housing schemes containing either purpose-built flats or individual bungalows, located within the Kings Lynn and West Norfolk local housing authority area (“the properties”).
2. The Applicant seeks a determination pursuant to section 20ZA of the Landlord and Tenant Act 1985, as amended (“the 1985 Act”) for the retrospective dispensation of consultation requirements in respect of a “qualifying long term agreement” (within the meaning of section 20ZA). The qualifying long term agreement is described in the application as a traditional fixed term contract for gas and electricity supply. In fact, the application concerns two agreements, one for gas and the other for electricity supply over a term of 4 years from 1 October 2022. Plus, another agreement for electricity only for a term of 3 years from 1 October 2023 for the properties at Clements Court and Grove Gardens.
3. The Respondents are the tenants or leaseholders of the flats or bungalows at the properties who are potentially responsible for the cost of the charges under the terms of their lease. The application states that service charges are imposed for personal and/or communal gas and electricity. Personal utility charges are for heating and hot water provided to individual flats by a communal heating system.
4. By virtue of sections 20 and 20ZA of the 1985 Act, any relevant contributions of an individual tenant through the service charge towards the charges would be limited to a fixed sum (currently £100 per accounting period) unless the statutory consultation requirements, prescribed by the Service Charges (Consultation) (England) Regulations 2003 (“the Regulations”) were either (a) complied with; or (b) dispensed with by the Tribunal. In this application the only issue is whether it is reasonable to dispense with the consultation requirements.

5. **Any issue as to the reasonableness and/or payability of service charges under the leases relating to the costs incurred/to be incurred, may be the subject of a separate application by the landlord or leaseholders under section 27A of the 1985 Act for a determination by the Tribunal.**

The Law

6. Section 20 of the 1985 Act sets out the consultation procedures that a landlord must comply with if intending to enter a “qualifying long term agreement”. Unless falling within an exclusion prescribed by the Regulations, a “qualifying long term agreement” is defined under section 20ZA(2) as an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than 12 months.
7. Regulation 4 provides that section 20 applies to a qualifying long term agreement which results in a service charge contribution by an individual tenant of more than £100 in any accounting period. The “accounting period” begins on the relevant date for which service charges are referable and ends 12 months after.
8. Unless dispensation is granted under section 20ZA, the consultation procedure essentially starts with the pre-tender stage where Notice of Intention to enter into the Agreement is given to each tenant and any recognised tenants’ association. That is followed by the tender stage where the landlord gives Notification of Proposals including estimates. Another stage is then required in some cases for the landlord to give written notice advising the tenants that the Agreement has been entered and the reasons for making that Agreement.
9. Section 20ZA of the 1985 Act, subsection (1) provides: *‘Where an application is made to a 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.’*
10. In the case of *Daejan Investments v Benson and others* [2013] UKSC 14 the Supreme Court set out certain principles relevant to section 20ZA. The case concerned ‘qualifying works’, but the principles apply equally to qualifying long term agreements. Lord Neuberger clarified that the purpose of sections 19 to 20ZA of the Act was to ensure that tenants are protected from paying for inappropriate works and paying more than would be appropriate. He went on to state: *‘it seems to me that the issue on which the [tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements’.*

Paper determination

11. The application is dated 26 October 2023. Directions were issued by the Tribunal on 3 January 2024. The Applicant landlord was required by 31 January 2024 to write to each of the Respondents, by email, hand delivery or first-class post to (i) inform them of the application (ii) provide a copy of the Tribunal directions (iii) advising where the qualifying long term agreement (or key parts) are available online (iv) how to receive printed copies, and (v) advising that additional documents will be added to the website as the application progresses.
12. The Applicant confirmed that the above steps were taken.
13. The Directions gave those leaseholders or tenants who oppose the application until 14 February 2024 to respond to the Tribunal by completing a reply form and returning it to the Tribunal. At the same time, any leaseholder or tenant in opposition would need to send to the landlord a statement in response to the application with a copy of their reply form and copies of documents relied upon.
14. The landlord was required to prepare a bundle containing all the documents it relies upon, including copies of any replies from the leaseholders. A bundle of some 176 pages was submitted to the Tribunal. It includes the application form and a supporting witness statement, details of the retirement schemes, Tribunal Directions, the energy contracts, and a copy of a specimen tenancy agreement. No reply forms or objections were submitted by the Respondents who have taken no active part in this application.
15. The Directions said that the Tribunal would determine the application based on written representations unless any party made a request for an oral hearing by 21 February 2024. No such request was received. Therefore, this application has been determined by the Tribunal on the papers based on the information supplied by the Applicant.

Consideration

16. The Tribunal has the jurisdiction to grant dispensation under section 20ZA of the 1985 Act “*if satisfied that it is reasonable to dispense with the requirements*”.
17. A witness statement has been prepared by Sophie Bates, as Director of Operations for the Applicant.
18. The Application states that the Applicant’s separate 3-year contracts for the supply of gas and electricity had expired in September 2021. At that time energy prices had started to rise rapidly. Due to the volatility of energy prices, the Applicant decided not to renew the contracts on a

fixed rate. Early in February 2022, the Applicant secured lower prices by entering a 6-month contract for both gas and electricity. Later that same month prices for gas and electricity rose sharply following the Russian invasion of Ukraine.

19. Ms Bates explains that the Applicant utilised a third-party intermediary to obtain bids from energy suppliers for a new contract. They went to the market to investigate which supplier would provide the most competitive rates over a 4-year term. From their research, the best available rates and terms were from TotalEnergies Gas & Power Limited.
20. The Applicant decided to procure two contracts with effect from 1 October 2022 with TotalEnergies; one for gas and the other electricity supply covering the application sites. It believes that this type of contract offers good value for money, at a point when market conditions were particularly volatile because of global pressures. The contract offered the residents some stability in prices over the contract term and enabled them to take advantage of economies of scale due to the Applicant's purchasing power. Ms Bates says that budget certainty was needed and to avoid the risk of further predicted price rises.
21. It is explained that a quick decision was needed as quotes provided by energy companies are only valid for the day on which they are provided with the market changing daily. To procure the energy contract there was only a small timeframe to accept the tendered price. As such, the Applicant maintains that it was impossible to comply with the section 20 consultation process, where energy prices fluctuate dramatically.
22. To illustrate the point, Ms Bates calculates that by entering the contracts when it did, the Applicant avoided paying market highs that would have potentially exceeded an additional £537,000 for the first 12 months.
23. For two of the retirement schemes, at Clements Court (located at Caves Close) and Grove Gardens, their electricity supply contract expired at a different time to the other schemes. These supply contracts expired February 2023. The Applicant submits that the markets were still exceptionally volatile. Again, the Applicant instructed the same third-party intermediary as before to go to the market to procure a 3-year contract expiring at the same time as the other contracts i.e., 30 September 2026. This resulted in a 3-year contract being entered from 1 October 2023 for electricity only with SmartestEnergy Limited. In doing so, the Applicant submits that it secured the best possible pricing obtainable.
24. Each contract is capped so that the price cannot exceed the capped rate, but on the anniversary date, the Applicant's third-party intermediary renegotiates the rate to benefit from any price drop in the market.

25. The Tribunal is satisfied that at the material times the market conditions not only gave rise to a level of urgency in procuring new contracts for energy supply but also made compliance with the statutory consultation requirements impractical.
26. As none of the Respondents have objected, the Tribunal finds no evidence they would suffer any prejudice if dispensation is granted.

The Tribunal's decision

27. In the circumstances set out above, the Tribunal considers it reasonable to dispense with the consultation requirements. Accordingly, dispensation is granted pursuant to section 20ZA of the 1985 Act.
28. This decision does not affect the Tribunal's jurisdiction upon any future application to make a determination under section 27A of the Act as to whether any service charge costs are reasonable and payable.
29. There is no application before the Tribunal for an order under section 20C (limiting the ability of the landlord to seek their costs of the dispensation application as part of the service charge). This could be the subject of a future application should any costs be charged to the leaseholders/tenants.
30. It is the responsibility of the Applicant to serve a copy of this decision on all Respondents.

Name: Judge K. Seward

Date: 14 March 2024

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).