



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

Case reference : **LON/00BE/LDC/2021/0225**

HMCTS code: : **P: PAPER REMOTE**

Property : **Various residential leasehold properties listed in the schedule to the application**

Applicant : **Wandle Housing Association Limited**

Representative : **Devonshires Solicitors LLP**
(ref: NML/WAN6/486)

Respondents : **951 long residential leaseholders subject to communal electricity and/or gas supplies**

Type of application : **Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**

Tribunal member : **Judge Robert Latham**
Jane Mann MCIEH

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **11 October 2021**

DECISION

The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 without condition in respect of a proposed long-term agreement for the supply of electricity and gas.

Covid-19 pandemic: description of hearing

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was P:PAPER REMOTE. The Directions provided for the application to be determined on the papers unless any party requested a hearing. No party has requested a hearing. The applicant has filed a bundle in support of the application.

The Application

1. The Tribunal has received an application from Wandle Housing Association Limited (“the Applicant”), dated 11 August 2021, seeking dispensation from of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 (“the Act”). The respondents to the application are 951 residential leaseholders of the Applicant to whom it supplies communal electricity and/or gas supplies. All of the affected properties are within the Greater London area, save for four situated in Epsom, Hersham, Sidcup and Middleton-on-Sea.

2. The Applicant’s Grounds for Seeking dispensation are as follows:

“1.1 The Applicant is looking to enter into new agreements with utility suppliers for the provision of gas and electricity from 01 October 2021 as the current contracts expire on 28 September 2021.

1.2 The Applicant is obliged to comply with Public Procurement Regulations when entering into the intended agreements. One aspect of this obligation is that a standstill period of ten days must be allowed between the notification of bidders of the decision to award the contract and signing the contract with the successful bidder. The energy market does not operate in this way as bids are requested and contracts usually signed within a twenty four hour period. The only way to reconcile these two constraining obligations is to use a third party intermediary (“TPI”).

1.3 The Applicants have appointed Energy and Carbon Management (E&CM) as their TPI to act on behalf of the Applicant during the consultation process. However, the TPI will need to approach the market on a set date to obtain bids from energy companies to supply gas and/or electric across all of the properties within the Applicant’s stock. The Applicant will be guided by their TPI in respect of the contract type i.e. fixed/variable/hybrid and its duration.

1.4 The Applicant deems it beneficial to enter into a single long-term agreement for utilities as, once agreed, the TPI will be instructed to identify optimum times to enter into new agreements with suppliers so the Applicant and the Respondents can benefit from dips in the market and the Applicant’s significant buying power.

1.5 The agreements to be signed by the broker on behalf of the Applicant are the QLTA's for which the Applicant is seeking dispensation with the requirements the Consultation Regulations 2003.”

3. The Applicant filed a witness statement from Alan Pibworth, its Procurement Category Manager, dated 21 July 2021, in support of its application. He attaches a letter that the Applicant had recently written to the Respondents informing them of this application. Mr Pibworth explained that the current contracts were to expire on 28 September 2021. Through an established procurement framework provider, the Applicant was planning to appoint an energy broker and invoice validator, to meet a contract start date of 1 October 2021. The proposed contract would be for 3 years with a possibility of an additional 12 month extension. Through the appointed broker, the Applicant planned to run a competitive tender for the supply of gas and electricity for communal (landlord) supplies. The duration of energy provision and contracts was to be determined with the appointed broker and agreed by a stakeholder group. The Applicant was undertaking this procurement exercise based on the need for a more flexible, yet risk-managed contracted approach, to future energy provision. This was based on the need for certainty of supply, balanced with price stability, yet also achieving value for money for the Applicant and to ensure reasonable charges for leaseholders. This flexible approach seeks to ensure attractive pricing for the purchase of gas and electricity, which may include metering and billing services. The plan is to have a contract length of three years plus a possible one year extension, which is designed to encourage collaborative working, as it seeks a partner in the long term. However, contract length will be determined on the advice received from the future energy brokers, as the energy market can and does fluctuate.
4. On 2 September 2021, the Tribunal issued Directions. The Tribunal stated that it would determine the application on the papers, unless any party requested an oral hearing. No party has done so.
5. By 6 September 2021, the Applicant was directed to write to each of the respondents by email, hand delivery or first-class post, setting out the following:
 - (i) Informing them of the application;
 - (ii) Advising them that a copy of the application (with personal details deleted), statement of case, supporting documents and a copy of these directions will be available on the applicant's website, advising them of the URL address, and notifying them that any response to the application should be made by 4 pm on 14 September 2021;
 - (iii) Informing the leaseholders that if they wish to receive a printed copy of the application and these directions they should write to the applicants, who will then send printed copies (again, with any personal details deleted).

6. On 7 September, the Applicant sent the Respondents a letter, dated 6 September, informing them that the relevant documentation relating to the application could be found at a dedicated page on its website. On 8 September, the Applicant confirmed to the Tribunal that it had done so. The Tribunal is satisfied that no prejudice has been caused by the letter being sent out one day late.
7. By 14 September, any leaseholder who opposed the application was directed to complete a Reply Form which was attached to the Directions and email it both to the Tribunal and to the Applicant. The leaseholder was further directed to send the applicant a statement in response to the application.
8. Two leaseholders have returned a completed Reply Form opposing the application, namely Mr Justin Gyphian, the leaseholder of 18 Royal Standard Court, 226 Hillingdon Street, SE17 3JD and Mr Kevin King, the leaseholder of 15 Garfield Road, SW11 2PL.
9. Mr Gyphian has provided a detailed statement objecting to the application. He takes issue with the Applicant's statement that competitive quotations are only held for a matter of hours on the energy trading market. Having consulted an energy trader, he suggests that the scale of any market fluctuations has been exaggerated, most likely to create a sense of urgency, which the Applicant feels is necessary in support of its application for dispensation. He complains of the lack of consultation. He sees "no significant impediment" to at least electronic notification of proposed pricing and duration which could be turned around in a matter of hours, thereby giving leaseholders an opportunity to input into what are significant financial decisions for both them and the landlord. He suggests that the Applicant should provide leaseholders with an electronic notification of any bids or proposals from potential suppliers and offer them an opportunity to respond. This would be much more aligned to the spirit of the legislation and its ultimate intent.
10. Mr Gyphian also considers that there are arguments against using such long-term agreements:

"(i) whilst fixing a price for a lengthy defined period may start out favourably, the price may end up being much higher than if achieved through a series of successive shorter contracts, and in some instances be comparatively much more expensive. Even though prices are set often set competitively at the outset of a contract, such contracts will normally contain a formula for how prices will increase during the term of the contract. A normal provision might be to say that prices will increase at the same rate as inflation, for example. The problem with this, and other any other formula, is that in practice prices go down as well as up. They don't always move in line with inflation or other measures, and this inevitably means either the landlord ends up paying too much or the service provider ends up getting paid too little;

(ii) there is a higher risk of service interruption. Landlords can become reliant on a single provider in long term agreements, and may find it more difficult to replace a service provider who fails in its obligations than a Landlord which has not developed this kind of reliance and can switch supplier more easily;

(iii) it can be more difficult to enforce standards of service. A Landlord may simply have to ‘put up’ with poor standards because of the difficulties, and costs, involved in terminating a long-term agreement. This element is of particular concern with Wandle, which scores consistently poorly for overall service levels. Any prospect of avoiding further degradation of service levels should therefore be explored; and

(iv) no matter how extensive the contract, where no fixed price has been agreed in advance, there is a danger that the contract might allow a service provider to charge very high, uncompetitive costs, which a landlord may, in practice, be unable to challenge, which will inevitably be passed onto Leaseholders.”

11. Mr Gyphian also raises concerns about the appointment of the TPI. He notes that in the application form, the TPI is given as “Energy and Carbon Management”, whilst in Mr Pibworth’s statement as “Inspired Energy”. The Applicant has provided no explanation for this apparent error. Mr Gyphian further complains that the Applicant has provided no justification or rationale for its selection of a TPI. Neither has it provided any information relating to the associated costs or commissions of the TPI and how these will be borne, if at all, by the leaseholders. Neither has the Applicant provided any information of any pre-existing relationship between it and the TPI.

12. Pursuant to the Directions, the Applicant has filed a Bundle of Documents. It has also posted this on its website.

13. Section 20ZA (1) of the Act provides:

“Where an application is made to the appropriate 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.”

14. **The only issue which this Tribunal has been required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements.** This application does not concern the issue of whether any service charge costs for electricity and/or gas will be reasonable or payable. A leaseholder who considers that the charges have not reasonably been incurred may still make an application to the Tribunal for a determination under section 27A of the Act.

15. The Tribunal is satisfied that it is reasonable to grant dispensation from the statutory consultation requirements. The Applicant has concluded that it is beneficial to enter a single long-term agreement for the supply of electricity and gas and that this will secure best value for its leaseholders. This has been an approach which has been adopted by a number of social landlords. The Tribunal is satisfied that this is an approach to procurement that the Applicant is entitled to adopt.
16. Mr Gyphian rehearses a number of arguments against these long-term arrangements. The Tribunal is satisfied that the Applicant would have had due regard to such concerns before making an informed decision to adopt its chosen approach to procurement.
17. The Tribunal accepts that the energy market operates in such a way that that bids are requested and contracts are signed within a very short period. This may be as short as 24 hours. This precludes that statutory 30-day consultation period.
18. The Tribunal does not consider it to be realistic to afford leaseholders the opportunity to comment between the notification of any bids or proposals and the signing of any contract. The Tribunal does expect a landlord to follow the spirit of the law. Mr Pibworth has exhibited the letter which the Applicant sent to leaseholders in July which provided an opportunity for leaseholders to express their views. The Applicant has publicised this application on its leaseholder website. Only two leaseholders have objected to the approach proposed by the Applicant. The Applicant has also agreed to publish the outcome of the procurement exercise on its website.
19. The Tribunal does not accept that the Applicant was obliged to consult leaseholders on its appointment of TPI, whether this was Energy and Carbon Management or Inspired Energy.
20. The Directions made provision for the service of the Tribunal's decision. The Tribunal will email a copy of its decision to the Applicant and to the two leaseholders who have opposed the application. The Tribunal has directed the Applicant to place a copy of this decision together with an explanation of the leaseholders' appeal rights on their website within 7 days of receipt and to maintain it there for at least 3 months, with a sufficiently prominent link to both on their home page. In this way, leaseholders who have not returned the reply form will be able to view the tribunal's decision on dispensation together with their rights of appeal.

Judge Robert Latham
11 October 2021

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 **by e-mail** 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).