



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

**Case Reference** : **BIR/00CN/LDC/2024/0003**

**Properties** : **Various Properties in the ownership of Midland Heart as Landlord**

**Applicant** : **Midland Heart Limited**

**Representative** : **Simon Allison – Counsel – Landmark Chambers  
Camilla Waszek – Trowers and Hamlins  
Guy Grant - Energy & Utilities Manager**

**Respondents** : **The Lessees**

**Type of Application** : **An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements.**

**Tribunal Members** : **V Ward BSc Hons FRICS – Regional Surveyor  
Judge David R Salter**

**Date of Decision** : **15 August 2024**

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**DECISION**

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## Background

1. By an application received by the Tribunal on 19 January 2024, the Applicant Landlord sought dispensation from all or some of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 (“the Act”).
2. Section 20 of the Act, as amended by the Commonhold and Leasehold Reform Act 2002, sets out the procedures landlords must follow which are particularised, collectively, in the Service Charges (Consultation Requirements) (England) Regulations 2003. There is a statutory maximum that a lessee has to pay by way of a contribution by way of a “qualifying long term agreement” unless the consultation requirements have been met or dispensation from the same has been granted. A qualifying long-term agreement is an agreement for more than 12 months where the amount payable by any one contributing leaseholder under the agreement in any accounting period exceeds £100.
3. The application relates to 1,829 properties in the Midlands, of which Midland Heart is the Landlord, which benefit from Landlord’s Lighting or District Heating. The Lessees of these properties are the Respondents to this application.
4. The Directions issued by the Tribunal instructed the Respondents to return a reply form to indicate whether they supported the application or opposed the same, and if they required the Tribunal to convene an oral hearing.
5. Twelve Respondents objected to the application as follows:
  - a) Bernice Larkin
  - b) Stephen Small
  - c) V Pavler
  - d) E Marriott & P Marriott
  - e) Elsa Davis-Washington
  - f) Mary Smart
  - g) Nicholas Wood
  - h) Mrs Linda Sharpe
  - i) Roderick Moseley
  - j) Sheridan Woodbine
  - k) Jennifer Bryan
  - l) Philip Gearing
6. Four Respondents requested an oral hearing which was held by video platform on 25 July 2024 by video platform. The Tribunal provided details of the hearing to all Respondents who had objected to the application. However, the only participants in the hearing were the following on behalf of the Applicant:

Simon Allison – Counsel – Landmark Chambers

Camilla Waszek and Hannah Caton both of Trowers and Hamlins, the Applicant's solicitors.

Unfortunately, Guy Grant and Andy Brown both employed by the Applicant in the department that deals with utilities were unable to join the hearing due to connection issues. Following a discussion with Mr Allison, the Applicant and the Tribunal decided that they were happy to proceed with those present.

## **The Submissions of the Parties**

### *The Applicant*

7. The Applicant's submissions in writing and confirmed at the hearing were as follows.
8. The Applicant is a housing association, owning and managing a large number of properties each of which has an electricity supply and some of which have a gas supply. Those properties include leasehold blocks, as well as sheltered housing / supported living schemes, and the Applicant's own head office. The electricity supplies in the leasehold blocks relate to the costs of the common parts electricity supply (lighting / heating etc.) will vary by block. Some blocks have gas supplies e.g. for heating, although this is less common. Typically, the gas costs per year in leasehold blocks are well under the £100 statutory limit (e.g. £10-12). However, dispensation is nonetheless sought as a matter of good order and bearing in mind prices are not fixed. Electricity costs are usually higher (due to higher consumption).
9. The Applicant procures its energy on a bulk basis to secure the best possible deal for it and for leaseholders. It aims to purchase energy on the wholesale markets by 'hedging', purchasing blocks of energy for periods of time when prices appear favourable. It is assisted in doing so by its energy broker - Inspired Energy plc, which is contracted to 30/9/28. By doing so, for instance, it protected itself and service charge payers from the substantial rise in gas and electricity costs in recent years following the invasion of Ukraine. These arrangements are put in place over 4-year periods. The current period ends on 30/9/24 (energy is all contracted to that date), and the new arrangements will be in place from 1/10/24 to 30/9/28; it is that period that this dispensation application relates to.
10. Because the energy markets are particularly volatile, it is not possible to get a competitive quote for energy to cover any particular period that would be held for the duration of a 30 day plus consultation period as the consultation requirements dictate. Prices are typically only held for a few hours. It is important to note, therefore, that it would not be possible to comply with the consultation requirements. That means, absent dispensation, the Applicant could only enter

into contracts lasting no more than a year. With dispensation, the Applicant can move quickly – for instance, as detailed below, the electricity supply contract from 1/10/24 only relates to 12 months of supply; when a good opportunity arises between now and 30/9/25, the Applicant wishes to be able to quickly capitalise upon it so as to secure the best price for the following periods; it cannot do so if it must follow the consultation requirements.

11. In addition, the market does not always look favourably upon energy contracts where there are a large number of small volume supplies (they prefer to provide a large consumption site with a single meter rather than have the hassle of lots of meters measuring low consumption).
12. There are real benefits to being able to contract for longer periods of time (as the Applicant has in fact done for the supply of gas). There are significant costs of entering into new contracts, both time and money – for both parties. The ability to buy forward more than one year means prices are cheaper. Buying further forward insulates the Applicant and Respondents from market movements, providing longer term and more stable pricing (improving budgeting). There are other ancillary benefits. But, most importantly, data shows that prices tend to be cheaper when buying over a 3–4-year period rather than annually.

#### *Gas*

13. The Applicant entered into a contract with SEFE for the supply of gas, covering the period 1/10/24 to 30/9/28, in late 2023, enabling it to start to purchase on the wholesale markets blocks of its energy requirements from 1/10/24 onwards already as it would not have been advisable to wait until close to the start of the period. The operation of this contract is complex, but in short, it gives the Applicant access to purchase blocks of energy on the wholesale market for supply over the 4-year period, with SEFE administering those purchases / trades and charging the cost of the supply to Applicant. It is a ‘flexible’ contract in that the prices for the supply are not fixed and, accordingly, the Applicant is able to capitalise on market movements by purchasing at appropriate points and reduce risk of impact from price ‘spikes’.
14. Whilst the SEFE contract covers supply over a 4-year period, there is provision for it to be terminated on each anniversary of the first supply date, albeit subject to a termination payment (which may be in either direction – by the Applicant to SEFE or the other way around, depending on the calculation at the time).

#### *Electricity*

15. More recently, the Applicant has entered into an electricity supply contract with EDF. Whilst the Applicant’s preference was for a similar ‘flex’ contract enabling it

to purchase its energy in blocks over the 4-year period, the tender exercise did not produce any operators in the market willing to contract on a flex basis; this will be kept under review. Accordingly, the EDF contract is a 12-month fixed price contract. The Applicant is seeking to make arrangements for a further electricity supply contract for the following period, on a flex basis if possible, or for a further fixed period, taking advice from Inspired Energy plc. Unit prices do vary slightly from site to site due to varying transmission costs etc.

16. It is worth noting that the energy price cap did not apply to 'bulk' supplies, and it is, of course, impossible to know what, if anything, a future government might put in place to protect residents from rising energy costs if another spike does occur. The whole point of the Applicant entering into the gas contract is that it can protect against future spikes by buying energy in blocks now. And if energy costs fall over the period, the Applicant can capitalise on that because it is not buying the whole 4-year block at once.
17. The Applicant also referred the Tribunal to *Daejan Investments Ltd v Benson and others* [2013] UKSC 14 (hereafter, *Daejan*).
18. The Applicant indicated that the costs of making the application would not be passed onto leaseholders.

#### *The Respondents*

19. Reply forms were received from 245 Respondents of whom 233 were in favour and 12 objected. Many comments made by objectors were not relevant to the application before the Tribunal.
20. In the main, relevant objections took a common theme. Several Respondents noted that longer term contracts may not enable the Applicant to take advantage of fluctuating prices as the indications are that energy prices are just as likely to decrease as rise, so there is no justification for rushing into a long-term contract and dispensing with the Section 20 process. It was pointed out that longer term contracts may be affected by energy caps under a new Government. There were also specific comments in respect of the communal electricity supply to one particular development.

#### *The Applicant's Reply to Objections*

21. In response to the objections, the Applicant stated that the current gas contract is coming to an end and the new one is a long-term flexible contract. Practically, this means that the Applicant can buy blocks of energy in the commercial energy market when they consider the prices are favourable i.e. make multiple purchases through the life of the contract.

## **The Statutory Background**

22. Relevant legislation is as follows:

Section 20ZA of the Landlord and Tenant Act 1985

*(1) 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.*

## **The Tribunal's determination**

23. The Supreme Court case of *Daejan* sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.
24. The general approach to be adopted by the Tribunal, following *Daejan*, has been summarised in paragraph 17 of the judgment of His Honour Judge Stuart Bridge in *Aster Communities v Chapman* [2020] UKUT 0177 (LC) as follows:

“The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered.”

25. The statutory consultation procedures are in the opinion of the Tribunal unworkable in terms of the procurement of electricity or gas; the prices of which change daily. Simplistically, the consultation procedures for qualifying long-term agreements are as follows:

Initially, a Notice of Intention must be given. This gives the leaseholder basic information about the services to be provided, the reasons why it is necessary and invites observations within 30 days.

This is then followed by a Notice of Proposals which sets out the actual details of the contract the Landlord intends to enter into, including price/cost. Again, observations are invited within 30 days.

Occasionally, a third stage notice is required.

These procedures are set out fully in The Service Charges (Consultation Requirements) (England) Regulations 2003.

As it will be noted, the minimum period to consult formally would be 60 days. By the end of that period, it is likely that the price of the commodity would have changed.

26. A popular theme raised by the objections is that the gas and electricity prices would be fixed for the entire period of the contract. As has been set out above, this is not correct. The contract simply allows the Applicant to take advantage of competitive prices when they are available and which they would not be able to do if they had to follow the consultation procedures before entering into the same. In addition, the costs of entering into an agreement every year will be avoided.
27. No Respondent has identified any prejudice they are likely to suffer if the consultation procedures are not followed. Therefore, we grant the application for dispensation to enter into the qualifying long-term agreements proposed by the Applicant as set out above for the period 1/10/24 to 30/9/28.
28. All parties should note that there is nothing in this determination that can result in the Respondents being obliged to pay a charge which is not recoverable under the Respondent's leases.
29. The Applicant shall place a copy of the Tribunal's decision together with an explanation of the leaseholders' appeal rights on their website within 7 days of receipt and shall maintain it there for at least 3 months, with a sufficiently prominent link to both on their home page.

## **Appeal**

30. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).