



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

Case reference	:	CAM/12UB/LDC/2024/0012
Applicant	:	BPHA Ltd
Representative	:	Clarke Willmott LLP
Respondents	:	All leaseholders of dwellings exhibited to the Application
Property	:	Various units in Beds, Bucks, Peterborough, Suffolk, Oxon, Northants, Cambs and Wilts
Type of Application	:	For dispensation of the consultation requirements under s.20ZA Landlord and Tenant Act 1985
Tribunal member(s)	:	Judge Stephen Evans
Date of decision	:	9 June 2024, on paper

DECISION

The Tribunal determines that:

- (1) The Applicant is granted permission retrospectively to vary paragraph 2(a) of the Tribunal directions dated 20 March 2024 to write to the Respondents by second class post instead of first class post;**
- (2) An order for unconditional dispensation under section 20ZA of the 1985 Act shall be made, dispensing with all necessary consultation requirements.**

The Application

1. The Applicant seeks an order pursuant to s.20ZA of the Landlord and Tenant Act 1985 (as amended) (“the 1985 Act”) for the retrospective dispensation of consultation requirements in respect of a QLTA for energy supply.
2. The Respondents are the leaseholders of various properties, a list of the same being attached to the application.

The issue

3. The only issue before the Tribunal is whether it should grant dispensation from all or any of the consultation requirements contained in section 20 of the 1985 Act. **The Application does not concern the issue of whether any service charge costs will be payable or reasonable.**

Background

4. A brief description of the Property is: a total of 1171 flats, 185 houses and 26 maisonettes, as detailed in the exhibit to the witness statement and as annexed to the application. Only leaseholders shall be relevant to this application.
5. The application is dated 28 February 2024, and states in the grounds for seeking dispensation that there are QLTA's in relation to the energy supply to the common areas of the properties listed in the aforementioned exhibit; that the current energy contracts will expire on 31 March 2025; and that the Applicant intends to enter into new energy contracts, which will be procured by third party intermediaries, The EIC Partnership, from 1 April 2025.
6. The Applicant has carried out informal consultation with the Respondents, including face to face meetings with some of them who are elderly, at Eyewood House, Oxlip House and Mill View House on 31 October, 2 November and 3 November 2023 respectively, to discuss the dispensation project.
7. In addition, the Applicants sent all the Respondents a letter dated 1 November 2023 explaining the process and the intention to enter into energy contracts for a longer period, to secure the best available prices. The Respondents were invited to make observations by e-mail, with letters being sent in two batches, the first containing an e-mail address, and the second no e-mail address. However, both batches contained the Applicant's general contact details on the letterhead. The Respondents have received only 2 observations, detailed further in this decision.

8. Dispensation is sought on the basis that is impractical for the Applicant to comply with the requirements under Schedule 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003; due to the nature of the energy market and the volatility of price fluctuations, the prices will almost certainly have varied and increased by the time the consultation process is complete; that the EIC Partnership will advise the Applicant of the period the bid should be accepted, to ensure the best price and value is obtained for the Respondents.
9. On 5 April 2024 solicitors for the Applicant wrote to the Tribunal stating that they were complying with paragraph 2(b) of the directions dated 20 March 2024, in that a letter containing the application and all the required information had been sent by the Applicant to each Respondent on 3 April 2024, pursuant to paragraph 2(a) of the directions; that given the volume of letters sent (1488), to keep costs down, the letters had been sent by second class post as opposed to 1st class post. The Tribunal's permission was therefore sought to vary the directions to permit such service. The letter also stated that a copy was being uploaded to the online portal, so it can be viewed by the Respondents.

The Leases

10. The Tribunal has been supplied 3 sample leases, which provide for the Applicant to provide Services to leaseholders which are ostensibly relevant to this application. For example, one lease provides that the Service Cost is to be found in paragraph 2 of Schedule 6; and that includes the cleaning and lighting of the common parts, and the provision of any other services and the carrying out of any other works including improvements which the landlord may from time to time consider desirable or necessary for the proper maintenance safety enjoyment or administration of the building or the estate.
11. Another lease specifically provides for the provision of heating lighting and hot water to development and the premises and gas water and electricity.

Discussion and determination

The application for variation of the directions dated 30 March 2024

12. The Applicants, pursuant to order, complied with paragraph 2(a) of the Tribunal directions dated 20 March 2024, save that the initial written notification to the Respondents was sent by second class post and not by first class post.
13. At the time of this decision, no Respondent has contacted the Tribunal, whether by the deadline in the directions of 22 April 2024 or at all, to object to either the variation of the directions, or to the substantive application itself.

14. In all the circumstances, the Tribunal determines that there is no prejudice to the Respondents in permitting the retrospective variation of direction 2(a) to allow service by second class post instead of first class post. The application is granted.
15. The letters dated 1 November 2023 are therefore deemed validly served.

The substantive application for dispensation

16. The Application is supported by a statement from Mr William McFarland, Head of Asset Strategy of the Applicant, dated 28 February 2024.
17. This evidences the following, in summary:
 - The Applicant is a registered provider of social housing and owns around 17,000 properties in the areas of Bedfordshire, Buckinghamshire, Peterborough, Suffolk, Oxfordshire, Northamptonshire, Cambridgeshire and Wiltshire;
 - The properties relevant to this application are those where the cost of energy is recovered by way of service charge which is likely to exceed £100 per leaseholder;
 - The list of Respondents is correct at the date of signature of the statement on 28 February 2024;
 - A total of 1171 flats, 185 houses and 26 maisonettes are subject to the energy contracts or impacted by them;
 - The Respondents occupy the properties which are subject to the application either under shared ownership leases, extra care or long leasehold interests; and sample leases are attached;
 - The Respondents have gas supply for communal heating and/or electricity supply for communal lighting.
 - The current contract for the supply of energy relating to the communal areas of the properties is due to expire on 31 March 2025;
 - The Applicant has engaged EIC Partnership Ltd to act as specialist third party intermediary, to procure the best possible energy contract. They are a trusted broker, which will leverage its direct access to the energy markets, with significant collective buying power, to support the Applicant with utilising best practice energy purchasing over a long term;

- By entering the market early for further years out, the initial position is protected against market volatility, and will ensure that gas and power contracts the Applicant enters into will be best value;
- In turn this mitigates the risks of residents being incorrectly charged;
- The Applicant has taken the advice of the EIC partnership that, in view of the rising cost of gas and electricity, trading the energy contract over a longer period will offer the Applicant the opportunity to work in the best interests of the Respondents and to ensure best value;
- The Applicants are obliged to comply with Public Procurement Regulations, but the energy market does not operate so as to allow a standstill period of 10 days; energy prices react within minutes of any changes, and they require full-time monitoring to obtain the best price. Accordingly the only way to reconcile the constraining obligations is to appoint a third party intermediary;
- The Pan Government Energy Project recommend that all public sector organisations buy their energy through an aggregated, flexible, risk managed framework managed by a third party intermediary;
- The nature of the long term agreements means that it is not reasonably practicable for the Applicant to give the required information at the notice of proposal stage of the consultation process;
- Time cannot be given to consult fully, as the prices cannot be held and will change during the consultation. It is not therefore possible to adhere to the timeline set out in the section 20 consultation process at the same time as complying with Public Procurement Regulations;
- The Applicant has complied with the spirit of the Consultation Regulations by doing an informal consultation with all residents within schemes where they may be liable to pay in excess of £100 per year for service charge for heating and or lighting at the communal areas;
- Details are then given of the various meetings set out in the application form, and the correspondence dated 1 November 2023, which informs the leaseholders of the intention to apply to this Tribunal for dispensation, on the grounds that prices change so quickly in the energy market that the Applicant would not have enough time to go through the full process and still secure it.
- The letter attaches a useful set of Frequently Asked Questions, informing the social leaseholders about section 20, about dispensation and about related other matters.

18. The Applicant's witness statement confirms that observations have been considered and responses given/attempted. At exhibit WM5 there are just two observations, which the Tribunal may set out in full:

- (1) The first is from an owner of three flats wishing to have clarity regarding direct payments to the energy supplier. The Applicant had responded to this owner, to explain that its letter relates to the communal costs for gas and electricity, and not individual flat heating costs which are subject to personal agreements with the open market utility provider;
- (2) The second is from someone who wanted more information and a comparison with Switch 2. The Applicant made two voice calls to this customer, but no response was received, even after voicemails were left. The response continues: "The query relates to the heat network within the block of flats and the utilities contracts and prices we secure will have a knock on impact to the tariffs the residents receive at the block, so there is a direct impact between the rates we secure and the costs residents will receive from the heat and metering billing agent Switch 2".

The Tribunal's decision

19. The Tribunal determines that an order for unconditional dispensation under section 20ZA of the 1985 Act shall be made dispensing with the consultation requirements.

Reasons for the Tribunal's decision

20. 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". The Tribunal has also had regard to the leading case of *Daejan Investments Ltd v Benson* [2013] UKSC 14, which confirmed that when considering an Application under section 20ZA, the Tribunal should focus on the extent, if any, to which the leaseholders are prejudiced by the failure to comply with the consultation requirements, in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the landlord to comply with the regulations.

21. In considering the lessees' position, the Application has not been opposed by any of the Respondents. There is no ostensible prejudice to the Respondents.

22. Moreover, the reasons given in the Application and Mr McFarland's statement are ostensibly sensible, and to the financial benefit of all the leaseholders named as Respondents to the Application. The Tribunal notes that informal consultation has taken place and the Applicant has had regard to observations made.

23. In all the circumstances, the Tribunal is satisfied that it is appropriate to grant an order for dispensation, as sought.

Conclusions

24. The Applicant is reminded of direction 7 of the directions dated 20 March 2024; a copy of this decision should be placed on the Applicant's website within 7 days of receipt, together with an explanation of the Respondents' appeal rights. The Applicant must keep it on its website for at least 6 months, with a sufficiently prominent link to the decision and the rights of appeal, on their home page.

Name: Tribunal Judge S Evans

Date: 9 June 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).