

9314



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

Case Reference : LON/00BG/LDC/2013/0039

Property : THE 17,334 LEASEHOLD
PROPERTIES AS REFERRED TO
AT SECTION 4 OF THE
APPLICATION

Applicant : CIRCLE HOUSING GROUP

Representative : MR ORLANDO STRAUSS
SOLICITOR

Respondent : LESSEES AND TENANTS OF THE
17,334 PROPERTIES LIABLE TO
CONTRIBUTE TOWARDS THE
COST OF COMMUNAL ENERGY
UNDER THE PROPOSED LONG
TERM AGREEMENT

Representative : MR WALSH represented two
lessees.

Type of Application : For dispensation from all or some
of the consultation requirements
required by section 20 of the
Landlord and Tenant Act 1985

Tribunal Members : Dr Helen Carr
Mr C. Gowman
Ms Lorraine Hart

**Date and venue of
Hearing** : 25th September 2013
Old Ford Housing Association
1 – 9 Romford Road
Stratford

Date of Decision : 3rd October 2013

DECISION

Decision of the Tribunal

1. The Tribunal determines to exercise its discretion to dispense with those elements of the statutory consultation requirement contained in Paragraph 4.7 of Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) England) Regulations 2003 on condition that the Applicant provides information about the unit price paid for energy as soon as it is available to its tenants/ lessees for instance by uploading the information to its internet site.

The Application

2. Circle Housing Group, on behalf of its 10 member landlords, applied on 21st June 2013 under section 20ZA for dispensation from the consultation requirements contained in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) England) Regulations 2003 in respect of a proposed long-term qualifying agreement for the supply of energy.
3. The relevant legislative provisions are set out in Appendix 1 of this decision.

Procedure

4. The Tribunal held a pre-trial review of this matter on 27th June 2013 and issued directions on the same date. In those directions it was decided that in view of the urgency of the application the matter should be determined on the basis of written representations and without an oral hearing.
5. The Directions gave an opportunity for any party to request an oral hearing. They also gave an opportunity for any leaseholder who wishes to oppose the application from the landlord to provide a statement to the Tribunal setting out his or her reasons for so doing. Requests for an oral hearing have been received by the Tribunal together with a number of statements of objection to the landlord's application for dispensation from consultation. This matter has therefore been set down for an oral hearing.

The Hearing

6. The hearing took place at Old Ford Housing Association offices, 1 – 9 Romford Road Stratford on 25th September 2013.
7. Mr Orlando Strauss, Solicitor with Circle Living represented the Applicant. He was accompanied by Ms Louise Launchbury, Group Section 20 Manager with Circle Mr Paul Norman Senior Category Manger (Property Services) for Circle Housing Group and Mr Andrew Blake, Head of UK Business Development at Energyquote JHA Ltd.
8. A small number of lessees/tenants were present at the hearing. Mr Walsh appeared on behalf of two lessees, Ms E McDonagh and Mr S Ballentine who were not able to be present and represented them. The Tribunal would like to thank Mr Walsh and the other Respondents present at the hearing for voicing objections to the Application and contributing to the discussion of the issues.
9. The Applicant received 39 letters/forms objections from lessees/tenants, 115 letters/forms supporting the application together with two letters stating that they were content for the Tribunal to decide the matter. The forms/letters of support were not in the bundles provided for the Tribunal but copies of those letters were made available to the Tribunal after the hearing and they were found to be in order.

Determination

The Background

10. The Application relates to some 17,334 properties owned by 10 landlords within the Circle Housing Group. The names of the 10 landlords are set out in Appendix 2 to this decision. The properties are dispersed over a wide geographical area. The occupiers of the properties hold the property on a variety of legal arrangements including Right to Buy leases, shared ownership leases, Right to Acquire leases and a variety of tenancy agreements. Under these agreements the tenants/lessees/shared owners contribute to the costs of communal energy.
11. Up until September 2009 Circle Housing purchased energy in yearly, fixed price contracts. The evidence from the Applicant is that this proved a very costly purchasing strategy. From September 2009 to date Circle Housing moved to a flexible contract to purchase energy so that it could manage its exposure to high energy market price spikes. The contracts were procured through frameworks such as the Government Procurement Service and Laser. Whilst the Applicant considers that these delivered price improvements compared with the fixed price contract previously used what is now proposed is that a procurement system that is more attuned to the needs of Circle Housing.

12. The Applicant therefore intends to enter into a long term qualifying agreement for a period of ten years for the procurement of energy from a single provider. The contract will cover electricity and gas supplies that serve facilities such as lighting of internal communal areas, lighting of external communal areas, fire detection equipment, lifts, water pumps and communal heating and hot water systems.
13. The proposed long term qualifying agreement will provide for the advance purchase of energy from the wholesale market in order to manage the risks associated with energy purchasing. The aim is to achieve best value in energy over the long term for leaseholders and tenants.
14. The proposed agreement triggers both the statutory consultation requirements and the Public Contract Regulations 2006. It has been advertised in the Official Journal of the European Union.

The Application

15. Mr Strauss, on behalf of the Applicant explained the grounds for the application as follows:
 - a. The Applicant is unable to comply with the Schedule 2 Paragraph 4 (4), 4(5), 4(6) and 4(7) of the Service Charges (Consultation Requirements) (England) Regulations 2003.
 - b. In particular the Applicant argues that it is not reasonably practicable for it to give the requisite information at the notice of proposal stage of the consultation process as follows:
 - i. Paragraph 4(4) because of the way fuel energy is procured,
 - ii. Paragraph 4(5) because of the continuous buying cycle, the actual prices will only be known when purchases are made in respect of a particular period,
 - iii. Paragraph 4(6) because there has to be an acceptance of prices offered within a small time window and
 - iv. Paragraph 4(7) because there is a continuous buying cycle and the prices are only known at the end and it takes a period of time to consolidate the unit rate. Although the Applicant may be able to provide an indicative price in advance of the flexible contract, this is entirely dependant upon when the energy purchases are made. The Applicant has limited control over this and as a result will not be

6. The hearing took place at Old Ford Housing Association offices, 1 – 9 Romford Road Stratford on 25th September 2013.
7. Mr Orlando Strauss, Solicitor with Circle Living represented the Applicant. He was accompanied by Ms Louise Launchbury, Group Section 20 Manager with Circle Mr Paul Norman Senior Category Manger (Property Services) for Circle Housing Group and Mr Andrew Blake, Head of UK Business Development at Energyquote JHA Ltd.
8. A small number of lessees/tenants were present at the hearing. Mr Walsh appeared on behalf of two lessees, Ms E McDonagh and Mr S Ballentine who were not able to be present and represented them. The Tribunal would like to thank Mr Walsh and the other Respondents present at the hearing for voicing objections to the Application and contributing to the discussion of the issues.
9. The Applicant received 39 letters/forms objections from lessees/tenants, 115 letters/forms supporting the application together with two letters stating that they were content for the Tribunal to decide the matter. The forms/letters of support were not in the bundles provided for the Tribunal but copies of those letters were made available to the Tribunal after the hearing and they were found to be in order.

Determination

The Background

10. The Application relates to some 17,334 properties owned by 10 landlords within the Circle Housing Group. The names of the 10 landlords are set out in Appendix 2 to this decision. The properties are dispersed over a wide geographical area. The occupiers of the properties hold the property on a variety of legal arrangements including Right to Buy leases, shared ownership leases, Right to Acquire leases and a variety of tenancy agreements. Under these agreements the tenants/lessees/shared owners contribute to the costs of communal energy.
11. Up until September 2009 Circle Housing purchased energy in yearly, fixed price contracts. The evidence from the Applicant is that this proved a very costly purchasing strategy. From September 2009 to date Circle Housing moved to a flexible contract to purchase energy so that it could manage its exposure to high energy market price spikes. The contracts were procured through frameworks such as the Government Procurement Service and Laser. Whilst the Applicant considers that these delivered price improvements compared with the fixed price contract previously used what is now proposed is that a procurement system that is more attuned to the needs of Circle Housing.

12. The Applicant therefore intends to enter into a long term qualifying agreement for a period of ten years for the procurement of energy from a single provider. The contract will cover electricity and gas supplies that serve facilities such as lighting of internal communal areas, lighting of external communal areas, fire detection equipment, lifts, water pumps and communal heating and hot water systems.
13. The proposed long term qualifying agreement will provide for the advance purchase of energy from the wholesale market in order to manage the risks associated with energy purchasing. The aim is to achieve best value in energy over the long term for leaseholders and tenants.
14. The proposed agreement triggers both the statutory consultation requirements and the Public Contract Regulations 2006. It has been advertised in the Official Journal of the European Union.

The Application

15. Mr Strauss, on behalf of the Applicant explained the grounds for the application as follows:
 - a. The Applicant is unable to comply with the Schedule 2 Paragraph 4 (4), 4(5), 4(6) and 4(7) of the Service Charges (Consultation Requirements) (England) Regulations 2003.
 - b. In particular the Applicant argues that it is not reasonably practicable for it to give the requisite information at the notice of proposal stage of the consultation process as follows:
 - i. Paragraph 4(4) because of the way fuel energy is procured,
 - ii. Paragraph 4(5) because of the continuous buying cycle, the actual prices will only be known when purchases are made in respect of a particular period,
 - iii. Paragraph 4(6) because there has to be an acceptance of prices offered within a small time window and
 - iv. Paragraph 4(7) because there is a continuous buying cycle and the prices are only known at the end and it takes a period of time to consolidate the unit rate. Although the Applicant may be able to provide an indicative price in advance of the flexible contract, this is entirely dependant upon when the energy purchases are made. The Applicant has limited control over this and as a result will not be

able to provide information that will be in any way useful or meaningful to leaseholders and tenants.

- c. When asked by the Tribunal Mr Strauss made it clear that the Applicant wanted a specific dispensation from compliance with Paragraph 4(7) of the Schedule. He also made it clear that without dispensation from this particular element of the consultation procedure he did not consider that the Applicant would be able to proceed with the contract.
16. Mr Andrew Blake, Head of UK Business Development at Energyquote JHA Ltd (EQ) gave evidence to the Tribunal about the benefits of the proposed long term qualifying agreement.
 17. He informed the Tribunal that EQ is a specialist organisation which works with some of the world's leading companies in respect of energy and sustainability. Over the past year EQ has been working with Circle Housing to develop an Energy Risk and Purchasing Strategy.
 18. The proposal that EQ has developed alongside Circle Housing moves away from using a procurement service to procuring energy for itself on the wholesale market. Mr Blake gave evidence that those who used the more active purchasing scheme achieved performance benefits in excess of 30% for both electricity and gas.
 19. He explained to the Tribunal that the proposed purchasing manner will provide a more sophisticated approach to buying energy than previously, as it looks at buying small quantities with the option of purchasing close to the usage period. This removes the 'risk premium' that would otherwise be built into the future supply price and allows Circle Housing to take advantage of falling wholesale prices which materialise at opportune times closer to delivery.
 20. Mr Norman also gave evidence to the Tribunal. He explained that the Applicant had not rushed into this proposal but had done extensive market research and utilised their in-house expertise, assisted by the consultancy arrangement it had entered into with EQ.
 21. He set out the problems with the fixed term contracts, which he recognised provided the advantage of a fixed unit rate. However,
 - a. Fixed price contract present a significant risk if the market price at the time you need to enter into the contract is high
 - b. The available length of a fixed contract is going to be limited because the energy supplier cannot guarantee the price it will pay for energy in the long term.

- c. Fixed contracts have the potential for regular supplier changes, which bring administrative challenges and prevent the development of a long-term positive relationship with a supplier.
22. In the opinion of Mr Norman, a flexible contract provides the greatest opportunity for savings on energy prices by purchasing from the wholesale market and provides the opportunity to commit to a long-term relationship with a single energy provider. These advantages outweigh the fact that a flexible contract does not give certainty of energy costs.
23. It is on this basis that the freeholder has made the application for dispensation.
24. The objections of those Respondents who have objected to the Application can be summarised as follows
 - a. Concern with the high level of standing charges
 - b. The uncertainty of the proposed arrangements
 - c. The risks faced by lessees/tenants
 - d. The length of the agreement
 - e. The need in principle for consultation
 - f. Lack of trust in the competence of Circle
 - g. The status of EQ
 - h. The expertise within Circle in connection with energy trading/purchasing
 - i. The sell back arrangement
25. Mr Norman and Mr Blake responded to these concerns as follows:-
 - a. The Applicant is well aware of the problems caused by standing charges. Entering into a 10 year contract with a supplier will enable it to better address the issue of standing charges than the current arrangements for the purchase of energy as the Applicant will have the benefit of a stable relationship with the supplier.

- b. Whilst the Applicant understands that the Respondents would like more certainty about energy prices it considers that the proposed agreement will provide more certainty than at present. It will protect the Respondents from the destabilising effects of spikes in energy prices.
- c. The Applicant considers that the proposed arrangement is less risky than the current practice of a spot purchase of energy. It will put in place as many safeguards as possible, including the appointment of a high quality consultant to advise. Purchase trip wires and budgets will be set at the start of the process and, with access to detailed market reports and industry expert advice, Circle will ensure that optimal buying opportunities are not missed and budgets are not exceeded. The strategy and procurement process are overseen by a strict governance process, which is led by Circle Executive Director of Operations. The Energy Risk and Purchasing Group will meet every quarter to review the process and ensure the energy budget is on track.
- d. The Applicant sees the length of the agreement as a positive advantage. It enables a proper relationship to develop between the parties and will enable the Applicant to negotiate about standing charges and other added benefits such as assistance with eco stuff and a better access to the supplier's corporate social responsibility monies. There will also be break clauses, if it transpires that the arrangement is not to the benefit of either party.
- e. The Applicant agrees that consultation is very important. It will endeavour to provide as much information about pricing to the Respondents as soon as possible so that people are aware of the likely costs of energy.
- f. The Applicant has put in place as many safeguards as possible. It has in-house expertise and engaged a highly regarded consultant to assist with the development of the strategy. As part of the process, and via competitive tendering, the Applicant will engage a high quality consultant to facilitate the implementation of the strategy. The only additional costs that will be incurred are the costs of the consultant.
- g. EQ was chosen after extensive market research and a competitive tendering process. It will have to tender again if it wishes to take on the role of consultant in the new arrangement.
- h. The Applicant is already engaged in the purchase of energy on the market, so it has expertise in this matter. It is bringing in the consultants to bolster its expertise

- i. The Applicant wishes to reassure the Respondents that it does not intend to trade in energy, and indeed the regulatory structure prevents it from doing so. The sell-back option exists solely so that the Applicant can take advantage of it if the market drops.

26. Mr Walsh made specific representations on behalf of the two lessees he was representing. His argument was that Circle had, in the past, overcharged the two lessees he was representing for the consumption of electricity in the common parts. Whilst he accepted that the particulars of the dispute were not relevant to the Application before the Tribunal, he argued that, as the Applicant was unable to manage to regulate standing charges to a reasonable degree, the Tribunal should not be persuaded that it was competent to manage the proposed sophisticated procedure.

27. He also raised a concern that the Applicant may have a conflict of interest in that it may prefer to negotiate a good deal for the supply of energy for its own offices, rather than negotiating for the benefit of the Respondents.

28. Mr Norman responded by pointing out that the current arrangement also provides energy to the offices. He emphasised that the proposal has potential for added value to Circle residents, as it would give access to the supplier's corporate social responsibility funds and programmes for environmental improvements.

29. Other Respondents at the hearing raised the issue of whether the benefits achieved for the communal supply of energy could be shared by extending it to individual residents' domestic supplies. Mr Norman said that there was a possibility of this, but the current regulatory arrangements would mean it would be difficult to make this a practical reality in the foreseeable future. Nonetheless he said that Circle would actively pursue any such possibilities if they arose.

The Determination

The Law

30. The Tribunal is being asked to exercise its discretion under s.20ZA of the Act. The wording of s.20ZA is significant. Subs. (1) provides:

“Where an application is made to a leasehold valuation 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**” (emphasis added).

The Decision

31. The Tribunal was impressed by the quality of evidence provided by the Applicant. It was clear that it had thought very carefully about the best way forward in connection with the purchase of energy and it has put in place a range of strategies designed to minimise risk to itself and the Respondents. The Tribunal was also impressed by the open and honest way the Applicant’s witnesses replied to questions raised by the Respondents and the Tribunal.

32. Whilst the Tribunal has sympathy with the concerns of the Respondents, they were not able to identify any substantial prejudice would flow from the failure to provide details of the costs of energy prior to entering into the contract. Indeed the Tribunal considered from the evidence presented to it, that the best interests of the Respondents were likely to be served by the proposed contract. However the Tribunal agrees with the Respondents that consultation and transparency are important. Therefore the Tribunal determines to exercise its discretion to dispense limited to the requirement set out in Paragraph 4.7 of Part 2 of Schedule 4 and on condition that the Applicant provides information about the unit price paid for energy as soon as it is available to its tenants/ lessees for instance by uploading the information to its internet site.

The parties should note that this determination does not concern the issue of whether any service charge costs will be reasonable or indeed payable. The Respondents are able, if it appears to them to be appropriate, to make an application under s.27A of the Landlord and Tenant Act 1985 as to reasonableness and payability.

Signed

Dr Helen Carr

Dated 3rd October 2013

Appendix 1

S20 Limitation of service charges: consultation requirements

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
- (2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
 - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 - (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.] [FN1]

S20ZA Consultation requirements: supplementary

- (1) Where an application is made to a leasehold valuation 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.
- (2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
- (3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
 - (a) if it is an agreement of a description prescribed by the regulations, or
 - (b) in any circumstances so prescribed.
- (4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
- (5) Regulations under subsection (4) may in particular include provision requiring the landlord—
 - (a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
 - (b) to obtain estimates for proposed works or agreements,
 - (c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
 - (d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
 - (e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.
- (6) Regulations under section 20 or this section—
 - (a) may make provision generally or only in relation to specific cases, and
 - (b) may make different provision for different purposes.
- (7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Appendix 2

Names of the 10 landlords within the Circle Housing Group who are parties to the Application

1. Circle 33 Housing Trust Ltd
2. Leamington Waterfront LLP
3. Mercian Housing Association Ltd

4. Merton Priory Homes
5. Mole Valley Housing Association Ltd
6. Old Ford Housing Association
7. Roddons Housing Association Ltd
8. Russet Homes Ltd
9. South Anglia Housing Ltd
10. Wherry Housing Association Ltd