

9753



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

Case Reference : **LON/00BG/LDC/2013/0122**

Property : **Various leasehold Properties of
Poplar HARCA, London E3 & E14**

Applicants : **Poplar HARCA**

Representative : **Mr Chris Lushley**

Respondents : **All residential long leaseholders of
Poplar HARCA**

Representative : **Mr L Seagroatt and Mr D Pauling
(son) representing Mrs S Pauling**

Type of Application : **Application under section 20ZA to
dispense with consultation
requirements**

Tribunal Members : **Judge Daley
Mr N L Maloney FRICS**

**Date and venue of
Hearing** : **29 January 2014 at 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **13 February 2014**

DECISION

Decision of the tribunal

- 1. The tribunal grants dispensation in respect of the landlord's proposal to enter into contracts for the supply of Electricity for the common parts, and the supply of gas for the landlord's communal boilers.**
- 2. Dispensation is granted on conditions set out in the reason for the Tribunal's decision, the tribunal being satisfied that once the conditions are complied with, the Respondents will not suffer prejudice as a result of the landlord's failure to consult.**

The application

1. The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 (the "1985 Act") from all/some of the consultation requirements imposed on the landlord by section 20 of the 1985 Act.
2. The application is in respect of a long term agreement for the procurement of gas and electricity for the dwellings.
3. The only issue for the tribunal is whether it is reasonable to dispense with the statutory consultation requirements. This application does not concern the issue of whether any service charge costs are recoverable or payable.
4. The application to the tribunal was dated 7 November 2013 and directions were given this matter on 21 November 2014.

The background

5. The properties which are the subject of this application are all long leasehold properties situated in blocks owned and managed by the Landlord Poplar HARCA in E3 and E14 district of London.
6. The directions dated 21 November 2014, provided for the Applicant to prepare a bundle for the tribunal's use which was to include (i) a statement setting out the full grounds for the application, including what consultation may have taken place and why it is considered not appropriate to complete the full consultation procedure (ii) representation as to whether it may be appropriate for the tribunal to grant dispensation 'on terms' (iii) the date and circumstances on which it first became apparent that the proposed agreements became

necessary (iv) a copy of the consultation documents so far provided (v) details of any responses so far received from the leaseholders...

7. The Applicant was also directed at point 6 of the Directions to send to each leaseholder and place a copy of the Directions and accompanying letter in the hall/notice board at each block and shall by 29.11.2013 confirm to the tribunal that this had been done.
8. On 5 December 2013, the Applicant's representative wrote to the Tribunal seeking a variation in respect of point 6. The Tribunal granted a variation to this and the subsequent directions to provide an extension of time for compliance with point 6 until 16 December 2013.
9. Mrs Pauling and Mr Seagroatt objected to the Application for dispensation, and the matter was set down for a hearing.

The hearing

The Applicant's case

10. Mr Lushey began by explaining the background to the application. The application concerns contracts for the supply of gas and electricity to the Applicant. The contracts include the supply of gas and electricity to the Applicant's estates. The current electricity contract was due to expire by the end of May 2014 and the gas contract by the end of September 2014 (however Mr Lushey wanted the ability to look at the gas contract early to allow a degree of flexibility to test the market).
11. Due to the volatility of the market the Applicant says it has to be able to react rapidly to the changing market and enter contracts when the best price is available. This is however clearly incompatible with the statutorily approved consultation process under which there is a delay of a number of months between the decision to enter into the contract and the conclusion of that contract.
12. The tribunal heard that the Applicant is part of a purchasing consortium which is operated by various housing associations which has allowed various saving to be achieved, as such the consortium have entered into arrangements to use energy brokers, Monarch who test the energy suppliers market on behalf of the Applicant. The Applicant believed that energy prices were likely to increase substantially based on past experience, and wanted the flexibility to determine whether it was better to enter into contracts for the supply of energy of any period between 12 months up to 5 years.
13. In the statement submitted as part of the bundle the Applicant deals with the issue of potential prejudice to the leaseholders as a result of the application being granted, the statement simply states:- "*I would*

ask the tribunal to consider that there is no prejudice to leaseholders in granting this dispensation for the following reasons (i) A contract term not exceeding 12 months would have no requirement to prepare a proposal or issue a notice of proposal (ii) the contracts are for continuing supplies of essential commodities which the lease requires us to provide. (iii) Dispensation from the consultation requirements would not prevent leaseholders from challenging the reasonableness of the costs at a later date should they consider that appropriate..."

14. The statement also included a copy of the notice of intention to enter into a long term agreement (dated 29 November 2013) in this notice the reasons for entering into the agreement are stated to be "*in order to secure cost savings, as in-contract prices are significantly lower than out of contract prices...*" No additional financial information was provided.
15. The statement also dealt with difficulties that the landlord had experienced in complying with the directions and the fact that this had resulted in complaints from leaseholders, who had either not received their copy of the directions prior to seeing copies in the hallway, or had only been alerted to the application from other leaseholders, or by seeing a partial copy of the directions in the hallway.
16. At the hearing Mr Lushey expanded on his application, in answer to questions he confirmed that Monarch were paid a commission for brokering the energy contracts (although he was unable to confirm the sum paid to them for their services). He was also unable to provide any information to demonstrate that the current contract had produced a saving.
17. In answer to questions from the Tribunal about the cost of Section 20 Consultation, Mr Lushey estimated the cost to be approximately £15,000. He stated that these cost were passed on to the leaseholders indirectly as 'on cost'. Although he was not able to say what the exact savings were likely to be as a result of a contract, he noted that energy prices were volatile and given this, it was likely that by fixing the price a saving could be made.
18. In respect of the responses received from some leaseholders to the directions, of 145 (out of a potential 2000) who had responded, 132 had indicated support for the application and 13 had objected.

The Respondent's case

19. The Respondents were represented by Mr Seagroatt and Mr Pauling who appeared on behalf of his mother.

20. The leaseholders were unhappy with the process adopted by the Applicant. The Respondents considered that they had not received the documentation on a timely basis and that there was little information which demonstrated that a saving would be achieved. Both representatives stated that they did not object to the energy contracts in principle; however they were concerned with the loss of their consultation rights, and about the process adopted by the Applicant for dealing with such matters.
21. There had been confusion about whether they had been consulted in the past about the energy contracts or proposals to dispense with the consultation requirements and whether this had resulted in any savings. In particular they were concerned about whether the contract would limit the extent to which they might benefit from any future "Green Energy initiatives" introduced by the government which might benefit social housing tenants.
22. A number of questions were set out in Mrs Pauling response including (amongst other questions) evidence of prices for the past contracts (ii) lack of evidence to support comparison of prices between brokering fixed term contracts, and the standard approach (iii) lack of discussion about the availability of 12 month contracts without the use of a broker (iv) no evidence of the efficacy of the past applications to dispense in terms of cost savings/reduced energy cost. The Application was criticised on the basis that the evidence was largely "opinion" and there had been no "hard evidence" before the tribunal.

The tribunal's decision

23. We dispense with the statutory consultation requirements of section 20 of the 1985 Act in relation to the proposed contracts to be entered into subject to the conditions set out below:-
24. The landlord provide to each of the leaseholders the following information (i) *Utility Brokers* a) the name and contact details of any broker used or consulted upon the placing of the current electricity and case contracts as well as those for the next intended/new contracts (obtained following this dispensation) b) the Brokers agreed amount of remuneration and/or method for calculation (e.g. the percentage of the contract value, fixed sum of etc.) c) Details of any tender process and tenders obtained from all brokers consulted to provide brokerage services, including definition of services to be provided. (2) *Utility Suppliers* a)current contract (1)name of supplier (ii)date of commencement of contract (iii)term of contract and expiry date (iv)spreadsheet analysis with columns for 1.standing charge frequency 2.date rate (e.g. electricity/kwh) 3.night rate 4.fit & ro 5.payment method 6.any discount and why 7.annual cost (for the previous year).

3Proposed contract(s) analysis required for each supplier different term contracts using the same information as before but also additional column for contract term and period.

Reasons for the decision

25. We had to consider whether it was reasonable to grant dispensation. The relevant statutory provisions are found in subsection 20ZA (1) of the 1985 Act under heading "Consultation Requirements: Supplementary". That subsection reads as follows: "*Where as 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 it is reasonable to dispense with the requirements*".
26. The Applicant was unable to consult fully under section 20 in relation to the contracts due to the nature of type of contracts and how they operate. The Tribunal however and was acting in accordance with central government recommendations. We accepted the evidence of the Applicant's witnesses that this method of procurement would result in savings that will in general benefit the Respondents.
27. The Applicant had acted with the intention of obtaining "*best value*" for both the Respondents and itself and we are of the view that the Applicant has acted reasonably. We accept that by entering into those contracts given the volatility of the market, the Applicant will continue to obtain best value.
28. The leaseholders will of course enjoy the protection of section 27A of the 1985 Act so that if they consider the costs of the gas and electricity to be unreasonable they may make an application to the tribunal for a determination of their liability to pay the resultant service charge.
29. For all of the above reasons we conclude that it is appropriate to exercise the discretion conferred on us by section 20ZA of the 1985 Act by dispensing with the consultation requirements in relation to the current contracts. We do however consider that there is a need to be able to demonstrate in a systematic manner that the contracts are in the best interest of the leaseholders, so that the leaseholders may if they wish exercise their rights under section 27A at any stage of the contract. Therefore we consider it appropriate to grant dispensation on the following terms:-
30. The tribunal directs that the Applicant shall notify all Respondents of the determination of the tribunal.
31. There were no applications for costs before the tribunal.

Chair Ms M W Daley

Date 13 February 2014