

12023



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

Case Reference : LON/00AL/LDC/2016/0100

Property : Halton Court, 5 Cranfield Walk,
London, SE3 9EX

Applicant : Viridian Housing

Respondents : (1) Michael Burgoyne and Maria
Avino (flat 128)
(3) Maureen and Michael Savell
(flat 152)

Type of Application : Dispensation from consultation
requirements under Landlord and
Tenant Act 1985 section 20ZA

Tribunal Member : Judge Richard Percival

Venue : 10 Alfred Place, London WC1E 7LR

**Date of Hearing and
Decision** : 15 February 2017

DETERMINATION

Decisions of the tribunal

- (1) The Tribunal pursuant to section 20ZA of the Landlord and Tenant Act 1985 (“the 1985 Act”) grants dispensation from the consultation requirements in respect of the qualifying long term agreements the subject of the application; but does so on condition that the Applicant does not pass the costs of the proceedings onto the tenants in the service charge.

Procedural

1. The Applicant landlord applies for a dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 and Service Charge (Consultation Requirements)(England) Regulations 2003 in respect of two qualifying long term agreements.
2. The question as to the nature of the contracts and whether dispensation was necessary arose in connection with an application under section 27A of the 1985 Act by Mr von Local (LON/00AL/LAC/2016/0020), the tenant of flat 155, Halton Court. Before the hearing of that application on 3 November 2016, the Applicant applied for dispensation in respect of a number of contracts. As a result of a determination by a procedural judge, the application was stayed pending the hearing of Mr von Local’s section 27A application on the basis that, should the question of dispensation remain a live issue at the conclusion of the hearing, the Tribunal would issue directions.
3. Following the Tribunal’s decision in that case (issued on 19 December 2016), the dispensation application only remained live in respect of contracts for electricity supply, for the reasons set out in that decision.
4. The Tribunal gave directions on 19 December 2016, the same day as the decision in the section 27A application was issued, which provided for a form to be distributed to the tenants to allow them to object to or agree with the application, and, if objecting, to provide such further material as they sought to rely on. Forms were received from the Respondents in this case, each of whom also sought an oral hearing of the application.

The property

5. The property comprises a purpose build block. The Respondents are the tenants of numbers 128 and 153. The block includes 170 flats. Twelve flats are held on long leases, and the remainder rented on short tenancies. The Respondent holds the head lease. The freeholder also holds the freehold of a broader development within which the block is located.

6. The block is limited to people over 55 years of age, and provides the residents with a variety of services appropriate for people of that age group.

The contracts

7. At the relevant time, the Applicant retained the services of an energy management consultancy called Inenco. The details of the services provided are set out and discussed in the decision on Mr von Local's application at paragraphs 61 to 63. It was not contested on the instant application that (as the Tribunal found on Mr von Local's application) the Inenco contract was for the management of energy contracts, and did not amount to a contract for the supply of electricity. The contractual information provided to the Tribunal on this application was more extensive than that available at the hearing of Mr von Local's application, but that did not affect this conclusion.
8. Through Inenco, two contracts were made with electricity suppliers. One was with Scottish Hydro, and lasted, at least, from 20 March 2014 to 30 September 2015. The second was with Haven (the contract concerned in Mr von Local's application), which (again, at least) persisted from 1 May 2014 to 30 September 2015. At least, because in evidence it was suggested that these contracts may have lasted for three years.

The hearing

9. The Applicant was represented by Mr Brewin of counsel and Mr Olaniyan, solicitor. Ms Hilary Gillies, the Applicant's interim head of procurement, and Ms Marian Boylan, head of retirement, give evidence. Mr Dan French, area services manager, also attended.
10. Mr and Mrs Savell appeared in person. Mr Burgoyne and Ms Aveno did not appear and were not represented.
11. Mr Brewin sought to justify the application on the basis set out in the Tribunal's decision in Mr von Local's application at paragraphs 75 to 76. He adduced evidence from Ms Gillies of the process involved in market testing, buying and managing the relevant contracts. While her direct evidence related to the process used to let a 12 months electricity supply contract via a replacement consultant to Inenco in 2016, she said that the file notes available to her made it clear that the same process had taken place in the past. The contracts in question covered the whole of the Applicant's very considerable stock, not just the property.
12. In the first place, the consultant advised the Applicant on the most cost-effective contract length to seek. This changed over time. Last year, they

had obtained a 12 month contract. It was likely, in the light of a market expectation of rising prices, that they would seek a longer contract next September. Once a contract length was decided on, the consultant sought the best price available in the market for that length of contract. The consultant used what was in effect an approved supplier list, comprising electricity supply companies who had the capacity to supply at the volume required. The consultant's systems for testing the market and contracting were compliant with public procurement requirements.

13. Mr Gillies said that typically, a price would be available in the market from 10 am to 4 pm on the same day. A contract based on such a price would be made some time in advance of supply, but not a very long time – last year, the contract was made at the end of August for supply to start on 1 October.
14. Her evidence was that a price available in advance of a consultation exercise, were one to be held, would in all likelihood not be the same as that available after the consultation process has been conducted.
15. Mr Berwin submitted that in these circumstances, a consultation exercise could only be conducted (if at all) in a way that would necessarily result in a higher price for electricity than one that did not.
16. In accordance with *Daejan Investments Ltd v Benson* [2013] UKSC 13, [2013] 1 WLR 854, Mr Brewin argued, it was for the Respondent to demonstrate prejudice. While the Tribunal had a wide power to seek further information in relation to prejudice, and to come to conclusions as to how to quantify it, where there was simply no starting point for a finding of prejudice, a dispensation under section 20ZA must follow.
17. Mr Savell's argument was that as a consequence of the failure to undertake a consultation exercise, the tenants had been denied the opportunity to properly scrutinise the value for money of the electricity contracts. It may be that the processes used by Inenco were such as to ensure that the best contracts were secured, but without the information provided as a result of a consultation exercise, they were unable to be sure that this was the case.
18. Mr Savell accepted that he could not demonstrate any specific prejudice that he had suffered as a result of the failure to consult. But the reason he could not do so was precisely that he, and the other tenants, had been denied their right to be consulted.
19. This was Mr Savell's principal submission. He also made a number of what I take to be subsidiary submissions.
20. First, he relied on a letter he produced showing that Southwark Borough Council had taken a different approach to consulting its

leaseholder/tenants in a similar situation, undertaking a consultation exercise on which of two gas-buying consortia to engage for a four year contract.

21. Secondly, Mr Savell relied on the fact, as he asserted, that the sums charged to the service charge account had increased very considerably over recent years. These reinforced, he said, the lack of trust felt by the tenants in the abilities of the Applicant. The Applicant did not accept that the sums quoted by Mr Savell were an accurate reflection of the eventual service charge, given adjustments that had been or were to be made; and interpreting the figures was not straightforward in the light of the nature of the property.
22. Finally, Mr Savell also sought to distinguish *Daejan* (a copy of which had helpfully been provided to him before the hearing by Mr Brewin), on the basis that there had been some consultation in that case.

Determination

23. I reject what I have described as Mr Savell's subsidiary submissions. While the Southwark letter is not wholly clear, on a closer reading it appears to deal with a situation in which the gas supply contract is with the consortium itself, where the consortium buys gas on a spot market. Even if that were not the case, the conduct of another landlord cannot provide a guide to the legal obligations of the Applicant. Mr Savell's argument in relation to the general increase in the service charge account do not assist his case significantly, even if the figures are to be treated as reliable. A generalised mistrust of the Applicant by the Respondent is not sufficient to undermine the market testing and contract management practices of the consultant. Further, *Daejan* cannot be distinguished. In that case, the Supreme Court clearly laid out general guidelines for the application of section 20ZA.
24. Nonetheless, in his primary submission, Mr Savell does highlight the difficulty of reconciling the consultation requirements of the 1985 Act with the modern practice of consultant-managed energy buying. Where the contract with the consultant is not a qualifying long term contract, as it will frequently not be, either because of duration or cost, the consultation requirements are in danger of having no application. There is no obligation to consult on the appointment of the consultant; but the market may impose such requirements as to make it impractical to consult on the buying decisions being made for just the large scale and long term contracts for which the consultation process was intended.
25. However, to adopt a formulation of Mr Brewin's, both the consultation process and consultant-managed energy buying are there to secure value for money. If the two are irreconcilable, a landlord must choose the course of action that most effectively pursues that end. And that will

mean, in the circumstances obtaining in this case, using the most efficient way of securing a contract and accordingly seeking dispensation from the requirement to consult under section 20ZA.

26. In this case, Mr Savell cannot point to any identifiable prejudice that he or the other tenants have suffered as a result of the failure to consult, and accordingly the Tribunal dispenses with the requirements to consult in relation to the specified qualifying long term contracts, in exercise of its discretion under section 20ZA of the 1985 Act

Costs

27. In Mr von Local's application, the Applicant made an express concession that it would not seek to recover the costs of the application in the service charge, and on that basis the Tribunal declined to make an order under section 20C of the 1985 Act.
28. Mr Brewin made no such concession in this case, and submitted that the Applicant should be able to so recover its costs, if the Tribunal dispensed with the consultation requirements. The issue, Mr Brewin submitted, had been determined in substance in the context of Mr von Local's application. Although that decision was not strictly binding on the Respondents in this application, the arguments were the same (even if they had been ventilated in on this application on the basis of more and better evidence). In respect of Mr von Local's application, the fact of the application being made had resulted in significant concessions being made by the landlord. There was no equivalent feature in this application.
29. Mr Savell argued that the other tenants had not been a party to Mr von Local's application, and he had not seen or known about the Tribunal's decision on that application before the day of the hearing. The form that had been distributed by the Applicant in accordance with the Tribunal's directions had asked if the addressee objected to the dispensation, and he had. There was no warning on the form that answering it would put him in danger of imposing costs on himself and the other tenants.
30. This application was made in advance of the hearing of Mr von Local's application, and is wider in extent (the original application was somewhat ambiguous, but, for the reasons related in the Tribunal's directions, it is clear that it was intended to be addressed to the tenants as a whole). In the event, it concerned not only more tenants, but also an additional contract, that relating to Scottish Hydro.
31. I accept that Mr Savell was unaware of the Tribunal's decision until the day of the hearing, and, in the case of a tenant acting in person, I do not think knowledge of it should be imputed to him.

32. As is evident from the determination above, the application raised real issues in relation to the compatibility of the consultation requirements with the modern practice of large social landlords, and Mr Savell's primary submission was relevant to those issues.
33. In the circumstances, the dispensation from the consultation requirements is conditional on the Applicant not passing on the costs of these proceedings in the service charge.

Name: Judge Richard Percival **Date:** 15 February 2017

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20

- (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) the appropriate 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.]

Section 20ZA

- (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.