



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

**Case reference** : **LON/00BJ/LDC/2020/0173**

**HMCTS code (paper, video, audio)** : **V**

**Property** : **Circus West Phase 1 Battersea Power Station Estate, Battersea Park Road, London SW11**

**Applicant** : **Battersea Project Land Co Ltd  
Battersea Power Station Estate Management Ltd**

**Representative** : **Howard Kennedy LLP**

**Respondents** : **The lessees of Circus West Phase 1, Battersea Power Station Estate**

**Type of application** : **Dispensation from statutory consultation requirements**

**Tribunal** : **Judge Nicol  
Mr SF Mason BSc FRICS**

**Date of decision** : **2<sup>nd</sup> February 2021**

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**DECISION**

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**The Tribunal would have granted unconditional dispensation from the statutory consultation requirements in accordance with section 20ZA of the Landlord and Tenant Act 1985 but the Concession Agreement for energy services which was the subject of this application is not subject to the statutory consultation requirements and so the application must be dismissed.**

**Reasons**

1. This application for dispensation from statutory consultation requirements under section 20ZA of the Landlord and Tenant Act 1985 has been determined by remote video conference held on 2<sup>nd</sup> February 2021. The attendees were:

- Mr Mark Loveday, counsel for the Applicants;
  - Ms Madonna Kinsey, in-house counsel for the first Applicant;
  - Ms Bhavini Patel, from Howard Kennedy LLP, the Applicants' solicitors;
  - Mr Edward John, from Howard Kennedy LLP;
  - Mr Richard Benson, witness and Deputy Head of Legal for Battersea Power Station Development Co Ltd;
  - Mr Kerry Thompson, witness and Executive Director of Inventa Partners Ltd;
  - Mr Jonathan Smith, witness and Senior Director of DP9, a town planning consultancy;
  - Ms Jane Hughes, Director of Special Projects with Battersea Power Station Development Co Ltd and replacement as witness for her colleague, Ms Rebecca Kent, who is currently suffering from COVID-19;
  - Mr Alex Calver, a lessee and a representative for a number of the other lessees;
  - Ms Katherine Hedley, a lessee; and
  - Mrs Gao, a lessee.
2. The Tribunal had a single bundle of documents prepared by the Applicants' solicitors, not only indexed and paginated but with bookmarks and hypertext links to enable better navigation. The bundle was supplemented by Mr Loveday with written submissions, a reading list and some authorities, for which the Tribunal is grateful.
  3. The iconic Battersea Power Station and the land around it is currently under development. There are 8 phases, the first of which, a mixed use scheme in 8 blocks, has been completed and is the principal focus of this application. Phase 2 is currently under construction and is also affected by this application.
  4. The First Applicant is the freeholder of the land and the Second Applicant manages it. The First Applicant granted a lease to Battersea Project Phase 1 Co Ltd who in turn granted long residential leases to the tenants of flats in Phase 1. A similar lease has been granted to Battersea Project Phase 2 Co Ltd although they have yet to grant any residential leases. Apparently, there is an intermediate lease which does not impact on the issues in this case.
  5. The planning consent for the development is subject to a condition that heating must be provided in accordance with an Energy Strategy dated November 2015. That Strategy provides for the flats to be supplied with heating, power and cooling from an Energy Centre situated within the old power station. The idea is that a gas-fired Combined Heat and Power system will provide the residents with high efficiency and low carbon services. As a result, none of the flats have their own boilers or air conditioning units.

6. The First Applicant wishes to engage a specialist energy service company to manage and operate the Energy Centre and supply the relevant utilities to the various flats. That company will then enter into individual contracts with each lessee for those utilities. Each lessee will be charged by and pay the relevant charges to the energy service company.
7. Consistent with this plan, the flats are subject to a standard lease which includes in Schedule 8 the following covenants on the part of the lessee:
  - Part One, paragraph 3: to pay the energy charge to the First Applicant or to the energy service company as directed by their landlord or in accordance with any energy supply agreement;
  - Part One, paragraph 9: to repair and keep in repair all Service Installations which includes those for energy services;
  - Part One, paragraph 34: save where they have already entered into a contract directly with the energy service company, to pay relevant charges to the landlord, the manager or any energy service company and to enter into any contracts required by the landlord or manager for the supply of such services; and
  - Part Two, paragraph 23: on receipt of a written request by the landlord or manager, to enter into an energy supply agreement directly with the energy services provider to whom the lessee will be directly liable for energy services.
8. The First Applicant is on the verge of appointing Engie Urban Energy Ltd as the energy service company which will provide the aforementioned energy services under a Concession Agreement with a term of 30 years. However, the parties to the Agreement are concerned that it is arguable that the appointment constitutes a long-term qualifying agreement which is subject to the consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.
9. The lessees have been consulted, to an extent in purported compliance with the statutory requirements and to a further extent outside that structure. However, the Applicants do not believe it is possible to comply with all the requirements. In particular, they believe it is not possible to obtain estimates from at least two nominated companies in compliance with paragraphs 1-8 of Schedule 1 of the Consultation Regulations.
10. The lessees have an obvious interest in who is appointed as the monopoly provider of energy services to their flats. For that reason, they are keen that the consultation requirements be complied with in full. In particular, for much of the lengthy process to date, they feel they were kept in the dark about many aspects. Fortunately, light was shed by a FAQ document produced relatively recently. The information provided in that document answered most of the lessees' questions and concerns to the point that Mr Calver, on behalf of some of the lessees, was able to say that he would no longer oppose dispensation from the consultation requirements being granted for the sole purpose of appointing Engie.

11. The Applicants and Engie are concerned that, at some point during its 30-year-term, there may be a challenge to the Concession Agreement on the basis that the consultation requirements were not complied with. Apparently, the handover to Engie is conditional on preventing the possibility of such a challenge. The Applicants' primary position is that the Concession Agreement is not subject to the consultation requirements. However, in order to head off any possibility of a future challenge, the Applicants decided to seek dispensation from the requirements under section 20ZA(1) of the Landlord and Tenant Act 1985. For the sole purpose of this application, the Applicants conceded that the agreement is subject to the requirements.
12. Under section 20ZA, the Tribunal may dispense with the statutory consultation requirements if satisfied that it is reasonable to do so. The Supreme Court provided further guidance in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854:
  - (a) Sections 19 to 20ZA of the Act are directed to ensuring that lessees of flats are not required to pay for unnecessary services or services which are provided to a defective standard or to pay more than they should for services which are necessary and provided to an acceptable standard. [42]
  - (b) On that basis, the Tribunal should focus on the extent to which lessees were prejudiced by any failure of the landlord to comply with the consultation requirements. [44]
  - (c) Where the extent, quality and cost of the works were unaffected by the landlord's failure to comply with the consultation requirements, an unconditional dispensation should normally be granted. [45]
  - (d) Dispensation should not be refused just because a landlord has breached the consultation requirements. Adherence to the requirements is a means to an end, not an end in itself, and the dispensing jurisdiction is not a punitive or exemplary exercise. The requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by and what amount is to be paid for them. [46]
  - (e) The financial consequences to a landlord of not granting dispensation and the nature of the landlord are not relevant. [51]
  - (f) Sections 20 and 20ZA were not included for the purpose of transparency or accountability. [52]
  - (g) Whether or not to grant dispensation is not a binary choice as dispensation may be granted on terms. [54, 58, 59]
  - (h) The only prejudice of which a lessee may legitimately complain is that which they would not have suffered if the requirements had been fully complied with but which they would suffer if unconditional dispensation were granted. [65]
  - (i) Although the legal burden of establishing that dispensation should be granted is on the landlord, there is a factual burden on the lessees to show that prejudice has been incurred. [67]

- (j) Given that the landlord has failed to comply with statutory requirements, the Tribunal should be sympathetic to the lessees. If the lessees raise a credible claim of prejudice, the Tribunal should look to the landlord to rebut it. Any reasonable costs incurred by the lessees in investigating this should be paid by the landlord as a condition of dispensation. [68]
- (k) The lessees' complaint will normally be that they have not had the opportunity to make representations about the works proposed by the landlord, in which case the lessees should identify what they would have said if they had had the opportunity. [69]
13. Given that the lessees do not now put forward a positive case that failure to comply with the requirements would cause any prejudice to them, it is difficult to see any basis for refusing dispensation. The Applicants have carried out some consultation and have strong reasons for not going through the full process – the Tribunal has read and considered the witness statements of all the Applicants' witnesses, none of whom were challenged. If the Tribunal were limited to the question under section 20ZA(1) of whether it is reasonable to dispense with the requirements, then the Tribunal would have no hesitation in granting that dispensation for the sole purpose of appointing Engie (such dispensation would not cover a future situation where Engie had to be replaced with a different energy service company).
14. However, the Tribunal finds itself in agreement with the Applicants' primary position that the Concession Agreement between the First Applicant and Engie is not a long-term qualifying agreement to which the statutory consultation requirements apply. That agreement does not result in any expenditure by the First Applicant which may be passed on through the service charge, i.e. there are no relevant costs within the meaning of section 18(2) of the Landlord and Tenant Act 1985.
15. Under section 30 of the Act "landlord" includes any person who has a right to enforce payment of a service charge and Mr Loveday suggested that this extended definition may catch Engie within its terms. However, Engie is not charging a service charge under the lease.
16. Normally, the energy charges would be payable by each lessee in accordance with a separate agreement between them and Engie and, on that basis, could not be a service charge payable under the lease as part of or in addition to the rent. There are obligations under the lease to pay Engie's charges, possibly even to the Applicants, in the event that no such agreement is in place but, even in the minority of cases to which that would apply (assuming there would be any at all), that does not convert a charge which is not a service charge into a service charge. The lease terms provide a back-up to the preferred contractual arrangements, equivalent to statutorily enforced payment obligations from which other utility suppliers benefit. Engie's charges still arise from services supplied outside the terms of the lease.
17. For these reasons, the application was unfounded. The Applicants' concession that the Concession Agreement is subject to the statutory

consultation requirements cannot confer on the Tribunal a jurisdiction or a power which is not granted to it by statute. A Tribunal may only grant dispensation in relation to an agreement which falls within the relevant statutory terms. This particular Agreement does not and so the Tribunal cannot grant dispensation.

**Name:** Judge Nicol

**Date:** 2<sup>nd</sup> February 2021

### **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).

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985**

#### **Section 18 Meaning of “service charge” and “relevant costs”**

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 20 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) [ 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 Consultation requirements: supplementary**

- (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.
- (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.

**Service Charges (Consultation Requirements) (England) Regulations 2003**

**4.— Application of section 20 to qualifying long term agreements**

- (1) Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

**5.— The consultation requirements: qualifying long term agreements**

- (1) Subject to paragraphs (2) and (3), in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA are the requirements specified in Schedule 1.