FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LDC/2024/0030**
Properties	**:**	**Various Properties**
Applicant	**:**	**Peabody Trust**
Representative	**:**	**Mr S Maltz of counsel**
Respondents	**:**	**The leaseholders named on the application**
Representative	**:**	
Type of application	**:**	**For the dispensation of some of the consultation requirements under s.20 Landlord and Tenant Act 1985**
Tribunal member	**:**	**Judge S Brilliant** **Ms M Krisko FRICS**
Date of decision	**:**	**18 June 2024**

DECISION

Decision of the Tribunal

The Tribunal determines that those parts of the consultation requirements provided for by s.20 of the Landlord and Tenant Act 1985 ("the Act") which have not been complied with are to be dispensed with, subject to (a) a maximum period of 3 years for any contract for the supply of energy entered into and (b) the conditions below.

The application

1. The Applicant seeks a determination pursuant to s.20ZA of the Act for the dispensation of all or any of the consultation requirements provided for by s.20 of the Act. The application was dated 02 February 2024.

2. Directions of the Tribunal were issued on 20 February 2024.

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The hearing

3. The hearing took place on 14 June 2024. The Applicant was represented by Mr Maltz of counsel. We were provided with a 97 page bundle.

4. The application was opposed by:

(a) Mr and Mrs Baker, the lessees of 39 Brockwell Place, London Road, Dunstable LU6 3FH. Mr Baker is a solicitor and appeared at the hearing.

(b) Mr Scrace, the lessee of 74 Owens Way, Oxford OX4 2GN, who sent in a written objection.

(c) Mr Bakrin, the lessee of 19 Bicknor House, Pembury Road, London E5 8LQ who sent in a written objection, and attended as an observer but cross examined Mr Ellis, the applicant's witness..

(d) Mr Hetzl, who lives at 24 The Hollies, Maxwell Road, Beaconsfield HP9 1RH, on whose behalf a written objection was sent in.

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The background

5. The Applicant merged with Catalyst Housing Group in April 2023 and manages 107,499 properties.

6. The Respondents were served with notice of this application. As set out above, 4 have objected. The merits of their objections are not affected by the small number of them making them.

The application

7. In this application, the Applicant landlord seeks dispensation with the statutory consultation requirements in respect of a proposed qualifying long-term agreement ("QLTA").

8. The Applicant proposes to enter into a QLTA for the supply of energy from about October 2025. This would include the supply of gas to heat any communal areas, and the supply of electricity for any communal lighting. The application does not apply to those who have their own energy supplies and deal directly with their respective utility companies.

9. The Applicant indicates that energy would be supplied under the proposed agreement to all its properties, commercial as well as residential.

10. The Applicant's evidence is contained the the witness statement of Richard Ellis, the Applicant's Director of Sustainability, dated 21 May 2024.

11. The Applicant has yet to appoint an energy broker. The intention is to enter into a new agreement with an energy broker and to use that broker to procure utility supply agreements. The terms of the energy contract are not yet known since it will only be when the broker approaches the energy market that it can advise the Applicant on the best value contract available for its needs.

12. The broker agreement is proposed to be for an initial period of 3 years with an option to extend by a further 2 years to provide expert utility

consultancy and invoice validation services. The broker agreement itself will not be a QLTA because of its value.

13. The Applicant says that by entering into this agreement it will allow the Applicant to take the desired longer term, strategic approach in purchasing energy on behalf of its residents. The broker will assist the Applicant in ensuring that the utility contracts it enters into are best value for the residents by using established trading practices and account management services.

14. This will also assist the Applicant in making sure that the invoices it receives and pays are being charged at the correct contractual rates to avoid situations where residents are being overcharged.

15. The broker will approach the market to obtain bids from energy companies to supply gas and/or electric across all of the properties within the Applicant's stock. The proposed new broker agreement is not the subject of this application, as no brokerage costs incurred by the Applicant under the broker agreement will be recharged to leaseholders.

16. This application therefore is made in respect of a new energy contract which the broker will in due course procure for the Applicant. The need for dispensation is because the proposed new contract will be for more than one year. The Applicant seeks to enter into a contract for three years, with an option for an extension of two years.

17. Once the broker has secured suitable options for the Applicant, it will advise the Applicant of the best available contracts and the Applicant will then have a very short window to enter into the contract with the most suitable energy supplier before the contract price changes to what may be a higher figure.

18. The existing agreement for energy expires on 1 October 2024. In its application the Applicant had originally intended for the dispensation to be required for the new energy agreements from 1 October 2024. However, due to
the delay in appointing a broker it now seeks dispensation for the agreement to be entered into from October 2025. The agreement from October 2024 will be just under 12 months, therefore does not amount to a QLTA.

19. The Applicants are obliged to comply with Public Procurement Regulations. The nature of purchasing of utilities in the energy market and QLTAs mean that it is not reasonably practicable for the Applicant to give the required information at the notice of proposal stage of the consultation process and also to have regard to the residents' observations as generally there has to be acceptance of prices offered in a small window of time.

20. The Applicant says it is therefore not possible to act in the residents' best interests as required by the Public Procurement Regulations whilst following the s.20 consultation requirements.

21. There have been four objections from the Respondents.

22. 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 will be reasonable or payable.

The law

23. A failure to consult on a QLTA will limit each qualifying tenant's contribution to costs payable in respect of the QLTA to £100 per service charge year.

24. Before we turn to the three individual objections, we set out the law relating to dispensation. The following paragraphs are mainly adapted from the decision of Martyn Rodger KC in Marshall v Northumberland & Durham Property Trust Ltd [2022] UKUT 92 (LC).

25. ss.18 to 23A of the Act comprise provisions intended to protect residential tenants from having to pay excessive, unreasonable, unexplained, or unexpected service charges. ss.20 and 20ZA provide protection by requiring landlords (and others entitled to levy service charges) to consult with tenants before they enter into a QLTA for which a service charge will be payable.

26. A failure to consult on a QLTA will limit each qualifying tenant's contribution to costs payable in respect of the QLTA to £100 per service charge year.

27. The basis on which the appropriate tribunal is to exercise the power to dispense with the consultation requirements is provided for by s.20ZA(1), which states:

"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."

28. In Daejan Investments Ltd v Benson [2013] UKSC 14, the Supreme Court considered the proper approach to an application for dispensation under s.20ZA. By a majority the Court concluded that securing compliance with the statutory consultation requirements was not an end in itself. ss.20 and 20ZA were intended to reinforce, and to give practical effect to the twin purposes of s.19 which were to ensure that tenants are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.

29. Lord Neuberger gave the only speech in support of the majority view, with which Lord Clarke and Lord Sumption JJSC agreed. He pointed out, at [40], that s.20ZA provides little guidance on how the dispensing jurisdiction is to be exercised, other than that the tribunal must be "satisfied that it is reasonable to do so".

30. He continued, at [41]:

"However, the very fact that s.20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of

the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a s.20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."

31. Having identified the purpose of the consultation provisions as being the protection of tenants from (i) paying for inappropriate works or (ii) paying more than would be appropriate, Lord Neuberger explained, at [44]-[45], that the issue on which tribunals should focus when determining an application under s.20ZA(1) was "the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements". If "the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements" dispensation should normally be granted, because, "in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the requirements had been complied with".

32. Lord Neuberger considered, at [46]-[47], that it would not be right to focus on the seriousness of the breach of the consultation requirements; the only relevance of the extent of the landlord's oversight was "in relation to the prejudice it causes". The overarching question was not whether the landlord had acted reasonably but was whether the tribunal was satisfied that it was reasonable to dispense with compliance.

29. In assessing the prejudice to the tenants if dispensation was granted Lord Neuberger explained, at [65], that it was necessary to take account only of the sort of prejudice which s.20 was intended to protect against: "… the only disadvantage of which they could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted."

33. The burden of identifying relevant prejudice would fall on the tenants, but this should not give rise to great difficulties because, as Lord Neuberger explained at [67], "the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically" (at that time the appropriate tribunal was the LVT). He continued, at [68]:

"The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it."

34. Lord Neuberger concluded that dispensation could be granted on conditions. One such condition of dispensation could be to require that the landlord compensate the tenants for any costs they may have incurred in connection with the application under s.20ZA. At [64], Lord Neuberger considered that a landlord seeking dispensation was in a similar position to a party seeking relief from forfeiture, in that they were "claiming what can be characterised as an indulgence from a tribunal at the expense of another party".

35. He said "Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence."

36. Summarising his conclusions, at [71], Lord Neuberger said that: "Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the requirements have been satisfied, and they will not be getting something of a windfall."

The objections

(1) Mr and Mrs Baker

37. Mr Baker prepared a helpful and clear skeleton argument where he set out his reasons opposing the dispensation.

38. He clearly has genuine and, on the face of it, justified complaints about the structure of his lease and the standard of services provided by the Applicant. He asked for his block to be excluded from any dispensation.

39. We mean no disrespect if we do not set out each and every complaint made by Mr Baker. We are satisfied that his concerns could be met by applications to vary his lease or challenging the reasonableness of any charges.

(2) Mr Scrace

40. Mr Scrace objected to the dispensation application on the basis that the Applicant had not previously found the cheapest arrangement for the supply of commonly used electricity. This is partly because it had not considered the fact that the amount of communal energy use by each household is very small. Consequently, the connection charge makes up a disproportionately large part of the total charge.

41. The Applicant responded that it would be appointing an energy broker who will source the best available energy deals that cover its entire property portfolio.

42. Again, this seems to us to be a matter of the reasonableness of any costs, rather than a dispensation matter.

(3) Mr Bakrin

43. Mr Bakrin primarily objected to the dispensation application on the basis of prejudice. He said the leaseholders will be deprived of the opportunity to be involved in determining the scope of the agreement, including the brokers remuneration.

44. Failing that, any dispensation should be granted with conditions.

45. The first condition is that a cost/benefit analysis should be provided or commissioned.

46. He argues that the Applicant has not carried out or shared a cost/benefit analysis with leaseholders to demonstrate the benefits of this procurement method or the need for its extension. This burden of proof lies with the Applicant – Daejan at [67]. It should also be noted that leaseholders must not be charged more than necessary, even for essential services provided to an acceptable standard – s.19(1)(a) of the Act. This was echoed in Daejan at [42].

47. The second condition he wants is that the broker's core duties should be provided and the remuneration disclosed.

48. He argues that there is insufficient information on how the energy broker provides value under this arrangement. The duties listed in the application form to be discharged by the broker, are general administrative duties (invoice validation, accounts reconciliation etc.), that he expects the Applicant to perform as part of its service charge management duties.

49. Whilst he cannot ascertain if this energy broker is involved, it is a fact that the invoice validation duties of some the Applicant's contractors (including the Applicant itself) have been poor in recent years and has resulted in leaseholders being overcharged.

50. He asks what measures will the Applicant put in place to ensure the invoice validation duties under this contract do not result in the detrimental outcome that leaseholders have been experiencing in recent years? He refers to an extract from the Resident Scrutiny Panel Report compiled in June 2022 – Findings from Staff (point 5).

51. He struggles to identify the broker's core purpose in this arrangement. It is unlikely the broker can predict future energy prices with sufficient accuracy, to deliver consistent useful value or price cuts to leaseholders, if any value at all.

52. He says it is essential that the Applicant discloses the additional costs that are normally added to the energy unit price to compensate the broker under this type of arrangement (the commission). The comment in the dispensation application form - *"no brokerage costs incurred by Peabody under the broker agreement will be recharged to leaseholders"* is potentially misleading. For clarity, is Applicant going to absorb the full broker's remuneration and demonstrate it?

53. He says transparency and accountability is the essence of the consultation process hence remuneration disclosure should be extracted from Peabody.

54. The third condition he wants is that a price cap guarantee or reference energy unit price should be provided.

55. He asks how will value be measured or secured under this arrangement? As a suggestion, a reference unit price with a ceiling should be considered ("the benchmark") as part of the conditions to grant dispensation. The benchmark used must be reasonable and easily verifiable by all stakeholders.

56. Alternatively, the Applicant should be made to guarantee an acceptable energy price cap for the duration of the contract as per Daejan at [71]. This would serve as compensation for the landlord's indulgence for dispensation. This point is essential, otherwise, it will be impossible for leaseholders to adduce comparable quotes at a Tribunal if they decide to challenge the Applicant's energy costs in future.

57. The fourth condition he wants is that the duration of the initial contract should be shortened and any option to extend excluded.

58. He argues that considering the price volatility nature of the energy market, correctly identified by the Applicant, a contract extending over 5 years is imprudent and should be avoided. A shorter duration (2-years maximum) should be considered, until energy prices have returned to their historical range. Also, the option to extend the contract after the initial period should be shelved for now, until there is an obvious benefit to extend the contract.

59. In addition, he says that locking in a price at the current elevated levels is concerning and potentially detrimental because we may be locking in an unfavourable price for longer than desired. (For example – average price in May 2020 – 24.01 GBP/MWh and currently, January 2024 - 73.34 GBP/MWh. A similar elevation in price is observed for gas supplies.

60. In reply, the Applicant makes the point that as only 13% of its stock is held on long leases, it is very much in its best interest to source the best deal possible. It wishes to have the ability to fix portions of the energy requirement when advantageous; but also wishes to retain the ability to risk manage its market exposure proactively on behalf of the portfolio. This would be done in conjunction with its energy broker.

61. The broker is responsible for the tender and appointment of a supplier as well as day to day management of the supplier queries; validating bills, budgets, and designing the energy risk management and purchasing strategy, in addition to trading activity and market analysis. Their cost is competitively evaluated, fixed and transparent.

62. The Applicant says the efficacy of long-term risk managed flexible supply agreements is well established, documented and understood by the UK energy supply chain and consumers. It is the reason that the types of products and services offered by suppliers increase in tiers of flexibility for higher consuming customers.

63. A Risk Management Strategy would enable the Applicant to set price triggers, caps and stop losses to actively protect the portfolio against volatility beyond a 12 month fixed period. It is a proactive approach to the volatile

energy market. Brokers costs are added to the energy unit price to compensate the broker under this type of arrangement, there is not any separate or additional costs/commissions that are recharged to leaseholders.

64. The Applicant agrees that, particularly since the EBDS rebilling, supplier consolidation and system changes which have been prevalent industry wide; that the last couple of years have been extremely challenging. It suggests the answer to this is not to reduce the amount of resource, expertise, and support around the account, which is in part why it has chosen to work with a consultancy/broker.

65. For an organisation internally to adopt the breadth of experience and software necessary to procure commercial energy contracts would cost a vast amount of money.

66. The point is also made that protection from volitivity cannot be done if there is only have a 12-month contract.

(4) *Mr Hetzel*

67. Mr Hetzel says that undue pressure is being put on the lessees to relinquish their rights to question any contract. But that is not correct as already stated. He also says that the fluctuations are not large enough to justify not consulting. We would not agree with this on the evidence.

68. Overall, a wide range of submissions were made to us both in writing and orally. We have taken them all into account, even if not specifically referred to.

Decision of the tribunal

69. The Tribunal is satisfied that, in the particular circumstances of this case, and having noted all the objections and arguments, it is reasonable to dispense with the consultation requirements in respect of a single new proposed agreement with an energy supplier for the supply of energy.

70. In most of the documents we have seen (including the application notice itself) the Applicant is asking for a 3 year contract: see pages 1, 3-6, 14, 26 and 43 of the bundle. It now is asking for a 3 year contract with an option to extend for another 2 years.

71. We do not consider the option is justified, and will grant a dispensation in respect a contract for up to 3 years.

72. Mr Maltz accepted that the conditions applied in the Notting Hill Genesis case (LON/00AU/LDC/2021/0209) should be applied.

Name: Simon Brilliant **Date:** 18 June 2024

Conditions

1. The Applicant will, within 28 days of entering into an agreement through its appointed broker for the procurement of gas or electricity for the period of any contract for the supply of gas or electricity:

1. Disclose all administration costs and other costs and charges associated with such procurement.

2. Disclose details of the main points of each procurement agreement, in particular the unit costs, the length of the contract, protection against price changes and a short summary to support the basis upon which it entered into the procurement agreement(s). This information must be placed on its website for the Respondents to view.

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).