



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

Case Reference : **MAN/00BP/LDC/2020/0004**

Properties : **Various Properties Across First Choice Homes Oldham Limited Portfolio**

Applicant : **First Choice Homes Oldham Limited**

Respondents : **Residential Leaseholders and Tenants**

Type of Application : **Landlord & Tenant Act 1985 – Section 20ZA**

Tribunal Members : **Niall Walsh (Regional Surveyor)
Laurence Bennett (Tribunal Judge)**

Date of determination : **29 April 2020**

Date of Decision :

Code : **P – PAPER REMOTE**

DECISION

Application

1. First Choice Homes Oldham Limited (FCHOL) apply to the Tribunal under Section 20ZA of Landlord and Tenant Act 1985 (the Act) for dispensation from the consultation requirements of Section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987), in respect of a contract for the purchase of gas for the Properties.
2. The Respondents are the individual Residential Leaseholders of the Properties.

Grounds and Submissions

3. The application was received by the Tribunal on 22 January 2020.
4. The Applicant is the Landlord and Freeholder of the Properties.
5. On 28 February 2020 Regional Surveyor Walsh made directions in respect of the service of the application and arrangements for a response. It was directed that in the absence of a request for an oral hearing the application would be determined upon the parties' written submissions without a hearing.
6. The Properties are stated to include residential properties of differing types in various locations across the Borough of Oldham and managed by the Applicants. The total number of tenants and leaseholders who benefit from a communal gas supply charged by way of service charge is c. 2,015.
7. The Applicant's bundle included, in addition to the application form and a specimen copy of a lease, witness statements from Ms Chloe Christian, the Executive Director within FCHOL with responsibility for procurement, and Mr Peter Webb a Compliance Project Manager also employed by FCHOL.
8. The key elements of the Applicant's case are set out in Ms Christian's witness statement, which outlines that the gas for the communal heating and hot water supplies for some 2,015 leaseholders and tenants operate via 15 separate gas-powered boiler houses. The cost of which is recovered via the service charge levied in respect of these and other services. Ms Christian states that a new contract must be entered into on the expiring of the existing contract, with expires at the end of May 2020.
9. Ms Christian contends that tight times constraints, allowing appropriate lead-in times to the end of May 2020 but specifically given the extremely narrow 3-hour acceptance window of the price offer rate, do not allow sufficient time for the normal statutory consultation period to be run and render the determination of this application urgent. The Applicant explains that its proposal is to enter into potentially a multi-year contract for the provision of gas supply services from 31 May 2020. The Applicant has engaged the services of an independent energy consultant, Apollo Energy, to undertake on its behalf an OJEU compliant competition from a pre-approved range of suppliers currently on a framework agreement. The Applicant believes that this is the best value procurement route for the Respondents for the following reasons:
 - Running a mini competition amongst pre-approved OJEU compliant suppliers will ensure that a competitive and market tested rate is secured for the Respondents.

- The gas energy market is very volatile, fluctuating frequently and significantly. By adopting this procurement approach the Applicant will be able to secure a competitive spot price at short notice and so secure the best value for money deal it can for the Respondents.
 - Apollo Energy and this procurement process is also employed by many other registered providers of social housing.
10. The Applicant also advised that while it has not attempted to comply with the statutory consultation requirements, it has provided Respondents with a contact telephone number to make enquiries, placed relevant documentation on its website and advised that this documentation is also available upon request. Mr Webb has stated in his witness statement that the Applicant received some 33 telephone enquiries and 1 letter since it outlined FCHOL's intention to enter into a Qualifying Long-term Agreement.
 11. The Tribunal received a detailed and considered submission from one Respondent raising an objection but confirming that a paper determination was acceptable. The sole participating Respondent, Mr Jerha Tshino, contended that the Applicant had not demonstrated a good reason for not complying with the consultation requirements. Consequently, there was insufficient transparency around this proposed contract, no visible benchmarking against other competitive price offerings and he raised a significant number of questions surrounding the efficacy of the whole procurement process. Such as why did the Applicant not use a different process, different brokers, seek to use hedge and future price benchmarking, and not explore engaging directly with suppliers?
 12. Mr Tshino considers that he has been prejudiced by the Applicant's failure to comply with statutory consultation regulation. While he outlines that he has struggled to identify exactly how the contract will or may prejudice him, he feels he has definitely been prejudiced by the fact that he will be required to pay a proportion, through his service charge, of the Applicant's legal costs incurred in making this application. He feels this is unjust and has accordingly, made a section 20(c) application under the Act for the costs incurred by the Landlord in the course of these proceedings not to be recoverable through the service charge.
 13. As neither the Applicant nor any Respondent requested a hearing, the Tribunal convened without the parties to make its determinations on 29 April 2020.

Law

14. Section 18 of the Act defines "service charge" and "relevant costs".
15. Section 19 of the Act limits the amount payable by the lessees to the extent that the charges are reasonably incurred.
16. Section 20 of the Act states:-

"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..... Unless the consultation requirements have 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 First Tier Tribunal
 - (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.
17. “The appropriate amount” is defined by regulation 4 of The Service Charges (Consultation Requirements) (England) Regulations 2003 (the Regulations) as “..... an amount which results in the relevant contribution of any tenant in respect of that period, being more than £100.00.”
18. Section 20ZA(1) of the Act states:-
"Where an application is made to a 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."
19. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson [2013] UKSC 14. In summary the Supreme Court noted the following:
- 19.1 the main question for the Tribunal, when considering how to exercise its jurisdiction in accordance with section 20ZA (1), is real prejudice to the tenants flowing from the Landlord’s breach of the consultation requirements.
 - 19.2 the financial consequences to the Landlord of not granting dispensation is not a relevant factor. The nature of the Landlord is not a relevant factor.
 - 19.3 Dispensation should not be refused solely because the Landlord seriously breached, or departed from, the consultation requirements.
 - 19.4 The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - 19.5 The Tribunal has power to impose a condition that the Landlord pays the tenants’ reasonable costs (including surveyor and/or legal fees) incurred in connection with the Landlord’s application under section 20ZA (1).
 - 19.6 The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some “relevant” prejudice that they would or might have suffered is on the tenants.
 - 19.7 The more serious and/or deliberate the Landlord’s failure, the more readily a tribunal would be likely to accept that the tenants had suffered prejudice.
 - 19.8 Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Tribunal's Conclusions with Reasons

We considered the written evidence accompanying the application. We note and have also carefully considered the submissions from the sole participating Respondent, Mr Tshino.

Our conclusions are:-

20. It is not necessary for us to consider at this stage the extent of the service charges that would result from any agreement for gas supply payable under the terms of the Respondents' leases and tenancy agreements. If and when such is demanded and if disputed, it may properly be the subject of a future application to the Tribunal.
21. Taking into account the Applicant's obligations we accept that a long-term agreement within the statutory definition is within the range of appropriate operational responses to discharge its responsibilities. Similarly, we find OJEU compliant processes appropriate procedure for this purpose. We accept the submissions within the grounds of application regarding the urgency to ensure the chance of a competitive gas supply agreement. Dispensation from consultation requirements does not imply that the resulting service charge is reasonable.
22. Mr Tshino himself stated that it was difficult to "outline how the Apollo gas procurement process prejudiced me as a tenant, because the applicant has not stated any benchmarking it is employing to show that the process is value for money". Accordingly, no evidence has been presented of prejudice to any tenant. In line with the *Daejan Investments Ltd v Benson* [2013] UKSC 14, there are therefore no grounds for the Tribunal to refuse this application. The only price comparisons quoted by the Respondent relate to the prices being charged now under the current agreement and comparing them to general residential gas prices now. This is however comparing gas prices in 2017 to current prices, which is not a like for like comparison. It is certainly not indicative of what the eventual price struck may be under the new contract at the end of May this year and so fails to demonstrate any prejudice to the Respondent.
23. We do however agree with Mr Tshino that it would not be reasonable, just or equitable for him to be expected to pay towards the costs of these proceedings. In separate correspondence with the Applicant he raised a number of legitimate questions, which he reiterated in his statement of case. These questions do not appear to have been answered by the Applicant but if they had been, perhaps he may not have felt compelled to have engaged with these proceedings.
24. We conclude therefore it reasonable in accordance with Section 20ZA(1) of the Act to dispense with the consultation requirements, specified in Section 20 and contained in Service Charges (Consultation Requirements)(England) Regulations 2003 (SI 2003/1987).
25. Nothing in this determination or order shall preclude consideration of whether the Applicant may recover by way of service charge from the Respondents any or all of the cost of the electricity supply or the costs of this application should a reference be received under Section 27A of the Landlord and Tenant Act 1985.

Order

26. The Applicant is dispensed from complying with the consultation requirements in respect of the proposed agreement specified in the application.
27. By virtue of section 20C (3), the Tribunal orders that the Applicant may not recover the costs it has incurred in these proceedings by means of future service charges levied on Mr Tshino.