

9480



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

Case Reference : **LON/00AU/LDC/2013/0067**

Property : **Leasehold Properties in the
London Borough of Islington**

Applicants : **The Mayor and Burgesses of the
London Borough of Islington**

Representative : **Mr Dymond of Counsel**

Respondent : **All residential long leaseholders of
the London Borough of Islington**

Representative : **Mrs Napier of the Islington
Leaseholders Association**

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

Tribunal Members : **Judge O'Sullivan
Lady Davies MRICS**

**Date and venue of
Hearing** : **2 October 2013 at 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **10 November 2013**

DECISION

Decision of the tribunal

- 1. The tribunal grants dispensation in respect of the three current contracts entered into under the DPS.**
- 2. Dispensation is not granted in respect of any future contracts which may be entered into under the DPS during its term. Each of those contracts must be the subject of a specific application to the tribunal under section 20ZA.**
- 3. Dispensation in respect of the current contracts is not awarded on terms, the tribunal being satisfied that the Respondents have not suffered 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 15 June 2013 and directions were made in this matter dated 23 July 2013.

The background

5. The property which is the subject of this application is described in the application as all long leasehold properties in the London Borough of Islington.
6. Neither party requested an inspection and the tribunal did not consider that one was necessary given the facts of the case.
7. The directions dated 23 July 2013 provided for the Applicant to prepare a bundle for the tribunal's use which was to include an expanded statement of reasons including any additional grounds upon which they

wished to rely. In turn any Respondent who did not consent to the application was directed to submit a bundle including a statement of response. The Applicant submitted a bundle as directed. A statement of case and bundle was filed in response by Mrs Patricia Napier of the Islington Leaseholders Association.

The hearing

8. The appeal was considered at a hearing on 2 October 2013. The Applicant was represented by Mr Dymond of Counsel. Also attending was Ms Begum, a litigation lawyer in the employment of the Applicant. Appearing for the Applicant to give evidence was Mr Panter, an energy manager, Ms Smith, a leasehold management officer and MR Eglinton, a procurement manager, all in the employ of the Applicant. For the Respondents were Mrs Patricia Napier, Ms Victoria Leonard and Ms Cagnoni.

The Applicant's case

9. Counsel 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 a range of departments within the Applicant's organisation including in particular the Applicant's housing stock. The value of these contracts varies from year to year but in the year 2011/12 the value of the electricity contract was £5.5 million and the gas contract £4.4 million. The housing department is the largest consumer.
10. 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 consultation process under the Consultation Regulations 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.
11. The tribunal heard that one of the permitted procurement processes is a Dynamic Purchasing System ("DPS") This is a completely electronic system established by a contracting authority which for its duration is open for the admission of economic operators who satisfy the authority's specified selection criteria and who submit an indicative tender to the authority complying with the authority's specification; regulation 20, Public Contracts Regulations 2006 SI 2006/5. A DPS allows a four year framework agreement to be set up with a panel of suppliers. The use of a framework agreement allows the Applicant to enter into the market for electricity and gas at the most opportune moment and obtain the best price whilst complying with all of the public procurement requirements.

12. On 30 March 2012 the Applicant set up the DPS which is for a period of four years. Six suppliers responded to PPQs all of whom were included in the DPS.
13. The Applicant has carried out some consultation. On 10 July 2012 the Applicant held a meeting with the Islington Leaseholders Association to discuss the proposals. On 10 September 2012 the Applicant sent all Respondents a letter explaining that it intended to use a DPS for the procurement of its gas and electricity contracts explaining why this was said to be the better course. It also explained that this meant that the Applicant would not be able to carry out the full consultation exercise under section 20 and would thus be seeking dispensation. It included a "*frequently asked questions*" factsheet and invited comments by 29 September 2012. Only 6 responses were received to that letter. A further response was received following a letter to some residents associations on 7 March 2013.
14. On 1 August 2012 the suppliers were invited to bid for the fixed cost of the element the supplies to establish what would be the most economically advantageous to the Applicant. Following a process of evaluation on 19 September 2012 contracts were entered into with three suppliers, Smartestenergy, Scottish and Southern and Corona Energy. Each contract is expressed to last from October 2012 to March 2015.
15. The Applicant seeks retrospective consent in relation to these contracts now in place.
16. Given that the DPS is to last until May 2016 and the current contracts expire in March 2015, the Applicant also seeks dispensation in relation to any further new contracts which will be awarded under the current DPS on expiry of the current ones. In response to a question from the tribunal it was confirmed that those contracts could in principal extend beyond the life of the current DPS which expires in May 2016. Counsel submitted that if the tribunal was satisfied that the method of using a DPS was cost effective there was no reason not to grant prospective contracts entered into before the expiry.
17. In relation to the current contracts the Applicant has complied with a number of requirements of section 20 by its letter of 10 September 2012. Accordingly it seeks dispensation in respect of the majority of Schedule 2, or alternatively the whole of Schedule 2 in relation to these.
18. In relation to any future contracts the Applicant seeks dispensation from the whole of the consultation requirements set out in Schedule 2.
19. Counsel also addressed the tribunal on dispensation on terms in the light of the comments in *Daejan Investments Ltd V Benson [2013]*

UKSC 14; {2013} 1. W.L.R 854. Counsel submitted that the tribunal should focus on the extent to which the leaseholders have been prejudiced by the landlord's failure to comply with the consultation requirements. Counsel submits that there is and can be no prejudice to the leaseholders. The extent and quality of the electricity and gas suppliers are unaffected by the failure to consult. In this case the failure to consult did not lead to an increase in costs but rather on the contrary, the Applicant by the use of the DPS has been able to purchase gas and electricity at a greatly reduced cost. Rather than suffer prejudice Counsel submits that the Respondents have gained an advantage.

20. The Applicant relied on the witness evidence of Nick Eglington, a Procurement Lead in the Finance Service Area, David Panter, an Energy Management Officer, and Lucy Smith, a Leasehold Services Manager. Witness statements were included in the bundle and all three witnesses appeared to give oral evidence. The tribunal sets out below a summary of the most important points;
 - i. The tribunal heard that Mr Panter had worked for Islington since 2001. Mr Panter's evidence was that by using this method of buying flexibly the Applicant would obtain the best prices in a volatile market. Risk could be managed over a longer period. The market was heard to be very volatile and this method meant that the Applicant was not forced to agree the price on any one trading day. This method was recommended by central government. In response to a question from Mrs Napier Mr Panter confirmed that they did not have any direct evidence of the savings of using a DPS as they did not have the resources to carry out such an investigation. However he confirmed that in his opinion this was the best method of obtaining the best prices. The Applicant was more likely to get the best prices if it is able to go to the market on multiple days. Even if the Applicant were to make a bad trade it has the ability to sell back.
 - ii. Mr Eglington confirmed that he had worked in procurement for local government for 20 years. His evidence was that purchasing by DPS was the less risky option and in his opinion was the best method for the purchase of gas and electricity.
 - iii. Ms Smith gave evidence in relation to the consultation process carried out. She took the tribunal by various documentation and explained how the Applicant had tried to explain the rationale behind the DPS.
21. It was conceded by Counsel that there had been some delay in applying for retrospective dispensation as the agreements had been entered into in September 2012. It was acknowledged that in this regard the process could have been better managed.

The Respondent's case

22. The Respondents were represented by Mrs Napier of the Islington Leaseholders Association.
23. In the statement of case Mrs Napier had first argued that the DPS itself should have been the subject of consultation. However this was conceded not to be the case at the hearing.
24. The leaseholders were unhappy with the process adopted by the Applicant. There had been much confusion about the DPS which they felt could have been handled in a better way. It had been acknowledged that the application for dispensation could have been made much sooner and Mrs Napier submitted that this was unacceptable. It was argued that the limited consultation which had taken place was a "*fait accompli*" and the Respondents could make no real representations concerning the use of the DPS.
25. Mrs Napier submitted that it had not been shown that the costs would be decreased by the use of the DPS. She suggested that in fact costs would be increased by the use of brokers and those employees in the energy management team. Although the tribunal had heard evidence this mostly consisted of their "opinion" and there had been no "hard evidence" before the tribunal.
26. As far as any prejudice was concerned she argued that there was no evidence that the DOS system was effective and that it saves money and therefore it was impossible to say whether the leaseholders had suffered any prejudice. She also asked the tribunal to consider that if this were to be allowed this would in effect deny the leaseholders of an opportunity to give their view in the future.
27. In the statement of case the Respondents had also raised a challenge in relation to the division of the power service to different sites within its organisation. The Respondents say that they have no confidence that the energy is properly identified and segregated from the remainder of the Council stock. The tribunal explained that any challenge as to the apportionment of the costs would be an issue should be raised on an application under section 27A of the 1985 Act and was not an issue for consideration under an application under section 20ZA.
28. In response Counsel argued that there was no evidence of increasing costs, it was well known that costs in the energy market had increased greatly in recent years. There was no evidence to suggest that the methodology of using the DPS had increased those costs. Counsel also pointed out that out of some 9400 leaseholders only 7 had responded to the Applicant's correspondence in this matter and it was inaccurate to

suggest that the leaseholders present at the hearing represented a majority of the leaseholders.

The tribunal's decision

29. We dispense with the statutory consultation requirements of section 20 of the 1985 Act in relation to the contracts entered into with Smartestenergy, Scottish & Southern and Corona Energy on 19 September 2012.
30. We do not grant dispensation in relation to any future contracts which may be entered into under the DPS during its current term. Those must be the subject of a future application to the tribunal.
31. Dispensation at 29 above is not granted on terms, the tribunal being satisfied that the leaseholders have suffered no prejudice.

Reasons for the decision

32. 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 longterm agreement, the Tribunal may make the determination if satisfied it is reasonable to dispense with the requirements*".
33. The Applicant was unable to consult fully under section 20 in relation to the contracts due to the nature of the DPS and how it operates. The Applicant had carefully considered advice from its energy management and procurement teams 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 significant savings that had benefitted the Respondents. 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.
34. 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.

35. 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. For the same reasons we consider that dispensation should not be granted on terms as it is our view that the leaseholders have not been prejudiced.
36. The Applicant has also asked for dispensation in respect of any future agreements which may be entered into pursuant to the DPS before its expiry in May 2016. The tribunal heard that these could be of a term beyond the expiry of the DPS. We are reluctant to presently grant such dispensation given the lack of clarity about the length of those agreements and any particular terms. We consider that any future contracts must be the subject of a further application for dispensation when the specific terms of those contracts are known.
37. The tribunal directs that the Applicant shall notify all Respondents of the determination of the tribunal.
38. There were no applications for costs before the tribunal.

Chair Sonya O'Sullivan **Date** 10 November 2013