

11851



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

Case reference : LON/OOBJ/LDC/2016/0051

Applicant : London Borough of Wandsworth

Representative : Ms E Dring of Counsel
Instructed by Sharp Pritchard,
Solicitors and Parliamentary Agents

Respondents : Leaseholder owners of 14,082 properties

Representative : None

Type of application : for the dispensation of all or any of the
consultation requirements provided for by
section 20 of the Landlord and Tenant Act
1985

Tribunal members : Judge J E Guest
Mr F Coffey FRICS
Mr A Ring

Date of hearing : 25/08/2016

Place of hearing : 10 Alfred Place, London WC1E 7LR

Date of decision : 07/09/2016

DECISION

The Tribunal dispenses with the requirement to consult under section 20ZA of the Landlord and Tenant Act 1985 in relation to the renewal of the agreement with LASER for a four year period with effect from 01/10/2016.

The application

1. On 24/05/2016, the Applicant made an application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation from the consultation requirements in relation to an intended renewal of an agreement with an organisation called LASER (Local Authority South East Region) for the supply gas and electricity for 4 year period from 01/10/2016. A witness statement dated 24/05/2016 by the Applicant's Head of the Design Service, Hussein El Bahrawy, was filed in support of the application.
2. The Applicant had previously made applications under section 20ZA in relation to earlier agreements with LASER that were granted by the Tribunal on 02/06/2009 (in relation to gas only), in June 2010 (electricity only) and on 22/08/2012 (gas and electricity).
3. The current application was first considered by the Tribunal on 14/06/2016 when directions were made. In compliance with those directions, the Applicant: (a) notified all leaseholders of the application by way of a letter dated 17/06/2016 (with a further letter dated 27/06/2016 stating that copies of the application and supporting documents would be provided on request); (b) produced the documents on its website and (c) held four separate public meetings (during the day and in the evenings at Battersea Library and the Town Hall). A witness statement dated 18/07/2016 by the Applicant's Leasehold Services Manager, Elizabeth Parrette, set out the steps taken by the Applicant to notify leaseholders of the application and the responses received.

The leaseholders' responses

4. A relatively small number of leaseholders objected to the application. Mr A Mil wrote a statement on 06/07/2016 stating that the dispensation was "not a democratic means of addressing the matter". Ms H Shroot wrote a statement on 08/07/2016 in which she said, amongst other things, that the consultation requirements were "safer for the tenants and show best value for money". Ms J Pocznejlo signed a statement on 07/07/2016 exhibiting her service charge statements for the period from 2010/11 to 2015/16 and expressing concern that electricity costs were increasing (£25.09 for 2010/11 to an estimated £49.00 for 2015/16).
5. Mr M Tyler attended one of the public meetings and he completed a response form on 08/07/2016 indicating that he opposed the application. He later provided a statement in a telephone call with the Applicant's solicitor on 24/08/2016, which he subsequently amended in a further telephone call on the day of the hearing.
6. A total of 13 response forms were completed at the meetings and exhibited to the witness statement of Ms Parrette. Another two forms were received directly by the Tribunal. Other than Mr Tyler, no leaseholder requested an oral hearing.

7. On 27/07/2016, the Tribunal made further directions. Directions were made for an oral hearing as Mr Tyler requested this. The Tribunal also directed that the Applicant provide evidence to compare the cost of gas and electricity under the LASER agreement to the costs if purchased directly from the energy suppliers. This was because the Applicant's Mr R Holt indicated that a monitoring exercise would be carried out when the Tribunal granted the first application in 2009. A witness statement dated 08/08/2016 by Ian Almeida, the Applicant's Project Officer (Energy Management) was submitted in response to this direction. This stated that Mr Holt had retired in March 2016 and, for various reasons, the Applicant was unable to provide details of any monitoring exercise, although some comparative evidence was provided.

The hearing

8. An oral hearing was held on 25/08/2016. Counsel, Ms E Dring, represented the Applicant. Mr El Bahrawy and Mr Almeida both gave oral evidence. Ms Parrette did not attend (the Tribunal having listed the hearing on a date that the Applicant had specifically requested be avoided) so Mr P Dwyer, the Applicant's Leasehold and Procurement Manager, also gave oral evidence.
9. The Tribunal heard that the agreement enables the Applicant - in conjunction with 39 other local authorities - to bulk buy gas and electricity through LASER. The Applicant prefers this method of procurement as it considers that this results in a saving. The Tribunal was informed that LASER is an expert body that in essence 'plays the market' to obtain what is, on the available evidence, the best wholesale price. LASER bulk buys energy when it appears that the market is offering the best deal and, as offers can change very quickly (even hourly), it is not possible for the Applicant to consult with leaseholders.
10. The Applicant produced documentary evidence that the gas costs obtained by the Applicant during the period October 2009 to January 2012 were cheaper when compared with 'Big Six' domestic energy suppliers. The Applicant's Finance report for 2010/11 stated that there was a 10-15% saving for gas and electricity, the Finance Report for 2011/12 stated that there was a saving of 6-7% against the benchmark price and the Report for 2012/13 referred to a saving of 3-4.8% against the average market price. Information provided to the Applicant by LASER showed an average saving of 29% for gas and 13% for electricity against the rates published by the former Department of Energy and Climate Change (DECC). The Applicant also produced evidence regarding the actual charges for the period October 2015 to October 2016 against DECC's published rates, which showed a saving of 41.8% for gas and 19.4% for electricity. Although required by the directions made on 27/07/2016, the Tribunal accepted that comparisons with the domestic market were not appropriate, as the Applicant is unable to purchase gas and electricity on anything other than a commercial basis.
11. Mr Almeida told the Tribunal that he was present at the meetings when forms were completed by 13 leaseholders. Mr Almeida explained that the

leaseholders thought that they were consenting to the application, rather than opposing it.

12. The Applicant did not address Ms Poczynajlo's concerns in its written evidence, but Mr Dwyer said in his oral evidence that the increases in her electricity charges may be for reasons unrelated to the method of procurement. Mr Dwyer gave examples, such as a service charge year including only 3 quarterly bills and another including 5 quarterly bills, an increase in usage and an increase in facilities.
13. Mr Tyler attended the hearing at the conclusion of the Applicant's oral evidence. Mr Tyler made oral submissions to the Tribunal. Mr Tyler appeared to accept that it was very difficult for the Applicant to consult on arrangement with LASER.

The law

14. Section 20ZA(2) of the 1985 defines a 'qualifying long term agreement' as an agreement entered into by a landlord for a term of more than 12 months.
15. Under section 20(1), the service charge a landlord can recover under such an agreement is limited unless the landlord has complied with the consultation requirements set out in Schedule 2 of the Service Charges (Consultation Requirements)(England) Regulations 2003.
16. A landlord may make an application under section 20ZA(1) to dispense with some or all of the consultation requirements and the Tribunal may make the determination if satisfied that it is reasonable.
17. The Supreme Court decision in *Daejan Investments Ltd v Benson and others [2013] UKSC 14* is the leading authority on dispensation and further guidance was given by the Upper Tribunal in the case of *OM Property Management Limited [2014] UKUT 0009*. In summary, the burden rests on a leaseholder to establish the existence of real prejudice resulting from the landlord's failure to comply with the consultation requirements and, if such a prejudice has been suffered, the landlord may be required to effectively compensate by reducing the amount of service charges claimed.

Reasons of the Tribunal's decision

18. The renewal of the agreement with LASER constitutes a 'qualifying long term agreement' as it is for a period of 4 years.
18. The Applicant – like many other local authorities – wishes to purchase energy through a conglomerate that is then able to obtain deals through the wholesale market. It is a matter for the Applicant as to whether it wishes to procure services in such a way. The likely alternative would be for the Applicant to purchase gas and electricity annually at a fixed price, which would not require consultation in any event, as the agreement would be for a period of less than 12 months.

19. All leaseholders were notified of the application. The application and evidence in support was made available, including on the Applicant's website. Four separate public meetings were held. Despite all this publicity, very few leaseholders responded and even fewer objected to the application (less than 0.03% objected). Of that small number, no actual evidence was produced to suggest that the procurement of gas and electricity through a central purchasing body was not appropriate.
20. The Tribunal was somewhat surprised to find that, given that this method of energy procurement has been adopted by the Applicant since 2009, the Applicant had difficulty in producing any analysis of its own to demonstrate the savings achieved over this period by comparison with other procurement options. At the very least, such an analysis may be helpful in addressing the perfectly valid point raised by Ms Pocznyajlo that, from a leaseholder's perspective, electricity costs had increased year on year to the point that they had almost doubled in 5 years. In any future application under section 20ZA, the Tribunal would expect to see some evidence that the Applicant has monitored the benefits of the arrangement with LASER. Also, any leaseholder's specific concerns raised in objections should be addressed.
21. The grant of dispensation does not affect a leaseholder's right to challenge the gas and electricity charges sought through their service charges. The dispensation only relates to the consultation requirements. A leaseholder who considers that the charges have not reasonably been incurred may still make an application to the Tribunal for a determination under section 27A of the 1985 Act.

Dated: 07/09/2016

Judge J E Guest