FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LDC/2020/0056**
HMCTS code (paper, video, audio)	**:**	**P: PAPER REMOTE**
Property	**:**	**Various leasehold properties in the London Borough of Wandsworth**
Applicant	**:**	**The London Borough of Wandsworth**
Representative	**:**	**Ashfords LLP, Solicitors**
Respondent	**:**	**13,966 leaseholders in Wandsworth who benefit from the communal supply of electricity and/or gas**
Representative	**:**	**In person**
Type of application	**:**	**Dispensation with Consultation Requirements under section 20ZA Landlord and Tenant Act 1985**
Tribunal member	**:**	**Judge Robert Latham**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**30 July 2020**

DECISION

The Tribunal grants this application to dispense with the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 in respect of the proposed renewal of is Framework Agreement with LASAR for the electricity and gas contracts for the period 1 October 2020 to 30 September 2024.

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. The Directions provided for the application to be determined on the papers unless any party requested a hearing. No party has requested a hearing. The applicant has filed a bundle of documents which extends to 111 pages. This includes the written representations which have been received from the leaseholders.

The Application

1. By an application, dated 1 April 2020, the London Borough of Wandsworth ("Wandsworth") seeks a rolling dispensation from the consultation requirements of Section 20 of the Landlord and Tenant Act 1985 ("the Act") in respect of qualifying long term agreements for the procurement of energy contracts for gas and electricity for the period 1 October 2020 to 30 September 2024. The application relates to 13,966 Wandsworth leaseholders who are required to pay for the provision of electricity and 668 leaseholders who are required to pay for the provision of gas through their service charge. The application is accompanied by a witness statement by Ian Almeida, a Project Officer in Wandsworth's Energy Management Team

2. Wandsworth is already part of a Framework Agreement with LASER to supply gas and electricity. The gas and electricity contracts are due to renewed in October 2020 and need to be extended. Dispensations have already given by the Tribunal:

   (i) June 2009 (LON/00BJ/LDC/2009/0021) for gas;
   (ii) February 2010 (LON/00BJ/LDC/2010/0017) for electricity;
   (iii) August 2012 (LON/00BJ/LDC/2012/0061) for electricity and gas; and
   (iv) August 2016 (LON/00BJ/LDC/2016/0051) for electricity and gas.

3. On 12 May 2020, the Tribunal issued Directions. Pursuant to these Directions,

   (i) By 1 June, Wandsworth had placed on its website a copy of the application form with all supporting documentation including a list of all leaseholders (but excluding any personal data) and the Directions. The website link is https://www.wandsworth.gov.uk/housing/leasehold-consultation-on-supply-of-gas-and-electricity-contract/.

   (ii) By 1 June 2020 Wandsworth had sent the leaseholders, by email, hand delivery or first class post a letter providing details of the website where all the documents relating to the application could be accessed. The letter also stated that if the leaseholder so

requested by 15 June, Wandsworth would send them a copy of the application form together with the supporting documents.

4. By 10 July, any leaseholder who opposed the application was directed to complete a Reply Form which was attached to the Directions and to send Wandsworth a statement in response to the application, together with and documents upon which they wish to rely. They were also asked to specify whether they required an oral hearing.

5. Wandsworth have produced a Bundle of Documents in support of this application. This includes the ten responses which they have received (at p.66 to 111). Wandsworth state that they have also received 183 emails and 180 telephone calls seeking clarification or amending their contact details.

The Responses

6. The following leaseholders have responded:

(i) Aile Darilag (p.66-8): On 1 June, Aile Darilag completed a Reply Form. No grounds for opposing the application are specified.

(ii) Nida Khayrallah (p.69-71): On 2 June, Ms Khayrallah requested a word version of the documents. These were provided. On 14 June, Ms Khayrallah completed a Reply Form. No grounds for opposing the application are specified.

(iii) Battersea High Street Residents Association (Paddy Keane) (p.72-79): On 6 June, Mr Keane completed a Reply Form. He stated that he was completing it in a personal capacity. He raised a number of queries and questioned how Wandsworth would ensure that the arrangement would secure best value for the leaseholders. On 16 June, Wandsworth responded to these queries. Mrs Ennafii, a Senior Consultation Officer in Wandsworth Housing & Regeneration Department, highlighted the passages in Mr Almeida's statement which sought to illustrate the savings which had been made since 2009 through the arrangement. Wandsworth would continue to carry out price monitoring exercises. Whilst the agreements between Wandsworth and LASER could not be disclosed as these contained commercially sensitive information, the authority would be willing to make these available to the tribunal. On 14 July, Mr Keane confirmed that he was not requesting an oral hearing. However, a number of members of the Association had raised concerns with him and they would be keeping an eye on costs,

(iv) Andrew Paul Healey (p.80-87): On 16 June, Mr Healey completed a Reply Form. He queried why the communal electricity charges in his block were so high. Mrs Ennafii responded providing details of the block electricity charges.

(v) Glorinda De Bellis (p.88-89): On 16 June, Ms De Bellis completed a Reply Form. No grounds for opposing the application are specified.

(vi) Tom de Castella (p.90-100): On 15 June, Mr d e Castella complained about the costs charged for the communal supply to his two-storey maisonette in Tooting. He lives in the first floor flat whilst a housing association hold the lease of the ground floor. Between them, the two lessees have to pay £150 a year for one hallway light which is on a 20 second timer switch. On 9 July, Cheryl Jordan, the Estate Manager, responded providing a breakdown of the meter and a summary of the costs for 2018/9. On 22 July, she provided further information.

(vii) C Brisco (p.101-104): On 3 July, Ms Brisco wrote to Wandsworth objecting to any attempt to dispensing with the consultation requirements. She complained about the proposed secrecy which she suggested breeds corruption. She also complained that she had not been provided with full details of the proposal. She did not complete a Reply Form. On the same day, Mrs Ennafii responded clarifying the nature of the application and pointing out where details of the proposal could be found on Wandsworth's website. She was reminded that if she objected to the proposal, she should complete the Reply Form and return it by 10 July. Ms Brisco did not do so.

(viii) Tanasak Wannarat (p.105-7): On 3 July, Mr Wannarat completed a Reply Form. Although this stated that he had sent a statement to Wandsworth, no statement was enclosed. On 6 July, Mrs Parrette, Leasehold Services Manager, responded clarifying the nature of the application.

(ix) Phil New (p.108): On 8 July, Mr New sent Wandsworth an email stating that he opposed the proposal due to cost. No Reply Form has been completed.

(x) Carol Campbell (p.109-111): On 9 July, Miss Campbell completed a Reply Form. She stated that she had sent a statement to Wandsworth. No statement was enclosed.

The Law

7. The only issue which this Tribunal is required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements, and if so, whether to impose any conditions. **This application does not concern the issue of whether any service charge costs will be reasonable or payable**. However, the statutory consultation procedures are part of the statutory armoury to protect leaseholders from paying excessive service charges.

8. Section 20ZA (2) of the Act defines a 'qualifying long term agreement' as an agreement entered into by a landlord for a term of more than 12 months.

9. Section 20(1), limits the service charge which a landlord can recover under such an agreement unless it has complied with the consultation requirements set out in Schedule 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003.

10. 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. The Supreme Court decision in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14; [2013] 1 WLR 854 is the leading authority on dispensation. In summary, the burden rests on a leaseholder to establish that real prejudice would arise from the landlord's failure to comply with the statutory consultation requirements. If such prejudice is established, dispensation may be refused or conditions may be imposed.

The Background

11. In his witness statement (at p.13-47), Mr Almeida describes the background to the current Framework Agreement for the supply of both the gas and electricity. Energy markets are complex and volatile, making them liable to sudden price fluctuations, which are often linked to real or perceived threats to supply and demand that can significantly change prices, on a daily basis. The key variant is the wholesale price.

12. Because of its volatility, the energy market cannot be index linked and the true cost savings accrue directly from the lower absolute outlay. Given the nature of the energy market and the influencing factors such as the increasing move to renewables, carbon reduction measures, taxation and increased reliance on energy imports, it is very unlikely that the opportunity for any absolute cost reduction will occur.

13. For many years, central government has recommended that all public sector bodies buy energy through an aggregated, flexible, risk managed framework, managed by experts: a central purchasing body ("CPB"). The effectiveness of the access agreement/call-off contract, is derived from the ability of public sector authorities to work together and collectively buy energy on the wholesale market, through a CPB that aggregates and purchases gas and electricity commodities where market conditions are favourable. The ability to purchase "chunks" of energy over longer periods of time avoids the high risk strategy of single day purchasing, typically associated with fixed price, fixed period, tendering.

14. Wandsworth's CPB is LASER (Local Authority South East Region) who are active in planned government initiatives and have been assessed and approved as a best practice energy procurement service provided by the OGC led collaborative energy category and London Energy Project. The contract arrangement has been let in compliance with EU Regulations.

15. Wandsworth has been a part of the framework agreement since 1 October 2009 and considers that the agreement has been very effective in mitigating the effects of a changeable energy market. LASER report an annual saving to the London Borough of Wandsworth of £564k, on an expenditure of approx. £9.7m a year, on their flexible energy procurement framework

16. Two external organisations have benchmarked LASER prices:

(i) The Major Energy Users Council: for the year 2018/19, against their average market prices, LASER's were 15% less for electricity and 12.5% less for gas. This equates to a cost avoidance of £693k.

(ii) The Department for Business, Energy and Industrial Strategy published figures which show that, for the year ending September 2019, LASER's prices were 7.5% lower than average consumer prices.

The Tribunal's Decision

17. The renewal of the agreement with LASER constitutes a 'qualifying long term agreement' as it is for a period of 4 years. The Tribunal is satisfied that it is reasonable to grant dispensation. Wandsworth consider that the current Framework Agreement with LASER secures best value for its leaseholders. The tribunal accepts that it is not practical for Wandsworth to comply with the full statutory consultation procedures. In particular, leaseholders cannot nominate a contractor in response to the Stage 1 notice which the Act would require the authority to serve. The alternative would be for Wandsworth to purchase gas and electricity annually at a fixed price. This would not require consultation as the agreement would be for a period of less than 12 months.

18. The tribunal have considered the objections raised by the leaseholders. Wandsworth has responded to these. It is apparent that some leaseholders have been unclear about what is proposed. Wandsworth has sought to provide clarification. Others suggest that the sums charged to their blocks have been unreasonably high. Wandsworth has sought to address their concerns.

19. The only issue which this tribunal has been required to determine is whether or not it is reasonable to dispense with the statutory consultation requirements. The grant of dispensation does not affect a leaseholder's right to challenge the gas and electricity charges sought through their service charges. 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 Act.

20. No leaseholder has established that that they will suffer any prejudice as a result of Wandsworth not complying with the statutory consultation

procedures. In the circumstances, it is appropriate to grant dispensation without any conditions.

Notification of this Decision

21. The tribunal will send a copy of its decision to the leaseholders specified in paragraph 6 above.

22. Wandsworth shall, by 7 August, send a copy of the tribunal's decision to all leaseholders, by email, hand delivery by first class post.

23. Further, Wandsworth shall, by 7 August, place a copy of the tribunal's decision on its website and shall maintain it there for at least 3 months, with a sufficiently prominent link on its home page.

Judge Robert Latham
30 July 2020

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 **by e-mail** 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).