

LANDLORD AND TENANT ACT 1985 – SECTION 20ZA

ALL RESIDENTIAL LEASEHOLD PROPERTIES
OF THE LONDON BOROUGH OF ISLINGTON

BETWEEN

THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF ISLINGTON

Applicant

and

ALL RESIDENTIAL LONG LEASEHOLDERS
OF THE LONDON BOROUGH OF ISLINGTON

Respondents

APPLICANT'S STATEMENT OF CASE

1. This statement is filed by the Landlord in support of its application for dispensation from the consultation requirements contained in Schedule 2 of the Service Charge (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987, ("the Consultation Regulations"). The Landlord relies upon Witness Statements from the following Council officers:
 - a. James Wilson (Head of Energy Services);
 - b. Richard Powell (Leasehold Services Project Manager).
2. The only issue for the tribunal is whether it is reasonable to dispense with the statutory consultation requirements.

BACKGROUND

Gas and Electricity Supply Contracts

3. This Application concerns contracts for the supply of gas and electricity to a range of departments within the Landlord's organisation (e.g. public buildings, social services, schools) and in particular, includes the Landlord's housing stock. The

value of the gas and electricity contracts was usually around £8m per annum. However, the large increase in prices in 2022/23 mean that the annual cost has risen sharply to around £25m.

4. The Landlord has some 9,571 residential long leaseholders (“leaseholders”) of which some 8,336 paid for electricity supplied to their buildings through their service charge and some 1,210 leaseholders paid for gas used for communal heating and in most cases the supply of hot water. Around 90% of leaseholders’ actual communal electricity charges were under £100 for 2021/22.
5. The Landlord’s existing agreements for electricity and gas with Scottish and Southern Energy (SSE) have been terminated and will end on 31 March 2023. The Council has entered into two new agreements for electricity and gas that will start on 1 April 2023 and run for up to two years (the Council has an option to terminate after one year). These will constitute Qualifying Long Term Agreements (“QLTAs”). The contracts had to be entered into by the end of September 2022 in order to secure the Council’s energy supplies for 2023/24.

Energy market volatility

6. The SSE electricity and gas contracts were agreed in 2019 to cover the period 2020 to 2024. The contracts were not for purchasing energy at a fixed price, but allowed the Council access to the commodity markets. The Council made trades on the markets through SSE to purchase volumes of electricity or gas for defined periods.
7. The commodity element of the electricity and gas was purchased flexibly, taking into account market conditions and the Council’s requirements of when the supplies are needed or when the market is low.
8. For 2020/21 and 2021/22, the supplies for both financial years were purchased in full prior to the start of each year by making trades for the full volumes. However, significant volatility and price rises in the energy market from September 2021 onwards meant that the usual strategy of purchasing when the market was low could not be implemented.
9. The Council therefore opted to purchase for shorter periods with the expectation that prices would eventually settle. However, the ongoing war in Ukraine and Russia unilaterally halting the flow of gas through the Nordstream pipeline led to increased volatility and further price rises. This left the Council’s energy portfolio exposed to a high level of risk in terms of costs for 2023/24 onwards.
10. In order to mitigate its exposure to the market for 2023/24 onwards, the Council approached Public Buying Organisations (PBO) to enquire whether they had

secured supplies for 2023/24 in advance, at lower than current market rates, and whether they had sufficient spare capacity for the Council to join. One PBO confirmed that this was the case. The rates they had purchased at were significantly below the market rate, offering a large potential saving for 2023/24. Based on market prices on 17 October 2022, it is estimated that the commodity prices that the council would secure through the PBO for 2023/24 are around 30-35% lower than market rates.

11. The Council also discussed the possibility of an early termination of its supply agreements with SSE, who agreed to do so on the basis that the Council would pay a termination fee. The fee is negligible in terms of the potential saving that could be achieved by switching to the PBO, and will be paid by the Council and not passed onto tenants and leaseholders.

Consultation with Respondents

12. The Landlord was unable to carry out the required consultations due to the short window of opportunity to secure the best priced contracts for the supply of gas and electricity to the benefit of all leaseholders.
13. Pursuant to the tribunals Directions dated 26.10.2022, the Landlord wrote to the leaseholders on 04.11.2022 informing them of the Application and the Landlord's website where copies of all relevant documents can be viewed – please see paragraphs 17-19 of Richard Powel's witness statement dated 07.11.2022.

Award of Contracts

14. Using the chosen PBO is a compliant route to market for the Council as its two relevant Framework Agreements (for electricity and gas) were formally tendered via OJEU and winning bidders appointed accordingly (Regulation 33). This route to market is also compliant with the council's Procurement Regulations and in particular Procurement Regulation 3.1.
15. In September 2022 Islington Council's Executive Committee agreed to enter into new energy supply contracts for electricity and gas with a PBO and to terminate the existing contracts with SSE.
16. The report was taken to the Executive Committee under the council's urgency provisions due to the tight timelines. The PBO required the council to contract with them six months before the start date of the supply contracts. As the supply contracts were due to start on 1 April 2023, this meant signing the contracts with

the PBO by 30 September 2022. The contracts were duly signed on 29 September 2022.

17. Each contract is expressed to last from 1 April 2023 to 31 March 2025, with the option of termination after one year (i.e. on 31 March 2024) if requested by 31 March 2023.

CONSULTATION AND DISPENSATION

18. Each contract is a QLTA for the purposes of Section 20ZA(2) and (3) of the Landlord and Tenant Act 1985. As a Public Notice was required, the relevant consultation requirements were those contained in the Consultation Regulations, Schedule 2. The Tribunal's power to grant dispensation from those consultation requirements is in Section 20ZA(1)) of the Landlord and Tenant Act 1985:

- a. *“(1) Where an application is made to the leasehold valuation 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 Landlord could not comply with the consultation requirements if it was to take advantage of the reduced prices obtainable through the use of flexible purchasing. The Landlord's non-compliance with the Consultation Regulations, Schedule 2, will lead to a direct benefit to leaseholders. In these circumstances, the Landlord contends that it is manifestly reasonable to grant dispensation.

20. In a number of cases, the Tribunal has granted dispensation, recognising the desirability of using flexible purchasing to obtain the best prices for gas and electricity supplies. By earlier decisions in 2006, 2013, 2015 and 2020 dispensation was granted to the Landlord in relation to the flexible purchasing system (Case ref: LON/00AU/LDC/2021/0209, LON/00BJ/LDC/2020/0056, LON/00AU/LDC/2006/0043, LON/00AU/LDC/2013/0067, and LON/00AU/LDC/2015/0106).

21. For a similar recent grant of dispensation, see LON/00AU/LDC/2021/0209 *Notting Hill Genesis v Various Leaseholders*; LON/00BJ/LDC/2020/0056 *The London Borough of Wandsworth v Various Leaseholders*; LON/00AZ/LDC/2017/0093 *Lewisham Homes v Various Leaseholders* and LON/00BJ/LDC/2016/0051 *London Borough of Wandsworth v Leaseholder owners*.

Terms of Application

22. The Landlord seeks the Tribunal's determination that it is reasonable to dispense with all and any of the consultation requirements in relation to contracts for the supply of gas and electricity entered into on 29.09.2022.

Dispensation on Terms

23. *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 W.L.R. 854 established relevant principles in relation to dispensation on terms as follows:
- a. *The consultation requirements are intended to reinforce and give practical effect to section 19 of the Landlord and Tenant Act 1985, i.e. to ensure that tenants are not required: (i) to pay for works which are unnecessary or provided to a defective standard; or (ii) to pay more than they should for works which are necessary and which are carried out to an acceptable standard [42].*
 - b. *In light of this, the Tribunal should focus on the extent (if any) to which the tenants have been prejudiced by the landlord's failure to comply with those requirements; where the extent, quality and cost of the service is in no way affected, there is no reason not to grant dispensation [44-45].*
 - c. *Dispensation should not be refused merely because the landlord has seriously breached or departed from the consultation requirements; the consultation process is a means to an end, not an end in itself [46].*
 - d. *The Tribunal has power to grant dispensation on such terms as it thinks fit; insofar as the tenants have suffered prejudice as a result of the landlord's non-compliance, the LVT should, in the absence of some good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants for that prejudice; for example, where the tenants can show that the landlord's non-compliance resulted in an increase in cost, dispensation should only be granted on the condition that the landlord reduces the service charge by that amount [54], [57-58].*
 - e. *Although the legal burden is on the landlord to establish that it is entitled to dispensation, the burden is on the tenants to identify some prejudice that they might have suffered as a result of the landlord's failure to comply with the consultation requirements [67].*
 - f. *In granting dispensation, the Tribunal has power to impose a term that the landlord pays the tenants' costs of resisting the application; save where the tenants' costs of investigating any prejudice are self-evidently unreasonable, it is for the landlord to show that those costs were unreasonably incurred before it can avoid being required to repay them as a term of dispensation being granted [61], [68].*

24. Applying the foregoing, the Landlord submits that there is, and can be, no prejudice to the leaseholders. The extent and quality of the electricity and gas supplies are unaffected by the failure to consult. The failure to consult is not going to lead to an increase in cost. On the contrary, by using the flexible purchasing arrangement and overriding the consultation process, the Applicant will be able to purchase gas and electricity supplies at a greatly reduced cost. The leaseholders will not have suffered prejudice, but instead have gained an advantage of much cheaper energy prices.
25. The Landlord proposes to keep the Leasehold Website pages regularly updated on purchases made throughout the contract period.

The Landlord believes that the facts stated in this statement are true.
I am duly authorised to sign this statement of truth of behalf of the Landlord.



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Predrag Suzic
Solicitor for the Landlord

Dated: 07.11.2022

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

Ref: LON/00AU/LDC/2022/0188

B E T W E E N:

**THE MAYOR AND BURGESSES
OF THE LONDON BOROUGH
OF ISLINGTON**

Applicant

-and-

**ALL RESIDENTIAL LONG
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Respondents

**APPLICANT'S STATEMENT
OF CASE**

**London Borough of Islington
Legal Services
7 Newington Barrow Way
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REF: PFS