

Y TRIBIWNLYS EIDDO PRESWYL
RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0004/05/23

In the matter of premises at Albion House Caldicot, Ash Tree Road Chepstow, Bishops Mead Chepstow, Brynteg Place Little Mill, Cae Pen Y Dre Close Abergavenny, Carbonne Close Monmouth, Chapel Road Abergavenny, Clare Court Usk, Crompton Court Monmouth, Cwrt Dewi Sant Abergavenny, Cwrt Severn Caldicot, Davis Court Chepstow, Dinham Road Caerwent, Drybridge Park Monmouth, Granville Street Monmouth, Grove Mansions Abergavenny, Jubilee Court Abergavenny, Kings Fee Monmouth, Lawrence Crescent Caerwent, Llwynu Close Abergavenny, Llys Llewellyn Abergavenny, Llys Y Brenin Abergavenny, Longfellow Road Caldicot, Mid Summer Way Monmouth, Middle Way Chepstow, Mounton Court Chepstow, Newland Way Monmouth, Old Hereford Road Abergavenny, Pembroke Court Monmouth, Pitmans Court Monmouth, Plas Mawr Usk, Radstock Court Abergavenny, Roman Court Monmouth, Rother Avenue Abergavenny, Skenfrith Court Abergavenny, Somerset Road Monmouth, St Andrews Crescent Abergavenny, St Davids Close Abergavenny, St Georges Crescent Abergavenny, St Helens Close Abergavenny, St Marys Place Portskewett, St Teilos Road Abergavenny, The Albion Monmouth, The Haven Goytre, The Lawns Magor, The Reddings Chepstow, Thornwell Road Chepstow, Trevor Bowen House Monmouth, Ty Coleg Abergavenny, Warren Slade Chepstow, Wellfield Close Abergavenny, Ysguborwen Abergavenny

In the matter of an application under Section 20ZA Landlord and Tenant Act 1985

APPLICANT: Monmouthshire Housing Association

Tenants: Tenants at the above-listed premises

Tribunal: Mr. M Hunt (Tribunal Judge)
Mr. J Singleton FRICS (Valuer)

Date of decision: 21st September 2023

DECISION

Dispensation from consultation is granted in respect of the agreement for the supply of electricity to the common areas of the above-listed premises, save in respect of the requirements laid down in paragraph 8 of Schedule 1 of the Service Charges (Consultation Requirements) (Wales) Regulations 2004/684 – the duty on entering into an agreement.

For the reasons given below, the Leasehold Valuation Tribunal finds that it is reasonable to dispense with all but one of the consultation requirements. This was the sole issue for the Tribunal to determine. It makes no findings as to any other issues.

REASONS FOR DECISION

The Facts

1. The Applicant manages the above-listed premises (the “Premises”). It seeks dispensation from the requirement to consult the Tenants in relation to the agreement for the supply of electricity to the communal areas of the Premises. The relevant consultation requirements are laid down in the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (the “Consultation Requirements”). The Applicant has stated that the first stage of the Consultation Requirements was complied with (i.e. notification that the Applicant was intending on entering into a new electricity supply agreement). The Tribunal was not provided with a copy of the notification, but has no reason to doubt the Applicant’s evidence.
2. The Applicant submits that its current electricity supply contract is due to expire on 30 September 2023. It submits that if a new supply contract cannot be agreed before this date, electricity will continue to be supplied, but at “*prohibitively high ‘out of contract’ rates*”. It submits that it is not possible to comply with the Consultation Requirements as electricity prices change on a daily basis. Accordingly, any proposals provided to the Tenants for consultation will have expired before the Consultation Requirements can be met. In addition, the Applicant submits that the volatility of electricity prices requires it to be able to act quickly to secure the cheapest rates when they become available, which the Consultation Requirements do not permit.
3. The Applicant submits that no prejudice would be caused to the Tenants by dispensing with the Consultation Requirements. To the contrary, refusing the application would be prejudicial to the Tenants as it would lead to them paying higher service charges as the Premises’ supply of electricity would be charged at higher, “out of contract” rates.
4. To support these submissions, the Applicant supplied an electricity quote analysis showing the “out of contract” prices that would be charged from 1 October 2023 onwards were no new agreement to be entered into, as well as the electricity supply prices under the current contract, and those that were available for new contracts on 23 May 2023 with selected commercial electricity suppliers. The Tribunal did not see the underlying contract or quotes, but found no reason to doubt the information provided. The Tribunal found that the analysis showed that entering into a new contract would likely result in significantly lower electricity charges, both in relation to unit cost (per kWh) and especially in relation to the standing charges.
5. Whether to grant dispensation from consultation is the only issue before this Tribunal.
6. On 12 June 2023, this Tribunal made directions for the preparation of the case and the submission of arguments and evidence. The Tribunal’s Order noted that none of the Tenants had applied to join the proceedings. The Applicant filed a witness statement provided by Liz Davies dated 26 June 2023. None of the Tenants have since applied to join the proceedings or filed any submissions or evidence.
7. The application was determined on the papers, without a hearing.

The Law

8. S.20ZA of the Landlord and Tenant Act 1985 (the “Act”) provides as follows (relevant excerpt).

20ZA Consultation requirements: supplementary

(1) Where an application is made to the appropriate 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.

(2) In section 20 and this section—

...

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

9. The powers of the Secretary of State were transferred to the National Assembly for Wales (now Welsh Parliament), which made the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (the “Regulations”).
10. The most relevant excerpts of the Regulations are as follows. Schedule 1 outlines the specific Consultation Requirements and is only reproduced in an annex to this decision.

4. Application of section 20 to qualifying long term agreements

(1) Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

5. The consultation requirements: qualifying long term agreements

(1) ... in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA are the requirements specified in Schedule 1.

11. The Supreme Court addressed the considerations that a Leasehold Valuation Tribunal should take into account in exercising its discretion to dispense with the Consultation Requirements: *Daejan Investments Limited v Benson and Others* [2013] UKSC 14. In very brief summary, the Supreme Court decided that the Tribunal should focus on the prejudice that the tenants might suffer due to the landlord’s failure to consult, notably in two respects: whether the works chosen were appropriate, or whether they cost more than would be appropriate (see paragraph 44 of the judgment). That case

concerned qualifying works, but the Tribunal believes the same principles apply to qualifying long term agreements.

12. The Supreme Court found that the scope of the Tribunal's powers to apply terms to any dispensation is broad, provided of course that any terms imposed are appropriate (see paragraphs 54-55 of the judgment).

The Determination

13. The premise to this application is that the Applicant believes that it is subject to the Consultation Requirements, is unable to comply with them due to electricity prices changing on a daily basis, and that it would be unwise to do so as it might prevent the Applicant from reacting quickly to secure the cheapest electricity prices if and when they become available. Additionally, that the only alternative to making this application is for the Premises' electricity supply to move on to an "out of contract" rate. The Tribunal accepts on the balance of probabilities that this is the Applicant's genuine belief and notes that it has sought to comply with the initial stages of the required consultation. Before determining the application, this Tribunal will make observations on each of these points as it is aware that the Applicant has made a number of similar applications in the past. These observations are not binding statements of law.
14. As to whether the Applicant is subject to the Consultation Requirements, certain quotes received were for electricity supply contracts lasting for 12 months. There would be a clear argument entering into such an agreement would be exempt from the Consultation Requirements in accordance with s.20ZA(2) of the Act. Additionally, it is not clear to the Tribunal that any individual Tenant's share of the annual cost of any agreement, whatever the duration, would exceed £100 per year. Nevertheless, as the Applicant has made this application, taking a proportionate approach the Tribunal is prepared to assume the Consultation Requirements do apply and has proceeded on that basis.
15. As to the inability of the Applicant to comply with the Consultation Requirements, this Tribunal does not share the Applicant's view. The main purpose of the Regulations is to ensure tenants are aware of proposals that a landlord makes that will have an impact on the service charges those tenants are expected to bear, and to provide those tenants with an opportunity to comment on the proposals. Nothing in the Regulations prevent those proposals from evolving over time. Indeed, they refer repeatedly to "estimates", not fixed prices. Paragraph 5(9) of Schedule 1 refers explicitly to proposals whose costs can't reasonably be estimated (stipulating that the "current unit cost" must be shown). Albeit it heard no argument on the point, this Tribunal cannot see any good reason why the Consultation Requirements could not be satisfied by giving an indication to tenants of what the landlord proposes in respect of electricity supply contracts. For instance, to enter into a new agreement, to pursue the cheapest tariff available when rates are adjudged the most competitive, and to consider contracts of varying length, albeit stating that precise unit charges are subject to change. Any tenant interested, for instance, in inviting the landlord to approach other electricity providers, or to comment on the length of contract, would then be afforded the opportunity to do so. In light of any such observations, the landlord would decide with whom to contract.
16. This observation also addresses the Applicant's perception that the Consultation Requirements are a barrier to efficient decision-making.

17. As to alternative options, simply entering into a 12-month contract would seem to avoid the Consultation Requirements. However, the Tribunal accepts there may be advantages to both the Applicant and Tenants in seeking agreements of a longer duration. It simply observes that progressing to an “out of contract” rate is not the only alternative available to the Applicant.
18. Be that as it may, the Tribunal must determine the application before it. The Applicant submits that the Tenants will not suffer any prejudice through the dispensation of the Consultation Requirements.
19. The Tenants have not alleged any prejudice, nor – to the Tribunal’s knowledge – have any made any observations at all to the Applicant subsequent to its limited consultation to date. However, the question for this Tribunal is whether it is reasonable to dispense with the Consultation Requirements. The applicable requirements in this case are laid down in Schedule 1 of the Regulations. As observed above, the Tribunal believes that the Consultation Requirements could have been followed in this case. However, the time it has taken to bring the application to a hearing means that there is now insufficient time before the expiry of the current electricity agreement in which to conduct a compliant consultation. The Tribunal accepts that failing to enter into a new agreement by the expiry of the existing supply contract is likely to result in more expensive electricity bills being passed on to the Tenants through their service charge. The Tribunal also accepts that pursuing alternative options at this late stage purely to avoid the necessity of consultation may not result in the optimal outcome for either the Applicant or Tenants. The Tribunal accepts that both of these courses would be prejudicial to the Tenants. As the limited consultation to date appears to have solicited no responses, this prejudice clearly outweighs the prejudice the Tenants might suffer due to the lack of more thorough consultation. It would therefore be reasonable to dispense with the vast majority of the Consultation Requirements.
20. However, in the Tribunal’s view, there is no justification for dispensing with all of the Consultation Requirements. Notably, there appears to be no good reason for failing to comply with paragraph 8 of Schedule 1, which describes a landlord’s duty on entering into an agreement. It requires the Tenants to be notified of a contract that has been entered into and to provide reasons for that decision if the agreement was not the cheapest – which will depend on the Applicant’s ultimate decision. Bearing in mind that decisions as to contracts entered into may be relevant to any challenge to, or assessment of, the reasonableness of any service charge, this information could be of some importance to the Tenants and it would be prejudicial to deprive them of it. It is not for this Tribunal to determine any of these issues, but equally it is not for this Tribunal to dispense with Consultation Requirements without good reason, especially when that could cause prejudice to the Tenants.
21. Accordingly, this Leasehold Valuation Tribunal dispenses with all of the consultation requirements save that laid down in paragraph 8 of Schedule 1 to the Regulations.

Dated this 21st day of September 2023

M Hunt
Tribunal Judge

Annex

Schedule 1 of the Service Charges (Consultation Requirements) (Wales) Regulations 2004

SCHEDULE 1 CONSULTATION REQUIREMENTS FOR QUALIFYING LONG TERM AGREEMENTS OTHER THAN THOSE FOR WHICH PUBLIC NOTICE IS REQUIRED

Notice of intention

1.—

(1) The landlord shall give notice in writing of intention to enter into the agreement—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) invite the making, in writing, of observations in relation to the proposed agreement; and

(e) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate in respect of the relevant matters.

Inspection of description of relevant matters

2.—

(1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed agreement

3.

Where, within the relevant period, observations are made in relation to the proposed agreement by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates

4.—

(1) Where, within the relevant period, a single nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a single nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

Preparation of landlord's proposals

5.—

(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, at least two proposals in respect of the relevant matters.

(2) At least one of the proposals must propose that goods or services are provided, or works are carried out (as the case may be), by a person wholly unconnected with the landlord.

(3) Where an estimate has been obtained from a nominated person, the landlord must prepare a proposal based on that estimate.

(4) Each proposal shall contain a statement of the relevant matters.

(5) Each proposal shall contain a statement, as regards each party to the proposed agreement other than the landlord—

(a) of the party's name and address; and

(b) of any connection (apart from the proposed agreement) between the party and the landlord.

(6) For the purposes of sub-paragraphs (2) and (5)(b), it shall be assumed that there is a connection between a party (as the case may be) and the landlord—

(a) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(7) Where, as regards each tenant's unit of occupation and the relevant matters, it is reasonably practicable for the landlord to estimate the relevant contribution attributable to the relevant matters to which the proposed agreement relates, each proposal shall contain a statement of that estimated contribution.

(8) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (7); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of the landlord's expenditure under the proposed agreement, each proposal shall contain a statement of that estimated expenditure.

(9) Where—

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in subparagraph (7) or (8)(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters, each proposal shall contain a statement of that cost or rate.

(10) Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by the landlord of premises to which the agreement relates, each proposal shall contain a statement—

(a) that the person whose appointment is proposed—

(i) is or, as the case may be, is not, a member of a professional body or trade association; and

(ii) subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and

(b) if the person is a member of a professional body or trade association, of the name of the body or association.

(11) Each proposal shall contain a statement as to the provisions (if any) for variation of any amount specified in, or to be determined under, the proposed agreement.

(12) Each proposal shall contain a statement of the intended duration of the proposed agreement.

(13) Where observations are made to which (in accordance with paragraph 3) the landlord is required to have regard, each proposal shall contain a statement summarising the observations and setting out the landlord's response to them.

Notification of landlord's proposals

6.—

(1) The landlord shall give notice in writing of proposals prepared under paragraph 5—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) be accompanied by a copy of each proposal or specify the place and hours at which the proposals may be inspected;

(b) invite the making, in writing, of observations in relation to the proposals; and

(c) specify—

(i) the address to which such observations may be sent;

- (ii) that they must be delivered within the relevant period; and
- (iii) the date on which the relevant period ends.

(3) Paragraph 2 shall apply to proposals made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.

Duty to have regard to observations in relation to proposals

7.

Where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Duty on entering into agreement

8.—

(1) Subject to sub-paragraph (2), where the landlord enters into an agreement relating to relevant matters, the landlord shall, within 21 days of entering into the agreement, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state the reasons for making that agreement or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where observations are made to which (in accordance with paragraph 7) the landlord is required to have regard, summarise the observations and respond to them or specify the place and hours at which that summary and response may be inspected.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the agreement is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement, summary and response made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.