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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/24UC/LDC/2013/0006

Section 20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act")

(Application to dispense with consultation requirements)

Re : Various Scheme addresses in Southampton, Eastleigh, Fordingbridge, Sawyers Close Estate, Windsor, and Longwood Park Estate, Langley, Petersfield, Portsmouth

Applicant Radian Group on behalf The Swaythling Housing Society Limited; Windsor & District Housing Association; Drum Housing Association and Portal Housing Association (the Landlords)

Respondents 2,593 Leaseholders

Date of Application 24 January 2013

Date of Determination 2 April 2013

Members of the Leasehold Valuation Tribunal:

P J Barber LL.B, J.P.

Lawyer Chairman

P D Turner-Powell FRICS

Valuer Member

Date of Tribunal's Decision: 2 April 2013

DETERMINATION

1. The Tribunal determines in accordance with the provisions of Section 20ZA of the Landlord and Tenant Act 1985 ("the Act") that dispensation be granted from all the requirements of Section 20(1) of the Act in respect of proposed arrangements for the supply of gas and electricity for the heating and/or lighting of the common areas of the properties which are the subject of this application.

THE APPLICATION

2. This is an application filed by Clarke Willmott LLP solicitors on behalf of the Applicant pursuant to Section 20ZA of the Act in relation to various property scheme addresses within Southampton, Eastleigh, Fordingbridge, Sawyers Close Estate, Windsor and Longwood Park Estate, Petersfield, Portsmouth ("the Scheme Properties") to dispense with the consultation requirements contained in Section 20 of the Act.
3. The application is similar in nature to a previous application made to the Tribunal in 2011 in response to then rising costs being incurred for the supply of gas and electricity to the Scheme Properties; dispensation was granted by the Tribunal in 2011 in respect of a qualifying agreement for the supply of gas and electricity for the heating and/or lighting of the common parts of properties where members of the Radian Housing Group were the landlords. The qualifying agreement entered into in 2011 by the Applicant is about to expire and the Applicant now wishes to enter into a further new contract in order to control and/or mitigate certain energy cost increases in the future.
4. The Radian Group includes The Swaythling Housing Society Limited; Drum Housing Association; Windsor & District Housing Association; Portal Housing Association and Longwood Park Limited. Altogether, the Applicant manages approximately 15,000 properties, of which approximately 2,539 are the subject of this application; these are properties where the cost of heating and/or lighting of the communal areas is recovered by way of a service charge which is likely to exceed £100 per annum.
5. The Tribunal issued directions on 31st January 2013 which inter alia provided that the Applicant was to serve notice of the application together with a copy of their application and supporting documents, a copy of those directions and a covering letter from the Tribunal by first class pre-paid post on each of the Respondents. A list of the Respondents was provided to the Tribunal by the Applicant and the Applicant duly confirmed that it had complied with the directions as to service of the papers.
6. The aforesaid directions also stated that it was the Tribunal's intention to deal with the matter without an oral hearing pursuant to Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations S.I. 2003 No. 2099. No objections have been notified to the Tribunal in respect of the application, which is almost identical to that made in 2011 when dispensation was granted. Notwithstanding the decisions on those earlier occasions, the Tribunal has considered the matter on its own merits in respect of the current application.

THE EVIDENCE

7. In support of its application, the Applicant submitted a witness statement dated 23rd January 2013 and made by Cecile Todd, Leasehold Services Manager for the Applicant; this stated that the Applicant intended to send consultation letters to all their residents who pay a service charge for supply of gas and/or electricity to communal areas; sample copies of the intended consultation letters were appended to the witness statement. As before, the problem for the Applicant in following the Section 20 consultation procedure is that it would be obliged to comply with EU Procurement Regulations which require a "standstill" period of ten days between the decision to award the contract and the signing of the contract. The energy market does not operate in this

way as bids are requested and contracts signed within a 24 hour period. The method of reconciling these conflicting situations, is therefore to use a third party intermediary ("a TPI") to obtain bids from energy suppliers. The Applicant has appointed UX Online for this purpose; UX Online will go to the market on a certain date to obtain bids for one, two or three year periods. UX Online will then advise the Applicant of the bids received and recommend the one to be accepted. The energy market is volatile and in order to obtain the best price reasonably obtainable for the supply and practical market requirements – it is impossible for the time periods for consultation laid down in Section 20 also to be followed, since the price cannot be held for the period necessary to carry out the consultation. Hence the necessity for the current Application to the Tribunal. The whole purpose of entering into such a long term agreement at a fixed price for the supply of energy is to ensure, as far as reasonably possible that the best price is achieved for that supply.

THE LAW

8. Where a landlord intends either to carry out major works or to enter into a long term agreement for the supply of goods or services, the cost of which will be borne by the service charge payers and, in the case of a long term agreement exceeds £100 per annum, Section 20 of the Act requires that the landlord shall first either go through a prescribed consultation process with the tenants concerned or alternatively obtain a determination from the Tribunal that it may dispense with those procedures. If it fails to do so, the amount it may recover from each service charge payer towards the cost of the item in question is limited, in the case of long term agreements, to £100 per annum. The detailed consultation requirements are set out in Schedule 2 to the Service Charges (Consultation Requirements) (England) Regulations S.I. 2003 No.1987 and require a notice of intention to enter into the agreement to be served on the tenants, facilities for inspection of the documents to be given, a duty to have regard to tenants' observations followed by the preparation of a detailed statement of the landlord's proposal and a further opportunity for the tenants to comment.
9. Section 20ZA of the Act allows the Tribunal to dispense with some or all of these requirements if it is satisfied that it is reasonable to do so.

TRIBUNAL'S FINDINGS

10. The Tribunal finds that the Applicant does intend to enter into a long term agreement for the supply of gas and/or electricity to the communal areas of the Scheme Properties and that the cost of so doing is to be recovered from the tenants of those properties as part of their service charge. However, in the circumstances described above, any nomination of suppliers by tenants is not a practical option.
11. The Tribunal notes the submission contained in the application to the effect that the use of a TPI to buy gas and electricity through the wholesale energy market, is considered to be best practice and is also recommended to all public sector organisations by the Pan-Government Energy Project.
12. The Tribunal also finds that the tendering process in the energy industry for such contracts gives only a very short period of time for bids to be received and a contract entered into. The Section 20 procedure involves much more extensive time periods than is permitted under the tendering process for energy and hence the Section 20 procedure is wholly unsuited for this purpose.

CONSIDERATION

13. The Tribunal is satisfied that the tendering process is likely to ensure as far as reasonably practicable that the gas and electricity purchased for the communal areas of the Scheme Properties will be on the best terms available and that it is impossible for the Applicant to comply with the EU procurement rules and the industry practice for submission and acceptance of bids, and at the same time to comply with Section 20 consultation requirements.
14. No objections to the application from any of the Respondents have been notified by the Applicant to the Tribunal; the Tribunal further notes that if any of the tenants consider that the claim for reimbursement of gas and electricity charges paid by the landlord and sought to be reclaimed through the service charge, is unreasonably incurred or of an unreasonable amount, they may always challenge them by making an application to the Tribunal under Section 27a of the Act when the service charge demand has been received notwithstanding that dispensation of the consultation requirements has been granted by the Tribunal.
15. The Tribunal is satisfied that in seeking to obtain the best price reasonably obtainable for the supply of gas and electricity to the common areas of the Scheme Properties, the Applicant is acting in the best interests of the tenants. The Section 20 consultation requirements are there for the protection of tenants from unscrupulous landlords who proceed to carry out repairs and enter into long term contracts without regard to the costs involved, in the knowledge that they are not having to bear that cost. This is not one of those situations. The Tribunal is satisfied that the best interests of the tenants are served by dispensing with the Section 20 requirements and thereby permitting the landlords to enter into a long term agreement for the supply of gas and/or electricity which would not be possible if the Section 20 consultation requirements were to apply.
16. Accordingly the Tribunal so makes the determination set out in paragraph 1 above.

[Signed] P J Barber

Chairman

A member of the Tribunal
appointed by the Lord Chancellor