

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00ML/LDC/2006/0021

Re: Various Flats in Dudeney Lodge and other Blocks of Flats
(as per the Schedule to this Decision) in the City of Brighton & Hove, East Sussex
Between:

Brighton & Hove City Council
and
("the Applicant/Landlord")

THE LESSEES
(as listed in the Schedule to this Decision)
("the Respondents")

**IN THE MATTER OF AN APPLICATION UNDER
SECTION 20ZA OF THE LANDLORD & TENANT ACT 1985**

Members of the Leasehold Valuation Tribunal:	Mr J.B. Tarling, MCMI (Lawyer/Chairman) Mr R.P. Long, LLB (Lawyer/Member)
Hearing:	7 th December 2006
Date of Decision:	15 th December 2006

**DECISION OF THE
LEASEHOLD VALUATION TRIBUNAL**

The Tribunal HEREBY DETERMINES that it is reasonable to dispense with all of the consultation requirements in relation to a qualifying long term agreement with British Gas for the supply of gas to the subject properties.

REASONS FOR THE DECISION

Background to the Application

1. The Applicant, Brighton and Hove City Council, is the Landlord of various Blocks of residential flats in the City of Brighton and Hove. The Respondents are 55 Lessees who have purchased long leases of their flats. Most of the Respondents have purchased their long leases under the Right to Buy legislation. Some of them have acquired the properties from the original tenants who had acquired the Right to Buy.
2. The long leases under which the Respondents own their properties include covenants by them as Lessees to contribute towards the costs of heating the flats and communal parts. Such contributions are payable through the service charge provisions in all the leases. The heating of the flats and communal parts is by gas Boilers in each of the Blocks. The cost of the gas supply to the Boilers is included in the service charge accounts and is payable by the Lessees.

3. In summer 2005 the Applicant realised that the group gas supply contract with British Gas was due for termination on 1st October 2005. The Applicant took advice from Consultants, Team Q, and a tendering process took place. As a result of the Tenders it became clear that there would be a considerable increase in the cost of gas supply. The price of gas had risen in recent years at the rate of 3% per week. None of the Companies who tendered were prepared to hold their prices more than for 24 hours. The reason for this was that the market was extremely volatile due to a number of reasons beyond their control.

The Application

4. On 6th October 2006 the Applicants made an Application to the Tribunal under Section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all of the consultation requirements contained in Section 20 of the 1985 Act. Section 20 makes detailed provisions requiring all landlords of residential property to consult with their Lessees who hold long leases of properties owned by the landlord. The Application was made by the Applicant's Solicitors, Thomas Eggar & So, of Crawley. In support of the Application was a brief Statement outlining the reasons for the Application and a separate document giving the Grounds for the Application prepared by Counsel dated 12th May 2006. It was also accompanied by copies of various Reports made to the Council's Policy and Resources Committee. Copies of sample Leases of the 55 Flats was also included in the papers before the Tribunal.

The relevant Law

5. Section 20ZA of the Landlord and Tenant Act 1985 provides *inter alia* "that the Tribunal may make a determination to dispense with all or any of the consultation requirements in relation to any qualifying long term agreement if it is satisfied that it is reasonable to dispense with the requirements." A qualifying long term agreement means any agreement entered into by a landlord for a term of more than twelve months. At the date of the Application the Applicant had already entered into a three year long term agreement with British Gas for the supply of gas for the heating of the various Blocks of Flats and other buildings owned by the Applicant. The Application now being made to the Tribunal was for retrospective dispensation of all of the consultation requirements contained in Section 20 of the 1985 Act and the regulations made under that Act in relation to the agreement that the Council had already entered into with British Gas.
6. Detailed Regulations regarding consultation procedures have been made by Parliament under delegated legislation and these are contained in the Service Charges (Consultation Requirements)(England)Regulations 2003 (Statutory Instrument Number 2003/1987) ("the 2003 Regulations"). The provisions of Schedule 2 of those Regulations set out in detail what a landlord of residential property is required to do in connection with qualifying long term agreements for which public notice is required (as in this case). In summary, a landlord is required to give notice of its intention to enter into a qualifying long term

agreement to all its Lessees, and if there is a recognised tenants association, to that association. The notice shall describe in general terms the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected. It shall state the reasons for considering it necessary to enter into the agreement and shall invite the making, in writing of observations in relation to the relevant matters. The whole idea of such a notice of intention is to give the Lessees, who are required under the terms of the Leases to contribute towards these costs, an opportunity to comment and make observations on the landlord's proposals.

7. No such notice of intention to enter into the long term agreement with British Gas had been given by the Applicant to any of the Respondents.

Preliminary matters

8. Following receipt of the Application, the Tribunal made Directions on 20th October 2006 which provided for notice of the Application to be served on all the Respondents and inviting those who wished to oppose the Application to write to the Applicant's Solicitors and to the Tribunal saying why they wished to oppose it. The Direction also set a date for a Hearing of the Application to be heard on 7th December 2006. At the date of the Hearing, none of the Respondent Lessees had replied to the Tribunal's Directions.

Hearing

9. A Hearing took place at Brighton Racecourse on 7th December 2006. The Applicant was represented by Mr Matthew Hutchings of Counsel. Two employees from the Applicant also attended, namely David Arthur and Caroline Price. None of the Respondent Lessees attended or were represented. Shortly before the date of the Hearing the Tribunal received a Witness Statement from Angela Dymott, Assistant Director Property and Design for the Applicant, dated 5th December 2006. Angela Dymott did not attend the Hearing.
10. Mr Hutchings outlined the case for the Applicant and referred the Tribunal to the background of the Application and the documents that were before the Tribunal. In particular he explained the unusual situation regarding the price of gas and the volatility of the market. The inability of any gas supplier to hold its prices for more than 24 hours made consultation with the Lessees virtually impossible. The Applicant had entered into a 3 year agreement to fix the price of gas and was now asking for retrospective dispensation to dispense with the consultation provisions required under the legislation.
11. Mr Hutchings set out five grounds in support of the Applicant's claim that it is reasonable to grant dispensation:
 - (i) The Council was at all times acting in the best interests of its leaseholders by seeking to obtain the lowest possible prices for gas over the next few years within the constraints of EU procurement requirements, and it was successful in achieving that objective;
 - (ii) Given the predicted continued increase in gas prices until 2007, the case for

entering into a further long term agreement fixing gas prices by reference to July 2005 levels was overwhelming;

(iii) The analysis of the tenders was a matter for expert advice which would not have been easily or quickly explained to lay persons without experience of large scale procurement;

(iv) It became effectively impossible to consult leaseholders on the prices tendered, since the gas suppliers were holding their tenders open for only 24 hours; and

(v) The result of such consultation as might have been possible with leaseholders would have been to delay the placing of the gas contract by at least several weeks which, according to Team Q's advice, would have added £60,000 per week to the contract price.

12. At the end of Counsel's oral submissions the Tribunal enquired what oral evidence the Applicant wished to present at the Hearing. A Witness Statement dated 5th December 2006 by Angela Dymott had been presented to the Tribunal, but she was apparently unavailable to give oral evidence and had not attended the Hearing. The Tribunal found this particularly annoying as it had a number of matters which arose from her Statement about which the Tribunal wished to question her. Mr Hutchings then asked that the two witnesses, Mr Arthur and Ms Price, who were present, may be allowed to give oral evidence and assist the Tribunal with answers to its questions. Neither of these witnesses had made Witness Statements prior to the Hearing, however the Tribunal agreed to listen to anything relevant they had to say on the matters before the Tribunal.
13. David Arthur gave evidence and said he was employed by the Applicant in the Housing Management department and he was responsible for Right to Buy and leasehold management. He had no professional qualifications and his job included preparing Service Charge Statements. He had played no part in the preparation of any Section 20 Notices under the 1985 Act and the consultation requirements did not come within his job specification. He had identified that there was a problem regarding absence of consultation and had been the person who had raised the matter originally when it was discovered. He confirmed that the contract had been entered into in summer 2005 but it was some time later that the failure to consult had been discovered. He could not remember the date when that had first been raised. Following discovery of the oversight, consideration had been given to the effect of the failure to consult. The Applicant had finally realised that if it failed to obtain dispensation from the consultation requirements, the Applicant may have found itself unable to collect more than £100 per annum from each Lessee instead of the amount of £400 per annum which was the estimated cost of the gas heating per flat.
14. Caroline Price gave evidence and said she was employed as a leasehold liaison officer by the Applicant. She had no professional qualifications. It was her job to prepare Section 20 Notices in respect of qualifying works under service charge provisions of the Flat Leases. She confirmed that she had not been aware of the requirements of the Consultation Regulations regarding qualifying long term agreements. No Notice of Intention had been given to any of the Lessees. This was the first time that such an agreement had been

entered into since the Regulations came into force in 2003. She told the Tribunal that no-one had instructed her to prepare the notices of intention or any consultation notices.

15. Mr Hutchings reminded the Tribunal that none of the Respondent Lessees had objected to the Application and they had all been given notice of the Hearing and none of them had attended the Hearing. He submitted that this in itself was evidence that the Lessees were content that the landlord had acted reasonably and invited the Tribunal to make a determination in favour of the Applicant. He admitted, on behalf of the Applicant, that no consultation at all had taken place and said that he believed procedures had now been put in place to make sure that this could not happen again.

Consideration of the law

16. Following the Hearing the Tribunal retired to consider its determination. First of all it reviewed the statutory provisions and in particular the wording of Section 20ZA of the 1985 Act. This provided that the Tribunal could make the determination if satisfied that it is reasonable to dispense with the *consultation* requirements. This seems to go a lot further than the previous jurisdiction under Section 20 (9) of the 1985 Act and the Tribunal took the view that it had a complete and unfettered discretion to make a decision as to what is, or is not, reasonable. In applying the law the Tribunal reviewed all the evidence and arguments put forward by the Applicant in support of its Application.

Consideration of the evidence

17. The Tribunal noted the Witness Statement of Angela Dymott which purported to give the reasons why the statutory consultation procedures had not taken place. One sentence in her Witness Statement says "Unfortunately, this *notice of intention consultation* did not happen because, due to a failure of internal procedures within the Council, Housing Management did not inform Property & Design of the requirement for consultation." This regrettable but honest admission of failure within the Council's administration is accepted by the Tribunal and goes to the heart of what had happened. The Tribunal would have liked to have had the opportunity to ask Angela Dymott some questions regarding the Council's internal arrangements to understand better exactly what had happened. As she did not attend the Hearing her evidence was untested and the Tribunal was left to reach its own conclusions on what other evidence was available.
18. So far as the history of the matter is concerned, a reasonable landlord would have known that a fixed term contract was approaching expiry and should have given some thought to what was to be done and what procedural steps ought to have been taken in advance of the renewal or renegotiating of the contract. Clearly the procurement department of the Council were ready to proceed to carry out their duties of advertising and tendering etc, but there was a break-down in communications with those responsible for administering the leasehold management. It is accepted by those Council employees who did attend the Hearing that the matter was overlooked. There seems to have been a

complete absence of knowledge about the statutory consultation procedures regarding qualifying long term contracts within the Council's procurement department. It is noted that Angela Dymott apparently consulted a Legal Officer Dianne Bates in July 2005 before the contract was entered into. It is not known if advice was given regarding the Council's statutory duty to consult, and if such advice was given, why it was not acted upon. This is most worrying when the Council is meant to be a public body which has statutory responsibilities as a landlord for probably several hundred former Council-owned Flats in the City.

19. The Tribunal then turned to the grounds on which the Application was based. It accepted that the Council as landlord was at all times acting in the best interests of its leaseholders. It was, of course, also looking after its own interests as the gas supply contract covered not only the 55 former Council Flats, but also their Council's own premises such as the Brighton Centre, Kings House, King Alfred Leisure Centre and the entire educational department building stock in the City. It is difficult to know without having heard any evidence as to how much weight the need to act as a reasonable landlord was given against the overwhelming wish to safeguard its own interests with regards to its own public buildings.
20. The evidence regarding the need to fix the gas price was not in dispute. Clearly as gas prices were increasing at 3% a week, it was essential that a decision was made quickly. Turning to ground 3 of the Application, where the Applicant said the analysis of the tenders was a matter for expert advice which would not have been easily or quickly explained to lay persons without experience of large scale procurement, the Tribunal was not convinced that this argument was valid. The Applicant seemed to be saying that because the Lessees were lay people they could not easily understand that the price of gas had to be fixed quickly. Despite the attempt at the Hearing by the Applicant's Counsel to place a different interpretation of this ground, the Tribunal was not impressed with this argument. The other grounds related to the matter of delay in fixing the price which would have meant the price (for the Lessees as well as the Council) would have risen.
21. The Tribunal then turned to balancing the arguments in favour of the Applicant and those against.
Matters in favour of the Applicant:
 - (a) There had been a saving in gas prices for the Lessees
 - (b) There had been no prejudice to the Lessees as the price for gas was lower and it was now fixed for three years.
 - (c) None of the Lessees had objected to the current Application.Matters against the Applicant:
 - (a) There had been a blatant disregard for the statutory consultation procedures by a landlord who should have known better. Ignorance of the law is a very poor excuse for a public body with huge resources at its disposal. Not even partial consultation had taken place.
 - (b) The Lessees Statutory Rights to be consulted had been breached and they did not have an opportunity to comment on the proposed contract before it was entered into. Some of them may have wished to express an opinion.

The Tribunal reminded itself of the "mischief" that Section 20 of the 1985 Act was designed to avoid.

- (c) The delay by the Applicant in making the current Application. The contract was signed on 19th July 2005. Counsel's "Grounds for seeking dispensation" attached to the Application Form is dated 12th May 2006, and yet the Application to the Tribunal is dated as late as 6th October 2006. Despite questions from the Tribunal at the Hearing no real explanation of the delay has been provided.

Decision

22. After a careful analysis of all the various factors for and against the Applicant, and for the reasons set out above, the Tribunal decided to make a determination in favour of the Applicant. On a balance of probabilities it is reasonable that the Applicant be granted dispensation. In making this Decision the Tribunal makes no decisions as to the reasonableness of the amount of any Service Charges to be levied in the future and either landlord or any of the Lessees are free to make any subsequent Application to the Tribunal as to liability to pay Service Charges under section 27A of the 1985 Act.
23. In making its Decision the Tribunal wishes to express its disappointment in the way in which the Applicant has behaved. On this occasion the Tribunal has given the Applicant the benefit of the doubt, but warns that on another occasion the Applicant may find that another tribunal may not be so well disposed to accept the excuses and failures in internal administration which are evident from this case.
24. The Tribunal takes the unusual step of directing that a copy of this Decision is sent to the Chief Executive of the Brighton and Hove City Council for his personal attention. The Tribunal wishes to draw attention to the failures in the Council's internal administration which have potentially serious implications for future management of the Council's former housing stock where it is a landlord. Consideration should be given to requiring those members of staff who are engaged in the procurement department that affects residential management to take full and proper training in the detail of the statutory provisions. It also seems to the Tribunal that there needs to be a proper procedure for exchanging relevant information between departments to enable the requirements to be met.

The SCHEDULE of Lessees who are the Respondents to this Application

<u>Block</u>	<u>Flat No.</u>	<u>Names</u>
Dudeny Lodge, Upper Hollingdean Road, Brighton BN1 7GT	114 131	Mrs S.K.Leeves Mr J. Mackin
Falcon Court, Swanborough Place, Brighton BN2 5QB	114 148 159	Miss E. Fox Miss J.H. Smith Mrs R. Hooda

Heron Court, Swanborough Place, Brighton BN2 5QA	72	Mr & Mrs J. Wayne
Kestrel Court, Swanborough Place, Brighton BN2 5PZ	13 27 34	Mr N. Hussain Mr & Mrs J. Gunn Mrs G. Dormer
Kingfisher Court, Albourne Close, Brighton BN2 5FX	68 78 84 87 91	Mr & Mrs D. Goldsmith Mrs S.J. Whitehead Mr E. Michaelides Mrs V. Sommerford Mr N.A. Bishop
Mayflower Square, New England Street, Brighton BN2 4NG	15 53	Mr G. Hasanic Mr G.E. Tribe
Mimosa Court, Burstead Close, Brighton BN1 7HW	3 10 11 12 16	Mr G.J. Greenfield Mr & Mrs J.C. Middleton Messrs J.R. Griston & P. Lahaise Mr W. Humphries Mr A. Walker
Nettleton Court, Upper Hollingdean Road, Brighton BN1 7GS	9 19 31 72 83	Ms B. Mantell Ms R.E.M. Lock Mr H.G. Mainwaring Mrs F.D. Bradley Forestdale Properties Ltd
St. James House, High Street, Brighton BN2 1RN	10 16 18 24 25 28 35 43 45 47 53 57 68 69 70 71 74 79 82 88 89 100 110 112 113 118	Ms A.M. Briars Ms S. Smith Ms W.L. Demain Alliance & Mutual Investment Mr W.F. Allum Mrs J. Nelson-Smith Mrs D.H. Smith Mr K. Wright Mr & Mrs A.J. Dykins Ms N. Nazari Mrs P.A. Mayle Miss A. Rose Mrs S.M. Brace Ms F. Bradley Mr & Mrs C. Bosker Mr & Mrs R. Rajkotia Mr & Mrs R. Ross Mr S. Simmonds Mr W.J. Barratt & Ms S. Pinnell Forestdale Properties Ltd Mr D. Easen Mrs E.F. Mitchell Forestdale Properties Ltd Mr & Mrs J.S. Brand Ms V. Holden/Mr A. Humphrey Mr & Mrs J.F. De Lacy
Swallow Court, Albourne Close, Brighton BN2 5FW	6 31 37	Mr. B. Bollingbroke Mr H.C. Gordon Mr T.H. Hopkinson

Dated 15th December 2006


J.B. Tarling, MCMI (Signed)

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A member of the Southern Leasehold Valuation Tribunal
appointed by the Lord Chancellor