FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00MC/LDC/2022/0032**
HMCTS	**:**	**CVP**
Property	**:**	**Dibleys, Blewbury, Oxfordshire OX11 9PT**
Applicant	**:**	**Dibleys Heritage Limited**
Representative	**:**	**RMK Goodman (Mr N Martyn)**
Respondents	**:**	**All leaseholders of dwellings at the Property (Including any of their subtenants of any such dwelling) who are liable to contribute to the cost of the relevant works**
Type of Application	**:**	**To dispense with the consultation requirements referred to in Section 20 of the Landlord and Tenant Act 1985 pursuant to Section 20ZA**
Tribunal	**:**	**Judge JR Morris**
Date of Application	**:**	**5th September 2022**
Date of Directions	**:**	**27th September 2022**
Date of Hearing	**:**	**24th January 2023**
Date of Decision	**:**	**10th February 2023**

DECISION

Decision

1. The Tribunal determines that it is reasonable to dispense with the consultation procedure required by section 20 of the Landlord and Tenant Act 1985 as set out in Schedule 1 of the 2003 Regulations.

2. The Tribunal makes the following conditions to the Dispensation Order:
   a) The Applicant is to provide in accordance with Regulation 2 of Schedule 1 of the 2003 Regulations the opportunity for the Respondents to view and take copies of the qualifying long-term agreement (the Contract). In addition, the Applicant must within 21 days of this order provide a statement to each of the Respondents setting out information explain why the Contract was entered into, the tariff, unit rate and standing charges, estimated usage and cost per occupational unit, method of payment together with information regarding the applicability of the Government's the Energy Bill Relief Scheme.
   b) The Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and for Mr Knapper's reasonable costs.

Reasons

The Application

3. An Application under 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for retrospective dispensation from the statutory consultation procedure ("the Section 20 Procedure") in respect of a qualifying long-term agreement as required under section 20 of the 1985 Act was received on 5th September 2022 ("the Dispensation Application").

4. The qualifying long-term agreement is a three-year contract for the supply of gas for the Property. The circumstances set out on the Application Form were that in or around March 2022, the Applicant entered into discussions with its broker, Mr David Lamb of Great Annual Savings, to secure a contract for the supply of gas following the expiry of the current gas contract in November 2022, as it was concerned that prices would rise in April 2022. The Applicant currently uses 631,000 units of gas annually, as a result of which, its gas contracts are classified as commercial contracts. The lowest of all quotes received was from Opus Energy. Opus had been the Applicant's supplier for the last 6 years and during that time the Applicant had always been able to negotiate a cheaper deal directly with Opus. The Applicant's Operations Manager, therefore approached Opus Energy directly and was able to obtain a lower quote, including a 0p per day standing charge, for a contractual period of 24, 36 or 48 months. However, that quote was only available for acceptance until 5pm the same day.

5. The Applicant entered into the Contract on 29th March 2022 which was to commence on 16th November 2022. No consultation was carried out prior to entering into the Contract. The Respondents were informed that a contract had

been entered into, and the reasons for this in a quarterly residents' update in the summer of 2022.

6. The Applicant said it had been advised that gas prices will not stabilise or fall until at least 2025 and therefore agreed to enter into a three-year contract. The Applicant believes that it has obtained the best deal possible, and that therefore no prejudice has been caused to the Respondents by its failure to consult.

7. Directions issued on 27th September 2023 required the Applicant Landlord to send copies of the Application Form (excluding the names and addresses of Leaseholders) and any other documents relied upon together with a copy of the Directions to each of the Respondents by 11th October 2022. On 11th October 2022, the Applicant Landlord's Representative certified that the Direction had been complied with by hand delivery on 10th October 2022.

8. The Directions required the Leaseholders who opposed the Dispensation Application to complete and send an attached reply form to the Tribunal and a statement in response to the Application, with a copy of the reply form to the Applicant, by 25th October 2022. Mr Dean Evans of 5 Dibleys responded and subsequently provided Statement of Case on 25th October 2022 to which the Applicants replied on 8th November 2022. No other representations were received from the Leaseholders.

The Law

9. The relevant law is set out in Appendix 2 of this Decision.

The Lease

10. The Applicant has been, since 18th October 1988, the freeholder of a residential development ("the Development") registered under Title Number BK66223 at HM Land Registry Copy of Entry provided). The Development includes 45 residential properties ("the Residential Properties") which are held on long leases from the Applicant as listed in the Schedule attached to the Application Form. These Residential Properties have a heating system which is fuelled by a communal gas supply which is the subject of the qualifying long-term agreement. All the Leases are for a term of 999 years. There are two types of residential Lease (collectively referred to as "the Leases"). According to the Title Number BK66223 is for a term of 999 years from 1st January 1988 and these Leases were granted on 26th August 1988 ("the 1988 Leases"). The second type of Lease is for a term of 999 years from 1st January 2019 and these Leases were granted at various dates after 27th August 2018 ("the 2019 Leases").

11. Both Leases contain a provision which requires an occupant must be at least 55 years of age. (In the 1988 Leases Clause 1 and 5.1 and in the 2019 Clause 1 and Paragraphs 1.18 and 1.20 of Schedule 3.) On examining the Leases, the Tribunal found that the Service Charge provisions required the Leaseholders to pay the

cost of the gas consumed for the heating system. In the present case this cost was incurred under a qualifying long-term agreement such liability being subject to the legislative provisions. (In the 1988 Leases Clause 1 and 5.1 and in the 2019 Clause 1 and Schedule 5.)

12. The Applicant is a company limited by shares registered at Companies House. The 45 Respondents are shareholders in the Applicant company which is non-profit making. It is not charitable nor is it a registered social landlord. Copy of the Memorandum and Articles was provided. The principal activity of the Applicant is the provision of maintenance services for members of the Company.

Description of Property

13. From the Applicant's and Mr Evans's description, the Tribunal found the Property comprises 56 1, 2 and 3 bedroom bungalows and 3 bedroom houses built in the 1950s with landscaped gardens allocated for occupation by the over 55s as a retirement complex. The only shared utility service is the heating system.

14. In May 2015, the Applicant commissioned Hoare Lea, a leading company in energy efficiency to produce a report on the communal Heating System. A copy of the report was provided. The Report stated that the Development included elderly residents some of whom are vulnerable and will need support with the cost of heating or would not want to have the added responsibility for managing their own heating system or cannot realise some of the energy reductions in use that may be possible.

Applicant's Written Statement of Case

15. The Applicant provided a Statement of Case in the Application Form for seeking retrospective dispensation from the statutory consultation procedure in respect of a qualifying long-term contract and this is summarised under the heading "The Application" above.

16. In addition, the Applicant provided a summary of the Contract as follows:

    The proposed contract ("the Contract") is a three-year contract for the supply of gas to the boiler rooms situated on the Property that provide heating to the residential properties situated on that site. The Contract commences on 16th November 2022 and expires on 15th November 2025. The Respondents will be aware from previous communications sent by the Applicant that the Contract has been secured to ensure certainty as regards energy costs in a rising market. Details of the reasons for entering into the Contract can be found in the Applicant's Summer Report 2022, its letter to the Respondents dated 5th September 2022 and in the Application.

    Estimated annual cost including professional fees (if appropriate) and VAT

The estimated annual cost of the Contract is £66,164.57 (inclusive of VAT).

Details of this cost and comparison contracts are set out in the Gas Comparison Table appended to the Application and in the Applicant's letter to the Respondents dated 5th September 2022.

There are no additional professional fees payable in respect of the Contract.

2 gas meters in Boiler House 3 and 4 have a standing charge of 31p per day and a Unit rate of 9.88p per kWh. The other 4 gas meters have a standing charge of 0p per day and a unit charge of 9.02p per kWh.

The quotation was dated 24th March 2022 at 13:48 and was available until 17:00 that day.

17. The Applicant also provided a further statement dated 8th November 2022, in answer to the Statement of Case provided by Mr Evans. The Directions did not make any provision for submitting a reply to Mr Evans Statement and Mr Evans was reluctant to have it admitted, however, the Procedural Judge in a letter dated 14th November 2022 to the parties determined that the reply should be included in the Bundle.

18. In the reply the Applicant provided explanations and made submissions with regard to the Dispensation Application, which are summarised as follows:

19. It was explained that the failure to implement the Section 20 Procedure in respect of the Contract for the supply of gas on 29th March 2022 was in part due to training in 2019 undertaken by the Applicant's Directors and Operations Manager which misled them to believe that consultation was not necessary where service charges were demanded on account. In July 2022, the Applicant's current solicitors corrected the Applicant's Directors' and Operations Manager's misunderstanding. The Applicant reviewed its position and on 5th September 2022 made the Dispensation Application and wrote to all Respondents on 6th September 2022 informing them of it. However, as set out in the Application Form, even if the Applicant had been aware of the need to consult, it would not have been possible to comply with the consultation requirements under the Act, given the time during which any quote was capable of acceptance.

20. The Applicant stated that whereas it operates as a Residents' Management Company and is run on a non-profit making basis, it is a private company limited by shares and registered at Companies House and as Mr Evans accepts, it is not a registered charity or registered social landlord.

21. The Applicant said its gas contracts are, and always has been, classed as commercial. This is because the Applicant is listed on the national database as commercial, because of its company profile and the profile class of the meters

and because gas is consumed via a commercial system and commercial boilers (there are no boilers within individual properties). The Applicant is, and always has been, classed as a business customer for the supply of gas and oil. The Applicant does, however, apply, on behalf of residents, for a reduction in the VAT payable from 20% to 5% on the basis that the supply is used wholly for domestic or non-business use.

22. It was submitted that no prejudice is caused to the Respondents by virtue of the gas being supplied under a commercial contract, as, the VAT position aside, it is likely that a domestic contract would result in higher costs. Indeed, Mr Evans has adduced no evidence to suggest that a domestic contract would give rise to a cost saving; on the contrary, the information supplied by Mr Evans from the British Gas website in his Statement of Case evidences significantly higher per kWh unit rates and daily standing charges than those secured under the Contract.

23. The Applicant referred to Ofgem Guidance (copy provided) which it said stated that prices per kWh under the Contract (£0.0988, Band 1 meters and £0.0902, Band 2 meters) and the daily standing charges (£0, Band 2 meters and £0.31, Band 1 meters) are lower than the current Energy Price Guarantee for domestic users, which from 1st October 2022 for gas is £0.10 per kWh and £0.28 per day standing charge. On the basis of current government policy, the Energy Price Guarantee is set to end in April 2023, with commentators predicting substantial increases in the unit rate and daily standing charges from that point.

24. Since the Dispensation Application was made, the Government has introduced the Energy Bill Relief Scheme to help businesses and other non-domestic customers. The Applicant will be able to benefit from this scheme on the commencement of the Contract, which will result in a £0.015 per kWh reduction in cost until 31st March 2023 (reference was made to the Government "Guidance Energy Bill Relief Scheme: help for businesses and other non-domestic customers" – copy provided). It was said that the per kWh prices will then revert to the wholesale costs, currently expected to be £0.18 pence which is twice the price payable under the Applicant's Contract. There is no cap on daily standing charges under the Energy Bill Relief Scheme.

25. It was also explained that for a number of years, the two gas meters located in Blocks 1 and 3 on the Development have failed to register gas usage, despite this having been reported to the gas supplier. This has had the effect of giving the residents of those blocks free gas and also means that the figure recorded for gas usage in previous years has been incorrect. Consequently, whilst the annual gas usage was recorded as being 631,000 kWh as at March 2022, the gas supply companies used an estimated figure of 675,000 kWh when providing quotes for the Contract. The two gas meters in Blocks 1 and 3 were replaced in 2022. As they are now recording gas consumption, the recorded gas consumption will rise significantly and the efficiency savings, which will arise as a result of upgrading the equipment, will not be evident.

26. It was added that the faulty meters have also resulted in the meters falling within different bands. The band a meter falls within is determined by reference to total annual consumption. As a result, the meters in Blocks 1 and 3 fall within Band 1, whilst the remaining meters fall within Band 2. The daily standing charge under the Contract is £0 for the Band 2 meters and £0.31 for the Band 1 meters (compared with £1.08 and £0.21 under the current contract). As the meters for Blocks 1 and 3 have now been fixed, they will fall within Band 2 after the first year due to an increase in recorded gas usage.

27. The Applicant went on to state that there is a difference between the cost of the Contract based on estimated usage of 675,000 kWh per annum and the estimated heating costs included in the service charge budget for 2022/2023, as the Applicant considers various factors when estimating those costs, for example, possible changes in weather. It was said that 2022 was a record-breaking period of heat throughout the summer, which lowered gas consumption and, whilst it is expected that UK temperatures will generally increase over time, such record-breaking temperatures are not expected year on year. The Applicant said it adopted a cautious approach to service charge budgeting so as to avoid the risk of making a loss. Any difference between the amount collected via the service charge in respect of heating and the actual cost of heating is retained in a heating reserve fund, which can then be used to offset future costs, if necessary.

28. Gas costs are calculated for the purposes of the estimated service charge per property by dividing the total gas cost by the total BTU allowance for all properties, multiplied by the BTU allowance for that property. The BTU allowances were calculated at the time the Estate was designed and built and the communal heating system installed and are as follows:

Property Type	No. of Radiators	No. of Properties	BTU Allowance	Total BTU Allowance
1 Bedroom (small)	3	12	14,500	174,000
1 Bedroom (large)	3	11	14,500	159,500
2 Bedroom Bungalow	3	14	14,500	203,000
3 Bedroom House	3	2	14,500	130,500
3 Bedroom Bungalow	6	9	23,000	46,000
Total				713,000

29. The current estimated total gas cost for 2022-23 is £68,000, so, for example, the annual estimated cost for a small one-bedroom property is 68,000/713,000 x 14,500 = £1,382.89. Calculated on this basis, the total estimated monthly gas cost per property is as set out below along with the total monthly heating cost:

Property Type	Monthly Gas Cost	Monthly Maintenance	Monthly Heating Reserve	Total Monthly Heating Costs

	£	£	£	£
1 Bedroom (small)	£115.24	£8.47	£3.65	£127.36
1 Bedroom (large)	£115.24	£8.47	£3.65	£127.36
2 Bedroom Bungalow	£115.24	£8.47	£3.65	£127.36
3 Bedroom House	£115.24	£8.47	£3.65	£127.36
3 Bedroom Bungalow	£182.80	£13.44	£3.65	£199.89
Total				713,000

30. It was submitted that the average energy bills calculated by British Gas are not an appropriate guide for comparison, as the properties on the Development are not average users. An average property has its own boiler controlled by the residents of that property. Residents of properties on the Development cannot control the communal boilers.

31. The communal heating system is designed and maintained to allow the delivery of at least 20-21 degrees heat in each property (the Applicant follows the AGE UK guidance of 20-21 degrees rather than the NHS guidance of 18 degrees due to the age of the majority of residents).
Consequently, the boilers run if –
1) the vented boiler house air temperature between 05:50am an 11:00pm is below 20 degrees;
or
2) the external air temperature between 11:00pm and 05:50am is below 8 degrees.

32. It was said that if a boiler is running it consumes gas. The amount of gas usage then increases or decreases according to the residents' use of the thermostatic radiator valves in their properties. Residents on the Development have differing needs as regards heating depending on factors such as age, health and mobility. The residents on the Development range in age from 55 to late 90's, with many of them having complex health needs and mobility issues. Whilst the Applicant does not have responsibility for care, it does have an obligation under the Leases to provide heating.

Respondent's Written Statement of Case

33. Mr Evans provided a written Statement of Case in which he referred the Tribunal to the tribunal decision case reference LON/00AM/LDC/2019/0174 in which Origin Housing Limited (copy provided) applied for dispensation from the Section 20 Procedure for a qualifying long-term agreement for the supply of energy to approximately 6,700 households in various regions. The contract was for £5,000,000, equating to £248.76 per residential unit per year. Before starting the tendering process, the applicant sent a notice of intention by first class post to all the respondents. They advised of the nature and requirements of the proposed contract; invited observations and nominations for alternative contractors and

invited them to respond to the tribunal if they opposed the application. Dispensation was granted unopposed.

34. Mr Evans made a number of points which are summarised as follows:

Critical of Applicant's conduct re Section 20 Procedure generally

35. Mr Evans was critical of what he considered amounted to a 'rubber stamping' of such applications due to the spot pricing of energy whereby purchasers were obliged to accept a price within a very short time of the quotation giving no time for full compliance with Section 20. Nevertheless, given that situation he submitted that Origin Housing Limited had at least complied with the first part of the Section 20 Procedure, explaining the situation to the tenants and giving them an opportunity to make observations and nominate suppliers. In the present case the Applicant had not complied with the Section 20 Procedure at all.

36. Mr Evans was critical of the Applicant's conduct in general with regard to the Section 20 Procedure. He said that the Applicant had failed to comply with the consultation requirements on other occasions and referred to the previous fixed term contract for gas between 2017 and 2022. He also questioned whether there would be compliance in respect of future works of upgrading the heating system and roof repairs. He said that the Applicant should have known about its obligations to consult having the benefit of professional expertise and that although the failure to comply with the requirements had been admitted, no explanation had been given for the delay of 2 months from the time the Contract was entered into before informing the Tenants in the Summer Report or for the delay of approximately 5 months before making the Dispensation Application.

37. Mr Evans said that there was a general lack of transparency and accountability and due diligence. Mr Evans stated that the Landlord is under a duty to consult and notify Tenants in a timely manner which it did not do, even after the Dispensation Application the Operations Manager did not facilitate the receipt of documents that had been requested.

Failure to consult caused prejudice due to lack of information and explanation

38. Mr Evans said that the failure to consult had caused prejudice due to the lack of information or explanation about the Contract. The Tenants had been deprived of the opportunity to question key elements of the Contract that had been entered into and which they would be bound by for three years which may have significantly reduced the cost.

Lack of explanation re commercial v domestic contract

39. Mr Evans said that because there was no consultation the Tenant had not had an opportunity to have explained why the Contract is deemed to be 'commercial' and

not 'domestic', as well as how this is of any benefit to the Tenants. Mr Evans said that the Tenants are not privy to the terms of the 'commercial contract'. Mr Evans said that Ofgem Guidance states that the size of consumption is not the defining characteristic determining whether or not a customer should be considered a Domestic Customer or Non-Domestic Customer and so he did not accept that the high usage was a definitive factor.

40. Mr Evans questioned why the Applicant had entered a commercial contract. He referred to the Opus website which stated that they only supply 'businesses' and 'business energy is different to domestic energy'; with key differences:
    - Different environmental taxes and levies
    - Different and more complex contract types
    - No consumer discounts or price cap protection

41. Mr Evans said that the gas is bought collectively for a wholly tenant owned non-commercial residential management company for the purpose of providing heat to the leaseholders or shareholders of the Company and to domestic premises. Mr Evans said that the Applicant had admitted that no aspect of the consultation under the Act has been undertaken and that the Dispensation Application did not afford an opportunity to see beyond the Applicant's claim of the Contract being the 'best deal' and the possibility of 'paying more than would be appropriate'. The lack of consultation had meant he had no opportunity to test the Applicant's claims regarding the Contract.

Lack of information

42. Mr Evans said that if he had been consulted before 29th March 2022 when the Contract was entered into, he would have sought information on the following:

    a) <u>Discrepancies</u>
    The Summer Report (copy provided) circulated on 31st May Report stated that the rate was 9.02 p per KWh with 0p per day standing charge yet the more detail information produced by Opus showed the rate for two of the six boilers to be 9.88p with a standing charge of 31p.

    b) <u>The alarming increase in usage</u>
    The usage in the year 2016 to 2017 was 546,506 yet the estimated usage for 2022 to 2025 is 675,000, after the costly replacement of the heating system which should have resulted in a reduction in usage. Mr Evans provided quotes from the Board of Director's Summary of end of year accounts for 2016, Board of Director's Report at Annual General Meeting 3rd December 2021 and the Summer Report of 31st May 2022 which referred to major works on the communal heating system including new boilers and new radiators, which it was claimed was to reduce the gas usage.

c) The basis of the quotations
The Applicant states that the current annual usage is 631,000 units of gas yet, the quotes are based on a usage of 675,000 units of gas which is 15% higher. In addition, the Contract agreed is for £66,164.57 yet, the service charge budget for 2022-2023 shows that the heating costs are expected to be £68,000 which is 15% higher than the annual estimated usage. Also, it is not clear why two of the six boiler houses have standing charges and a different unit rate.

d) The cost per property
The annual gas cost per property as set out in the 2022 Annual report is above the average energy bill on the British Gas website and not significantly under the Ofgem cap as claimed.

43. In support of his statement that if he had been given the opportunity to make observations, he would have identified specific points to which he would require a response in particular the Landlord should be required to provide:
1. The Contract details and a clear and concise explanation regarding the reasons why it is a 'commercial contract'.
2. The final invoices for the duration of the Contract with Opus to enable the pattern in the annual usage to be identified and whether the residents have potentially been overcharged.
3. The four quotes obtained, with details according to my email on 12th September 2022 of:
• Tariff information – dual fuel
• Tariff type, in other words: Fixed or Variable
• Current Annual Usage
• Daily Standing Charge
• Unit rate
• Meter type
• Payment Method quarterly/monthly
• Exit fee
4. Information on how the Landlord will apply the government's provisions under the Energy Bill Relief Scheme;

44. He added that he would still like to know this information and would like there to be a condition to any dispensation order, if granted, that the information be provided.

45. Mr Evans was dismissive of the Applicant's statement that it could have entered a one-year contract which would not require a Section 20 Procedure with British Gas at a cost of £120,727.55 as this would have been unreasonable.

46. Mr Evans appreciated that dispensation may not be refused solely because a landlord seriously breaches the consultation requirements. However, he submitted that he was prejudiced by the failure to provide information which, if provided might have saved expense. He was unable to obtain alternative

quotations and terms to compare the Contract with any other that might be obtained because he had not either as part of the Section 20 Procedure or as part of the Dispensation Application received all the relevant information.

47. Mr Evans requested that the Tenants should not be liable for the Landlord's costs incurred in respect of the Dispensation Application.

48. Mr Evans also referred to the differences between the 1988 and 2019 Leases. The points raised were not within the jurisdiction of the Tribunal in respect of this Application.

The Hearing

49. A hearing was held on 24th January 2023 which was attended by Ms Ellodie Gibbons of Counsel (instructed by Mr Nicholas Martyn, Solicitor of RWK Goodman), Mr Adrian Curtis, Operations Manager for the Applicant and Mr Charles Knapper, Solicitor and Mr Dean Evans and Mrs Evans Respondent Tenants. The Hearing was also attended by a number of Respondents who did not make representations but observed the proceedings.

50. At the hearing both Ms Gibbons for the Applicant and Mr Knapper for Mr Evans confirmed the points made in their written Statement of Case. They went on to reinforce these points and to make submissions which are précised and paraphrased as follows.

51. Mr Knapper for Mr Evans raised as a particular issue the question of whether the Applicant could and should have entered a domestic rather than a commercial contract. He said that it had been assumed that networked or communal heating systems were bound to enter commercial contracts for supply. He questioned this and said he could not find any definitive reason why an entirely residential development should be obliged to obtain their energy supply under a commercial contract.

52. Mrs Evans said that the issue regarding whether or not the supply was to a domestic or commercial premises was important. Vulnerable domestic users, such as the residents of the Development, had protection from the supply being cut off in the event of non-payment. This was not available to commercial users. She added that the lack of information before the Contract was entered into meant that the Tenants did not know the likely cost of the gas supply. The basic information as to cost was only given after the Contract was complete. She also said that her concern was as much about the increased number of units that were being used after the supposed improvements to the heating system as the cost.

53. Mr Evans reaffirmed the points that he had made in his written Statement of Case. In particular, he said that there were matters that he would have raised had he had the opportunity by way of the consultation. He said the Applicant had failed to give the Respondents any information about the Contract before it was

entered into and if they had they might have been able to have reduced the costs to be incurred by requiring the Applicant to negotiate the type of contract (domestic or commercial) the type of tariff (dual fuel and fixed or variable), the rates and charges and the method of payment.

54. Mr Evans added that he had asked for detailed information regarding the Contract after he was aware that it had been entered but was only given the most basic information. Mr Evans referred to his email of 12th September 2022 to Mr Adrian Curtis, the Operation Manager, in which he requested to be provided with copies of the quotations and details of the Contract as mentioned above. He said none of the information had been provided either following his email or the Application.

55. In response, Ms Gibbons said that notwithstanding the Applicant's non-compliance with the Section 20 Procedure, Mr Evans had not provided any evidence to show that Mr and Mrs Evans had been prejudiced by the non-compliance.

56. Mr Knapper summarised Mr Evans's written Statement of Case in his closing submission. He also referred to a statement that he had made at the beginning of his presentation at the hearing in which he said that the Applicant in a letter dated 13th November 2022, had, in his view unfairly, sought to dissuade Mr Evans and any other Respondent from objecting to the Dispensation proceedings. He felt that the wording was such as to give the impression that any Tenant who did object would incur the other Tenants in unnecessary expense which could cause discontent and discord between Tenants. Mr Knapper went on to say that his client, like any Respondent was entitled to and was justified in raising objections to the Dispensation Application and that he should not have to bear the costs of obtaining legal representation alone. He added that the way the matter had been dealt with meant the Contract was a *fait accompli*. He appreciated that the Tribunal could not in making its decision take into account that the Landlord was wholly owned by the Tenants, nevertheless, whatever the decision, the Tenants would be liable under the three-year Contract either as Tenants or as shareholders of the Landlord. Even so, he submitted that, as Tenants they had been prejudiced by the Applicant's failure to consult. He submitted that if it had done so, providing the information referred to, on the balance of probabilities the observations that his client would have raised would have resulted in a more cost-effective contract.

57. Ms Gibbons said that the Applicant through its Operations Manager had negotiated a commercial contract, as had been done previously, which was a better deal than one that could have been negotiated by the Applicant's broker. No evidence had been adduced by Mr Evans, upon whom the burden of proof rested, to show that a more cost-effective contract, whether domestic or commercial, could have been negotiated as a result of any observations that he would have made had a consultation taken place.

58. Ms Gibbons referred to the British Gas quotation that the Applicant obtained to illustrate the high cost of gas in the market place and the need to negotiate contract which required the acceptance of spot prices. A one-year domestic Contract for which no consultation would be required would have cost twice the amount of a three-year commercial contract as negotiated by the Applicant.

59. With regard to costs Ms Gibbons said that the Applicant did not apply for costs under Rule 13 of the Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013 but did not consider that the Tribunal should make a condition that the Applicant must pay Mr Evans's legal costs. Mr Evans knew that dispensation may not be refused solely because a landlord seriously breaches the consultation requirements and he had adduced no evidence of prejudice caused by the lack of consultation. The Tribunal had considered that the matter was suitable to be dealt with on the basis of paper submission alone but Mr Evans had requested a hearing incurring further tribunal fee of £200.00 and the cost of counsel to represent the Applicant company.

Determination

60. The only issue for the Tribunal in this Application is whether it is reasonable to dispense with the statutory consultation requirements for a qualifying long-term agreement as required under Regulation 5(1) and Schedule 1 of the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). Pursuant to Section 20 of the 1985 Act, Regulation 3(2) of the 2003 Regulations, subject to exceptions not applicable here, defines a qualifying long-term agreement as being one entered into by or on behalf of the landlord for a term of more than 12 months. Regulation 4 states that if the contribution of any tenant to the costs incurred under such an agreement exceed £100.00 in any accounting period, then the consultation requirements must be complied with or the contribution is capped at £100.00 unless dispensation is granted under section 20ZA.

61. This decision does not affect the Tribunal's jurisdiction upon any future application to make a determination under section 27A of the 1985 Act in respect of the reasonableness extent, quality or cost of the qualifying long-term agreement. Those matters are not in issue in this case.

62. In determining whether or not dispensation should be given and the extent of such dispensation the Tribunal took into account the decision in *Daejan Investments v Benson* [2013] UKSC 14. Lord Justice Gross said that "*significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion under s.20ZA(1)*".

63. In addition, Lord Neuberger said that the main issue and often the only issue is whether the tenants have been prejudiced by the failure to comply:
Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than

would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements. [44]

64. The prejudice must be directly related to the lack of consultation and generally a matter that cannot be remedied by an application under section 27A of the 1985 Act. An example applicable to both qualifying works and long-term agreements would be that the failure to comply with the consultation procedure deprived the tenants of the opportunity to nominate a contractor or supplier who if allowed to tender would have given a lower quotation or to seek certain provisions to be included in the contract which would have been advantageous to the tenants and made the contract more cost effective. Once the contract is entered into the opportunity to make such nomination or observation is gone and the tenants are left paying higher costs for the same or a less good service than might otherwise have been obtained.

65. The consultation procedure set out in Schedule 1 of the 2003 Regulations is summarised in Appendix 2 to this Decision and Reasons.

66. The Tribunal finds, and the Applicant admitted that none of the consultation requirements referred to in Section 20 of the Landlord and Tenant Act 1985 and as set out in Schedule 1 of the 2003 Regulations 2003 have been complied with.

67. As illustrated by the tribunal decision as in the case of Origin Housing Limited, case reference LON/00AM/LDC/2019/0174 referred to by Mr Evans it would have been possible to have served on the Tenants within the latter months of the 2017 to 2022 contract, a Notice of Intention stating that the Contract for gas would expire on 16th November 2022. The relevant matters which such a Notice should have included are an explanation for selecting a commercial contract and the advantages and disadvantages of such a contract, the procedure which the Applicant intended to follow in obtaining quotations through its broker, David Lamb of Great Annual Savings and that a better price might be obtained by the Applicant's Operations Manager approaching supply companies directly, as had been done previously. The Applicant was aware of, and should have explained to the Tenants, the pressures on the market place in advance of seeking quotations and that a decision may have to be made within hours in order to get the best value, with no time to report back to the Tenants to request observations on the quotations obtained. The Applicant could have made an application for dispensation from the latter part of the procedure when serving the Notice of Intention, as did Origin Housing Limited. Some estimate of the likely increased cost could have been obtained from the broker to include in the Notice. The Notice should have been served sufficiently in advance of obtaining quotations that the requisite period for Tenants to make observations and nominate suppliers could have been given.

68. The Tribunal considered whether, notwithstanding that none of the above was undertaken, the Respondents were prejudiced.

69. Firstly, the Tribunal addressed Mr Evans's allegation as to the conduct of the Applicant with regard to compliance with the Section 20 Procedure for other projects. The Tribunal can only take account of compliance with the section 20 procedure in respect of this Dispensation Application.

70. Secondly, the Tribunal considered the issue regarding the commercial and domestic contracts.

71. Mr Evans said that the lack of consultation prejudiced the Respondent Tenants because a commercial contract was entered rather than a domestic one which in his view would have provided better value.

72. The fuel for network or community heating systems is obtained under a contract between a landlord and a supplier. As most landlords are businesses and so commercial the contract for the supply of fuel is a commercial contract even though it is used to heat domestic residential homes. The contract between a landlord and a tenant for the supply of heating is the lease under which the tenant agrees to pay the cost of the fuel purchased by the landlord from the supplier.

73. Mrs Evans expressed concern at the lack of protection for Tenants who are vulnerable persons which would be afforded them under a domestic contract. The protection she refers to would only be available if the contract for the supply was directly between a tenant and a supplier. In this instance the terms of supply are within the Lease between the Tenant and the Landlord.

74. Mr Knapper questioned why an entirely residential development should be obliged to obtain their energy supply under a commercial contract. The reason put forward by the Tribunal is that the contract is between the commercial landlord and the commercial supplier. However, there are exceptions in respect of landlords which are wholly owned by tenants whose leases are for domestic residential premises. Therefore, in this case, the Landlord could have sought to enter a domestic contract.

75. Although Mr Evans is correct in his submission that a domestic contract could have been entered into, he adduced no evidence to show that a domestic contract would either generally or specifically have been at a better price and/or conditions than the commercial one actually entered. The onus is on the Respondent Tenants to show that they were prejudiced. This requires Mr Evans to show that had he been consulted he would have nominated a supplier who would have offered better rates and terms than those actually obtained, whether under a commercial or domestic contract. Mr Evans did not adduce any evidence to demonstrate this.

76. Thirdly the Tribunal considered whether the Respondents were prejudiced by the lack of information as set out in Mr Evan's Statement of Case confirmed by Mr Knapper at the hearing. Even though Mr Evans did not receive the details of the Contract asked for as part of the consultation it would not have prevented him from obtaining quotations with which he could challenge the Contract as to its rates and terms.

77. As stated above, the onus is on the Respondent Tenants to show that they were prejudiced. This requires Mr Evans to show that had he been consulted and provided with the information he now requests this would have resulted in a more cost-effective contract. Although Mr Evans did not have all the information regarding the Contract, for the purposes of these proceedings he did have an opportunity to obtain evidence of alternative quotations and terms from suppliers which could subsequently be submitted to the Tribunal and compared with the Contract. If the quotations and terms obtained by Mr Evans were more advantageous, then the prejudice could be addressed either by the Tribunal refusing dispensation or allow the dispensation with a condition awarding a sum which would reflect the differential between the cost of the Contract and the quotations and terms obtained by Mr Evans. However, Mr Evans did not adduce this evidence.

78. The Tribunal finds that the Respondents have not adduced evidence to show they have been prejudiced by the lack of consultation on this occasion and it determines that it is reasonable to dispense with the consultation procedure required by section 20 of the Landlord and Tenant Act 1985 with regard to the consultation requirements as set out in Schedule 1 of the 2003 Regulations.

79. The Tribunal then considered whether any conditions should be included in the order for dispensation. It found that the Applicant had failed to provide a statement of all the relevant matters which should have been described in the Notice of Intention, it had also failed to provide copies of the estimates obtained. The Applicant has in the course of these proceedings provided information which should have been in the Notice of Intention. To ensure that all the Respondents are aware of the terms of the qualifying long-term agreement for which they are paying, the Tribunal orders that the Applicant provide in accordance with Regulation 2 of Schedule 1 of the 2003 Regulations the opportunity to view and take copies of the Contract. In addition, the Applicant must within 21 days of this order provide a statement to each of the Respondents setting out information to explain why the Contract was entered into, the tariff, unit rate and standing charges, estimated usage and cost per occupational unit, method of payment together with information regarding the applicability of the Government's the Energy Bill Relief Scheme.

80. The Tribunal finds that the Applicant did not attempt to comply with the consultation procedure under section 20 of the 1985 Act and as set out Schedule 1 of the 2003 Regulations. The Contract was completed on 29th March 2022 and yet the Respondents were not informed of the Contract until the Summer Report

of 31st May 2022. The reason given for the non-compliance that the Applicant's Directors and Operations Manager did not know that they had to provide the information is not considered reasonable. The role that these persons play requires them to be aware of the statutory obligations especially where large sums of money are to be paid by vulnerable persons. In the circumstances the Respondents were entitled to object to the Dispensation Application and Mr Evans was entitled to present his submission at an oral hearing.

81. Taking this into account, the Tribunal makes it a condition of granting the dispensation that the Applicant shall be responsible for all the costs the Applicant has incurred in respect of the Dispensation Application and for Mr Knapper's reasonable costs.

82. A number of matters, including past invoices, gas usage increasing instead of decreasing following the updating of the heating system and contributions to the reserve fund, were referred to by Mr and Mrs Evans. These are not addressed by the Tribunal as they are not within the Tribunal's jurisdiction in respect of this Dispensation Application.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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.

APPENDIX 2 - THE LAW

1. Section 20 of the Landlord and Tenant Act 1985 limits the relevant service charge contribution of tenants unless the prescribed consultation requirements have been complied with or dispensed with under section 20ZA. The requirements are set out in The Service Charges (Consultation Requirements) (England) Regulations 2003. Section 20 applies to qualifying long-term agreements if the relevant costs incurred exceed an amount which results in the relevant contribution of any tenant being more than £100.00 over an accounting period. A qualifying long-term agreement is an agreement entered into by a landlord with a wholly independent organisation or contractor for a period of more than 12 months. Failure to comply with the procedure or to obtain dispensation will mean the landlord cannot recover more than £100.00 of the relevant costs.

2. The consultation provisions appropriate to the present case are set out in Schedule 1 to the Service Charges (Consultation etc) (England) Regulations 2003 (SI 2003/1987) (the 2003 Regulations). The consultation procedure is summarised as being in 4 stages, as follows:

   A Notice of Intention to enter a qualifying long-term agreement must be served on all the tenants. The Notice must describe the "relevant matters", which are the goods or serves to be provided or the works to be carried out under the agreement, or must specify a reasonable time or place where the relevant matters can be inspected (as specified in paragraph 2 of Schedule 1), and invite observations and the nomination of contractors with a time limit for responding of no less than 30 days. The landlord must have regard to the observations made.

   Estimates must be obtained from contractors identified by the landlord (if these have not already been obtained) and any contractors nominated by the Tenants must be invited to provide estimates.

   The landlord must prepare at least two proposals in respect of the relevant matters. Where reasonably practicable the landlord shall provide an estimate of the relevant contribution for each tenant's unit of occupation. Where this is not reasonably practicable the landlord shall estimate the total amount of expenditure for the building or a statement of the cost or rate. Each proposal shall contain a statement as to the provisions (if any) for variation of any amount in or to be determined under the agreement and a statement as to its duration. Where the landlord has received observations that landlord shall summarise them and set out a response. The landlord shall give notice of the proposals in writing to each tenant with a copy of each proposal or must specify a reasonable time or place where the proposals can be inspected (as specified in paragraph 2 of Schedule 1), and invite observations with a time limit for responding of no less than 30 days. The landlord must have regard to the observations made.

Where the landlord enters into an agreement relating to the relevant matters the landlord shall within 21 days of entering into the agreement give notice in writing stating the reasons for entering the agreement to each tenant giving the reasons for awarding the contract and, where the tenants made observations, to summarise those observations and set out the landlord's response to them or must specify a reasonable time or place where the information can be inspected (as specified in paragraph 2 of Schedule 1).

3. Section 20ZA allows a Landlord to seek dispensation from these requirements, as follows –

(1) Where an application is made to a 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.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"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—
if it is an agreement of a description prescribed by the regulations, or in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
b) to obtain estimates for proposed works or agreements,
c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) and (7)… not relevant to this application.