

**IN THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER) (MIDLAND RESIDENTIAL PROPERTY)**

**IN THE MATTER OF THE LANDLORD AND TENANT ACT 1985
VARIOUS PROPERTIES**

BETWEEN:

MIDLAND HEART LIMITED

Applicant

-and-

LEASEHOLDERS OF MIDLAND HEART

Respondents

**SKELETON ARGUMENT OF
THE APPLICANT**

Hearing: 25 July 2024

1. This skeleton argument is filed on behalf of Midland Heart Limited ('A') in support of its application for dispensation from the need to statutorily consult its leaseholders with respect to energy supply contracts for supplies in the period from 1/10/24 to 30/09/28. References herein shown [**thus**] are to pages within the **amended** hearing bundle prepared by A's recently instructed solicitors. That bundle is the subject of an outstanding application, which will need to be addressed at the outset of the application.
2. The respondents to this application ('R') consist of 1829 leaseholders, who live across a large number of A's developments. In addition to the properties in which the Rs live, A has various sheltered housing / supported living schemes and other property interests such as its head office and depots. The energy supply contracts A has entered into cover not only the supplies to the properties in which R live, but also other property owned

by A; the interests of A and R are aligned in seeking the most competitive price for the supply of energy alongside mitigating risks in a very volatile market.

3. Directions were given at an early stage for the service of this application upon R [14] and for keeping leaseholders updated. A website was set up for this purpose: <https://www.midlandheart.org.uk/dispensation/> . A copy of the Tribunal's decision and rights of appeal will be posted on that website in due course. Of all the Rs given notice of the application, 245 responded to it. Only 11 of those responses indicated an objection to the application. Those objections are found at [54]-[78].
4. A does not know how many Rs will attend the final hearing of the application on 25 July 2024, however, will be attending to present its application and address any queries the Tribunal or any of the 11 objecting Rs may have (two of A's officers will attend for that purpose – no direction for witness statements was provided but A is content to aim to address any queries leaseholders have relating to the energy supply contracts).

Outstanding application

5. On or about 16 July 2024, A (by its recently instructed solicitors) applied to rely upon an amended hearing bundle, being the bundle to which page references in this document are made. That application has not (at the time of drafting this skeleton argument) been addressed. It is worth noting:
 - a. The original hearing bundle (prepared by A without legal assistance) was regrettably light on documents, for instance, not containing all of the responses from the Rs, just a summary.
 - b. Save for the (lengthy) contracts themselves, and a few background tender documents, the rest of the documents within the revised bundle are documents all parties should have had separately in any event.
 - c. The new documents making up the rest of the bundle (page 88 onwards) are:
 - i. The contract for the supply of gas, as entered into by A in late 2023 [88]

- ii. The contract for the supply of electricity, as entered into by A *recently* [140]. This is a very lengthy document as it sets out supply details for every single development in A's portfolio; there is no need to consider those pages in any detail save the main 'Term Sheet' itself and related docs, found at [140] & [1791].
 - iii. There are 23 additional pages of background information, being the results of testing the market and other market based data, as provided to A in several presentations to it by its energy broker, Inspired Plc: [1802]-[1824]. These may assist in answering a few of the Rs' questions about the process followed.
6. A will invite the Tribunal to consider the whole of the revised bundle so that it has a complete picture of the application before it. Save the two contracts and the short presentation, the remainder of the bundle is documents the Rs have already had previously.

The Application

7. A seeks dispensation from the statutory consultation requirements, pursuant to s20ZA of the Act. The basis for seeking dispensation is set out in A's application form and statement in support, principally at [7], [9-10], and [42].
8. By way of summary, the broad background to the application is as follows:
 - a. A is a housing association, owning and managing a large number of properties each of which has an electricity supply and some of which have a gas supply. Those properties include leasehold blocks, as well as sheltered housing / supported living schemes, and A's own head office and depots. The electricity supplies in the leasehold blocks relate to the costs of the common parts electricity supply (lighting / heating etc – will vary by block). Some blocks have gas supplies e.g. for heating, although this is less common. Typically the gas costs per year in leasehold blocks are well under the £100 statutory limit (e.g.

£10-12) however dispensation is nonetheless sought as a matter of good order and bearing in mind prices are not fixed. Electricity costs are usually higher (due to higher consumption).

- b. A procures its energy on a bulk basis so as to secure the best possible deal for it and leaseholders. It aims to purchase energy on the wholesale markets by ‘hedging’, purchasing blocks of energy for periods of time when prices appear favourable (see, e.g. [1823]). It is assisted in doing so by its energy broker (Inspired Energy Plc, who are contracted to 30/9/28). By doing so, for instance, it protected itself and service charge payers from the substantial rise in gas and electricity costs in recent years following the invasion of Ukraine.
- c. These arrangements are put in place over 4 year periods. The current period ends on 30/9/24 (energy is all contracted to that date [9]), and the new arrangements will be in place from 1/10/24 to 30/9/28; it is that period that this dispensation application relates to.
- d. Because the energy markets are particularly volatile, it is not possible to get a competitive quote for energy to cover any particular period that would be held for the duration of a 30 day+ consultation period as the consultation requirements dictate. Prices are typically only held for a few hours: [10] / [43-44]. It is important to note therefore that it would not be possible to comply with the consultation requirements. That means, absent dispensation, A could only enter into contracts lasting no more than a year. With dispensation, A can move quickly – for instance, as detailed below, the electricity supply contract from 1/10/24 only relates to 12 months of supply; when a good opportunity arises between now and 30/9/25, A wishes to be able to quickly capitalise upon it so as to secure the best price for the following periods; it cannot do so if it must follow the consultation requirements.
- e. In addition, the market does not always look favourably upon energy contracts where there are a large number of small volume supplies (they prefer to provide a large consumption site with a single meter rather than have the hassle of lots

of meters measuring low consumption). That is borne out by the tender exercise undertaken in 2023: [1804]

- f. There are real benefits to being able to contract for longer periods of time (as A has in fact done for the supply of gas). There are significant costs of entering into new contracts, both time and money – for both parties. The ability to buy forward more than one year means prices are cheaper: [42]. Buying further forward insulates A and R from market movements: [42], providing longer term and more stable pricing (improving budgeting). There are other ancillary benefits. But most importantly, data shows that prices tend to be cheaper when buying over a 3-4 year period rather than annually: [44].
9. A has entered into a contract with SEFE for the supply of gas, covering the period 1/10/24 to 30/9/28: [88]. Whilst the date isn't apparent on the version in the bundle, it was entered into in late 2023, enabling A to start to purchase on the wholesale markets blocks of its energy requirements for the 1/10/24 onwards period already (it would not have been advisable to wait until close to the start of the period). The operation of this contract is complex, but in short, it gives A access to purchase blocks of energy on the wholesale market for supply over the 4 year period, with SEFE administering those purchases / trades and charging the cost of the supply to A. It is a 'flexible' contract in that the prices for the supply are not fixed; A is therefore able to capitalise on market movements by purchasing at appropriate points, and reduce risk of impact from price 'spikes'.
10. Whilst the SEFE contract covers supply over a 4 year period, there is provision for it to be terminated on each anniversary of the first supply date: §10.1 [124], albeit subject to a termination payment (which may be in either direction – by A to SEFE or the other way around, depending on the calculation at the time).
11. More recently, A has entered into an electricity supply contract with EDF. Whilst A's preference was for a similar 'flex' contract enabling it to purchase its energy in blocks over the 4 year period, the tender exercise [1804] did not produce any operators in the market willing to contract on a flex basis; this will be kept under review. Accordingly, the EDF contract is a 12 month fixed price contract. A will, of course, be looking to

make arrangements for a further electricity supply contract for the following period, potentially on a flex basis if possible, or further a further fixed period, taking advice from Inspired. A copy of the EDF contract (recently entered into) is at [140] – covering 1581 metered supplies, which are then individually detailed in the pages that follow. Unit prices do vary slightly from site to site due to varying transmission costs etc..

12. The various responses of the Rs to this application are found at [54]-[78], with A's broad reply at [79]. It is worth noting that the energy price cap did not apply to 'bulk' supplies, and it is of course impossible to know what, if anything, a future government might put in place to protect residents from rising energy costs if another spike does occur. The whole point of A entering into the gas contract it has is that it can protect against future spikes by buying energy in blocks now. And if energy costs fall over the period A can capitalise on that because it is not buying the whole 4 year block at once.

The Law

13. By section 20ZA(1) of the Landlord and Tenant Act 1985:

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.

14. When considering whether it would be reasonable to dispense with the requirements, the Tribunal's focus will be upon any prejudice identified by leaseholders that flows from the failure to follow the consultation requirements: Daejan Investments Ltd v Benson [2013] 1 WLR 854.
 - a. The circumstances in which an application might be made are 'almost infinitely various' (at §41), so no fetter should be placed on the Tribunal's exercise of the s20ZA(1) jurisdiction beyond what can be gathered from the Act itself and any other admissible material.

- b. The purpose of the consultation requirements is to protect tenants from (i) paying for inappropriate works, or (ii) paying more than would be appropriate.
- c. The focus should therefore be upon the extent if any to which the tenants were prejudiced in either respect by the failure of the landlord to comply: §44-45.
- d. Dispensation should normally be granted where the extent quality and cost of the works were in no way affected by the failure to comply with the consultation requirements.
- e. Dispensation can be sought in advance of doing works / entering into a qualifying long term agreement, or can be sought after the event.

The Order Sought

15. It is A's case that the Rs cannot show any relevant prejudice flows from the failure of A to follow the formal consultation requirements, and that dispensation ought to be granted for the 4 year period 1/10/24 to 30/9/28 unconditionally. That said, A has no objection to the Tribunal making such dispensation conditional upon:

- a. A publishing a copy of the Tribunal's determination (and information about rights of appeal) on A's website, sign-posted from the home page, as directed previously: see direction 19 at [20]; and,
- b. A not passing on its costs of bringing this application to the Rs by way of service charge (or otherwise). A confirms it has no intention of doing so, whether or not the dispensation is granted or made conditional upon such a requirement.

16. For all the above reasons, A seeks an order from the Tribunal granting it dispensation from the need to statutorily consult the Rs with respect to energy supply contracts that are qualifying long term agreements that are entered into by it for the supply of energy to its leasehold properties for the period 1 October 2024 to 30 September 2028, to include:

- a. The fixed price electricity supply contract already entered into with EDF for a 12 month supply period from 1/10/24.
 - b. The flexible gas supply contract already entered into with SEFE Energy for supply of gas from 1/10/24 to 30/9/28.
 - c. Such further gas and or electricity supply contracts as A may enter into from the date of the hearing until 30/9/28 for the supply of gas and or electricity up to that date.
17. For the avoidance of doubt, the rights of the Rs to challenge the actual costs that come to be incurred under the energy supply contracts (in particular, on the basis that they have not been reasonably incurred for the purpose of s.19 of the Act) are unaffected by the grant of dispensation. This decision would solely relate to whether or not the formal consultation requirements can be dispensed with.

Simon Allison

Landmark Chambers

SAllison@landmarkchambers.co.uk

23.07.2024